# Beyond Storytelling: Refugee Participation in Decision-Making Processes

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# BEYOND STORYTELLING

## REFUGEE PARTICIPATION IN DECISION-MAKING PROCESSES

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# || ABSTRACT ||

One of the most significant issues to emerge in international refugee law and policy in recent years has been the push to enhance the meaningful participation of refugees in decision-making processes. Around the world, refugee-led networks and organisations have advocated for refugees to be able to engage directly with states, international organisations and other stakeholders in decisions that affect them. Further, states have recognised the value of meaningful participation and have made commitments through new international instruments, particularly the 2016 *New York Declaration for Refugees and Migrants* and the 2018 *Global Compact on Refugees*, towards enabling the participation of refugees in designated responses to refugees and displacement.

These developments represent a significant shift in thinking. However, for these developments to be implemented effectively, greater clarity is needed as to what meaningful refugee participation looks like and how the international law and policy framework governing participation can be best designed. This thesis provides a detailed socio-legal analysis of these issues. The thesis asks: what does participation in decision-making refer to in the context of the international refugee regime; in what ways and to what extent have refugees been included in different decision-making areas in practice; and how could the legal and policy framework be improved to enhance meaningful refugee participation.

This thesis argues that despite recent commitments towards advancing the participation of refugees in decision-making processes, the international legal and policy framework governing refugee participation has insufficiently provided for this to occur. The thesis demonstrates how refugees have been restricted from fully participating in a variety of decision-making areas. These areas include law and policy reform; the implementation of durable solutions and other relocation decisions; and the delivery of programmes and services for refugees. Additionally, the thesis highlights the current limitations of international refugee and human rights law for ensuring meaningful refugee participation. To address these issues, the thesis proposes novel reforms to improve the international legal and policy framework. Central among these reform options is the proposal for a new international law instrument that more clearly commits states and others to ensuring that refugees are heard.

# || ACKNOWLEDGEMENTS ||

There is an unwritten norm in academia to leave the most personal elements of one's acknowledgements to the end. However, to mix things up, I would like to begin with those who are closest to me. I am indebted to the love and support that my family has provided me throughout my life. I would like to thank my parents, Jenny and Peter, who nourished me in the early years and have supported my decisions ever since. I would like to specially thank my wife Rutty who has been a beacon of love and support during these years, and our two children, Ella and Tom, both of whom were born during this project. Ella has not only provided an abundance of cuddles but has also committed to sleeping through the night over the past year. This is a contribution that has not gone unnoticed. Tom has also provided additional motivation upon his arrival in the late stages. Lastly, I would like to thank Mitch, Luke, Karen, Julian, Oskar, Louisa, Roshni, Khushroo, Anaita, Matt, and Nan – each of whom has helped me in a multitude of ways.

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It is not lost on me that I am very fortunate to live in a country that offers some financial support to students wishing to undertake higher degree research. Accordingly, I gratefully acknowledge the support provided by the Australian Government Research Training Program Scholarship, along with the UNSW Faculty of Law and Justice Scholarship and the HDR Fieldwork Support Fund. During this project, I have also received funding to undertake interrelated research from Act for Peace, the Asia Pacific Network of Refugees, the Asia Pacific Refugee Rights Network, the World Refugee and Migration Council and UNHCR. I thank these organisations for investing in research in this subject matter. Finally, I would like to acknowledge that most of this research was completed on the unceded territory of the Bedegal people. I would like to pay my respects to their Elders, both past and present, and would encourage all to engage with the Uluru Statement from the Heart.

This thesis is dedicated to all the refugees around the world who wish for a greater opportunity to be heard.

**Note:** During this project, I have published parts of Chapter 4 in ‘Refugee Participation Revisited: The Contributions of Refugees to Early International Refugee Law and Policy’ (2021) 40(1) *Refugee Survey Quarterly* 51. Some aspects of Chapters 2 and 7 have also been published in Tristan Harley and Harry Hobbs, ‘The Meaningful Participation of Refugees in Decision-Making Processes: Questions of Law and Policy’ (2020) 32(2) *International Journal of Refugee Law* 200.

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# || LIST OF ABBREVIATIONS ||

| | |
|---|---|
| 1933 Refugee Convention | *1933 Convention relating to the International Status of Refugees*, opened for signature 28 October 1933, 159 LNTS 3663 (entered into force 13 June 1935) |
| 1951 Refugee Convention | *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) |
| 1967 Protocol | *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) |
| ATCR | UNHCR Annual Tripartite Consultations on Resettlement |
| CCPP | *Comisiones Permanentes* |
| CEDAW | *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) |
| COMAR | Mexican Commission for Aid to Refugees |
| CRC | *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) |
| CRPD | *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) |
| ExCom | Executive Committee of the High Commissioner's Programme |

| | |
|---|---|
| ICCPR | *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) |
| ICESCR | *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1996, 993 UNTS 3 (entered into force 3 January 1976) |
| IDP | Internally displaced person |
| IOM | International Organization for Migration |
| IRO | International Refugee Organisation |
| LGBTIQ+ | Lesbian, Gay, Bisexual, Trans, Intersex, Queer, and other gender identities and sexualities not included in the term LGBTIQ |
| MOU | Memorandum of Understanding |
| New York Declaration | *New York Declaration for Refugees and Migrants*, UNGA Doc A/RES/71/1 (3 October 2016) |
| NGO | Non-governmental organisation |
| RSD | Refugee status determination |
| SWAPO | South West Africa People's Organisation |
| UDHR | *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) |
| UN | United Nations |
| UNDRIP | *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2007) |

| | |
|---|---|
| UN ECOSOC | United Nations Economic and Social Council |
| UNGA | United Nations General Assembly |
| UNHCR | United Nations High Commissioner for Refugees |
| UNHCR Statute | *Statute of the Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/428(V) (14 December 1950) |
| UNICEF | United Nations Children's Fund |
| USD | United States Dollars |

# || 1 ||

# INTRODUCTION

In recent years, the push to enhance the meaningful participation of refugees in decision-making processes has emerged as one of the defining issues in international refugee law and policy debates. Harnessing the mantra employed by disability advocates during the 1990s – 'Nothing about us without us!'[1] – new refugee-led networks and organisations have sought to challenge pre-existing power relations and have made strong moral demands for the inclusion of refugees and their chosen representatives in decision-making processes that affect them.[2] Partly in response to this advocacy, international organisations such as the United Nations High Commissioner for Refugees ('UNHCR'), civil society organisations and states have also begun to take this issue more seriously.

This emergent trend towards enhancing the participation of refugees in decision-making processes can also be seen in new international law instruments. In September 2016, all 193 Member States of the United Nations General Assembly adopted the *New York Declaration for Refugees and Migrants* ('New York Declaration'). This legal instrument proposes a 'multi-stakeholder approach' to refugee protection which includes the input of refugees themselves.[3] Further, in December 2018, 181 Member States of

[1] See, for example, Sana Mustafa, 'Nothing About Us Without Us: Why Refugee Inclusion is Long Overdue', *News Deeply/ The New Humanitarian* (Geneva, 20 June 2018) <https://deeply.thenewhumanitarian.org/refugees/community/2018/06/20/how-the-media-can-better-listen-to-refugees>; also, UNHCR, 'Nothing About Us, Without Us: 7 ways you can promote refugee leadership', *Global Compact on Refugees Digital Platform* (Web page, 2 March 2022) <https://globalcompactrefugees.org/article/nothing-about-us-without-us-7-ways-you-can-promote-refugee-leadership>.

[2] See, for example, Network for Refugee Voices, *Declaration for Effective and Sustainable Refugee Policy* (Network for Refugee Voices, 10 July 2017) <https://www.unhcr.org/5975a8a82e5.pdf> ('*Declaration for Effective and Sustainable Refugee Policy*'); also, The Global Summit of Refugees Steering Committee, 'The Global Summit of Refugees and the importance of refugee self-representation' (2018) 59 *Forced Migration Review* 62; also, Global Refugee-led Network, *Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action* (Asylum Access, December 2019) <https://www.asylumaccess.org/wp-content/uploads/2019/12/Meaningful-Refugee-Participation-Guidelines_Web.pdf> ('*Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action*').

[3] *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (3 October 2016) [69].

the United Nations General Assembly adopted the *Global Compact for Refugees*.[4] Paragraph 34 of the Global Compact on Refugees 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.

This paragraph makes a statement on the value of refugee participation, establishing a link between the participation of refugees and effective policy responses. The paragraph also reflects a commitment from states, albeit non-binding, to pursue participatory projects when designing responses to refugee displacement. However, beyond this, the paragraph provides very little guidance as to how the meaningful participation of refugees should be pursued.

What has prompted this shift in thinking? For many refugees, calls for enhanced participation in decision-making reflect a general desire to overcome the structural inequalities many refugees experience, as well as a belief that such participation will lead to more effective and sustainable refugee policy.[5] As refugees and scholars both detail, the exclusion of refugees from most formal decision-making processes has had several impacts on the functioning of the international refugee regime.[6] At an instrumental level, it has hindered the effectiveness and appropriateness of protection programmes and services. Several policy failures point towards a

[4] *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2 August 2018) ('Global Compact on Refugees'). The Global Compact on Refugees 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 UNGA General Assembly, *Reports of the Third Committee*, UN Doc A/73/PV.55 (17 December 2018) 10.

[5] See, for example, *Declaration for Effective and Sustainable Refugee Policy* (n 2).

[6] The concept of the international refugee regime in this research thesis refers to the 'implicit or explicit principles, norms, rules and decision making procedures' that regulate the behaviour and actions of states and other actors in relation to refugees: see Stephen D Krasner, 'Structural causes and regime consequences: regimes as intervening variables' (1982) 36 *International Organization* 185, 186. This concept is sufficiently broad. It includes not only the binding legal obligations found under treaties, customs or general principles of international law relating to refugees, but also a range of other international, regional, and national legal instruments, as well as behaviours and practices, both implicit and explicit.

lack of understanding of contextual conditions, and in particular a failure to consider relevant information that only refugees possess.[7]

The exclusion of refugee voices has also led to the production of discourses, particularly among humanitarian organisations, that 'tend to privilege a one-dimensional representation of the refugee'.[8] These discourses abstract 'people's predicaments from specific political, historical, and cultural milieus'.[9] They also use the language and images of trauma and vulnerability in ways that diminish refugees' 'subjectivity and agency'.[10] As Syrian activist and researcher Rifaie Tammas has indicated, '[t]he curated form of storytelling prevalent nowadays tends to marginalise or oversimplify'.[11] It can also 'leave refugees feeling tokenised and disempowered'.[12]

To counteract this, refugees have often advocated for inclusion in terms of a desire to go beyond storytelling. As Sana Mustafa, co-founder of the international Network for Refugee Voices, stated in 2018:

> Storytelling can be a helpful tool to shift xenophobic narratives about refugees, but it is not enough. Meaningful refugee participation requires a rethink of the international humanitarian support and development landscape.
>
> We must uproot the traditional, top-down, structure of humanitarian aid and initiate a participatory, bottom-up, approach to refugee

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[7] See, for example, Veronique Barbelet, Jessica Hagen-Zanker and Dina Mansour-Ille, 'The Jordan Compact: lessons learnt and implications for future refugee compacts' (Policy Briefing, Overseas Development Institute, February 2018) <www.odi.org/publications/11045-jordan-compact-lessons-learnt-and-implications-future-refugee-compacts>; also, Will Jones, 'Refugee Voices' (World Refugee Council Research Paper No 8, February 2019).

[8] 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(1) *Refuge* 60, 61.

[9] Sigona (n 8) 370; Prem Kumar Rajaram, 'Humanitarianism and Representations of the Refugee' (2002) 15(3) *Journal of Refugee Studies* 247, 248; also. Liisa Malkki, 'Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization' (1996) 11(3) *Cultural Anthropology* 377, 378.

[10] 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.

[11] Rifaie Tammas, 'Refugee stories could do more harm than good', *Open Democracy* (London, 1 November 2019) <https://www.opendemocracy.net/en/refugee-stories-could-do-more-harm-good/>.

[12] Ibid.

> policy. Refugees must be given a seat at the table to participate in existing conversations about refugee policy and empowered to create their own spaces.[13]

Similarly, co-founder of the Global Refugee-led Network and CEO of the Asia Pacific Network of Refugees, Najeeba Wazefadost, has indicated her dream for refugees to be able to go beyond storytelling. In 2018, she stated:

> I have this dream that refugees are able to share their stories and at the same time they are mentored and supported and empowered to go beyond story-telling; to be involved in designing and creating and implementing and evaluating projects for their own communities. Because who knows better than them?[14]

The title of this thesis – Beyond Storytelling – reflects the aspirations expressed by these refugee advocates.

### 1.1 Overview of research

This thesis provides an in-depth analysis of the international legal and policy framework governing the participation of refugees in decision-making processes. This thesis is not about refugee storytelling per se, but rather about the involvement of refugees in various decision-making processes that materially impact their human rights. The thesis asks three main research questions. First, what does participation in decision-making refer to in the context of the international refugee regime? Second, in what ways and to what extent have refugees been included in different decision-making areas in practice? Third, how could the legal and policy framework be improved to enhance the participation of refugees in decision-making processes?

In addressing these research questions, the thesis analyses the scope of extant legal requirements on states and international organisations to consult with or include refugees in decisions that directly affect them. The thesis then sheds light on how states, international organisations, civil society organisations and refugee-led organisations have sought to include refugees in a variety of different decision-making scenarios. Lastly, the thesis considers what could or should be done going forward to address refugee

[13] Mustafa (n 1).
[14] Cited in Asia Pacific Summit of Refugees, *Outcomes Report* (Asia Pacific Summit of Refugees, February 2019) <https://aprrn.info/wp-content/uploads/2019/02/APSOR-Outcomes-Paper_Final.pdf> 6.

participation in law and policy. It is hoped that the shortcomings, lessons learned, and promising practices identified in this analysis will inform the development of better laws, policies and practices relating to the participation of refugees in the future.

With regards to research method, this thesis has been informed by a wide range of primary and secondary literature. This literature includes law and policy sources, academic texts, publications by international organisations and non-governmental organisations, newspaper articles, speeches by key advocates and informants, and archival records, among other things. In assessing this literature, consideration has been given to common academic standards, such as where the source is published and whether the source has been subject to academic peer review. Yet additionally, and more unusually, there has also been a conscious attempt to foreground the views of refugees and refugee-led initiatives in this thesis. This approach has been taken in part due to the clear relevance of refugee voices to the subject matter at hand, but also because these voices have often not been heard in forced migration research due to various structural barriers in place related to knowledge production.[15]

Beyond this, this thesis is also informed by 10 qualitative interviews that were undertaken between September 2019 and January 2022 with staff or representatives from international organisations, civil society organisations, and refugee-led organisations knowledgeable or directly involved in different institutional initiatives seeking to include refugees in decision-making processes.[16] The contributions of these participants offer some

[15] For more details on some of these barriers to knowledge production, particularly in terms of academic research, see Kathryn Hampton et al, 'How global is the RSQ? A reflection on author affiliation and knowledge production in the global forced migration academic discourse', *Refugee Law Initiative Blog on Refugee Law and Forced Migration* (Blog post, University of London, 12 November 2020) <https://rli.blogs.sas.ac.uk/2020/11/12/how-global-is-the-rsq-a-reflection-on-author-affiliation-and-knowledge-production-in-the-global-forced-migration-academic-discourse/>; also, Rachel McNally and Nadeea Rahim, 'How global is the Journal of Refugee Studies?', *LERRN: The Local Engagement Refugee Research Network* (Blog post, 25 March 2020) <https://carleton.ca/lerrn/2020/how-global-is-the-journal-of-refugee-studies/>.

[16] Although there is no commonly accepted definition (legal or otherwise) of what constitutes a 'refugee-led organisation', this thesis interprets the term to refer to non-governmental, membership-based organisations that are led and controlled by refugees for the purpose of collectively acting in relation to a common interest pertaining to refugees. These organisations may operate as individual organisations, or alternatively as coalitions or umbrella organisations. Importantly, organisations *of* refugees should be distinguished from organisations *for* refugees. While the former are led and controlled by refugees, the latter are normally civil-society organisations which provide services to refugees and/or advocate on their behalf. This definition of refugee led-organisations borrows from the definition of representative organisations of persons with disabilities which has been

supplementary insights into how refugee participation in decision-making is understood in practice, and they provide information not available on the public record until now. Given the small sample size however, they do not purport to represent the diversity of experiences and understandings from around the world. Furthermore, what holds true in one context may not hold true in another. For this project, interview participants were identified either via publicly available information on websites relating to the initiatives discussed or through referral by personal contacts and other interviewees ('snowball method').[17]

Although this research considers the subject matter from a variety of different vantage points, a central component of this thesis is focused on the *international legal and policy framework* governing the participation of refugees in decision-making processes. To this end, this thesis employs a mixed methods research approach that combines doctrinal legal analysis with socio-legal research. While the doctrinal research seeks to locate the relevant sources of international law and analyse what the laws require or prohibit in relation to refugee participation in decision-making processes,[18] the socio-legal component of this research seeks to understand how laws and understandings of participation function within the international refugee regime, taking into consideration other disciplinary perspectives and insights and practices from the field.[19] This mixed-methods research approach has been adopted in part to deal with the subject matter more comprehensively, and also to enable better consideration of potential reform options.

This focus on the legal dimensions of refugee participation is somewhat novel. Up until now, most academic research on the inclusion of refugee voices has been undertaken by political scientists, anthropologists, sociologists, international relations scholars and development studies scholars. These studies have made important contributions in understanding

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developed by the Special Rapporteur on the Rights of Persons with Disabilities. See Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, UN Doc A/HRC/31/62 (12 January 2016) [36]–[38].

[17] In accordance with the wishes of the participants and the requirements of the research ethics process undertaken for this research, some participants are personally identified in this thesis, while others remain unidentified.

[18] For more on doctrinal legal research, see Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

[19] For more on socio-legal research, including its interdisciplinary nature and emphasis on reform, see Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie, 'Socio-legal theory and methods: introduction' in Naomi Creutzfeldt, Marc Mason and Kirsten McConnachie (eds), *Routledge Handbook of Socio-Legal Theory and Methods* (Routledge, 2019) 3; also, Terry Hutchinson, *Research and Writing in Law* (Thomson Reuters, 2010) 99–100.

how refugees have been marginalised and rendered speechless by current decision-making approaches, including for particular groups of refugees such as women and children.[20] They have also highlighted how refugees have exercised their political agency through protest, the media, sport, the arts or other mediums, in the absence of formal mechanisms to assert their voice.[21] However, the roles and possibilities of international law, in terms of both facilitating and restricting the inclusion of refugees in formal decision-making processes, have been largely overlooked.

At a conference held at the Refugee Studies Centre at the University of Oxford on 'Democratizing Displacement' in March 2019, one attendee asked me how international law could assist, if at all, in the democratization of forced displacement discourse, and in particular, the participation of refugees. While there is a wealth of scholarship on the effectiveness of international law more broadly,[22] in sum this thesis understands international law, as J L Brierly notes, as 'just one institution among others which we can use for the building of a better international order'.[23] Other than establishing binding obligations on states (which may or may not be complied with), some of the important roles international law can play include setting benchmarks for states and other actors, shifting decision-making authority from some actors to others, shaping behaviours and ways of understanding the world, identifying and entrenching best practices and influencing the interpretation and development of local, national and regional law.[24]

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[20] See, for example, Barbara E Harrell-Bond, *Imposing Aid: Emergency Assistances to Refugees* (Oxford University Press, 1986); Elisabeth Olivius, '(Un)Governable Subjects: The Limits of Refugee Participation in the Promotion of Gender Equality in Humanitarian Aid' (2014) 27(1) *Journal of Refugee Studies* 42.

[21] See Sieglinde Rosenberger, Verena Stern and Nina Merhaut (eds), *Protest Movements in Asylum and Deportation* (Springer, 2018); also, Barbara Harrell-Bond, 'Protests Against the UNHCR to Achieve Rights: Some Reflections' in Katarzyna Grabska and Lyla Mehta (eds), *Forced Displacement: Why Rights Matter* (Palgrave Macmillan, 2008) 222.

[22] See, for example, Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2012); also, Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87(2) *American Journal of International Law* 205.

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

[24] See Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 *Global Policy* 2.

This thesis recognises that these functions of international law will always be greatly influenced by the politics of the international system.[25] As David Cantor notes, 'any failure to achieve the objectives of refugee law reflects deeper social and political factors that structure the contemporary response to refugee movements by states, communities and individuals in practice'.[26] Nevertheless, these functions of international law remain significant to the operation of the international refugee regime. In the area of meaningful refugee participation, these functions are particularly important given the widespread absence of national refugee law providing for meaningful refugee participation around the world.[27]

In recent times, there is some evidence which suggests that some shift in thinking and behaviours among states is taking place in this regard. Other than the commitments to refugee participation made by states in the international instruments discussed above, in June 2020 Canada announced that it would establish a formal advisory role for a former refugee to attend its international refugee protection meetings as part of the Canadian delegation going forward.[28] Since then, other states, including Germany and USA, have adopted this practice.[29] Additionally, several states have either made pledges to support meaningful refugee participation in response to

[25] See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers Publishing Company, 1989) 2–3.
[26] David James Cantor, 'The End of Refugee Law?' (2017) 9(2) *Journal of Human Rights Practice* 203, 204.
[27] One notable exception to this, as discussed in Chapter 6, is Kenya. Under Article 10 of the Kenyan constitution, public participation is identified as a national value and principle of governance that requires all state organs, state officers, public officers, and other persons in Kenya to engage in public participation when making or implementing public policy decisions. The High Court of Kenya confirmed in the case of *Okiya Omtatah Okoiti v Refugee Affairs Secretariat (RAS) Kenya & 2 others* [2020] that this constitutional requirement is not limited to citizens or permanent residents, but rather extends to all members of the public who 'will be directly affected by those decisions', including refugees where appropriate. See Chapter 6.3.1 for more detail and references.
[28] See Government of Canada, 'Canada continues to explore innovative solutions for refugees', *Immigration, Refugees and Citizenship Canada* (News Release, 25 June 2020) <https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/06/canada-continues-to-explore-innovative-solutions-for-refugees.html>. Note that this announcement built upon the Canadian government's decision to include a former refugee as part of its official delegation to the UNHCR's Annual Tripartite Consultations on Resettlement in 2019: see Nicholas Keung, 'Canadian refugee makes history as state delegate at UNHCR forum', *The Star* (Toronto,12 January 2020) <https://www.thestar.com/news/gta/2020/01/12/canadian-refugee-makes-history-as-state-delegate-at-unhcr-forum.html>.
[29] See James Milner, Mustafa Alio and Rez Gardi, 'Meaningful Refugee Participation: An emerging norm in the global refugee regime' (2022) *Refugee Survey Quarterly* (forthcoming) 1; also, Federal Republic of Germany, 'Statement of the Federal Republic of Germany' (Speech, UNHCR High-level Officials Meeting, 14-15 December 2021) <https://www.unhcr.org/events/conferences/61b8c68b4/statement-federal-republic-germany.html>.

advocacy from the Global Refugee-led Network,[30] or have spoken favourably in policy discussions about the need to include refugees in policy responses.[31]

However, at the same time, some states are also using legal measures, as well as the absence of legal accountability in certain contexts, to stifle the voices of refugees. This is particularly occurring in situations where governments are concerned that refugees may expose human rights violations or other mistreatment.[32] For example, in contexts including Cox's Bazar refugee camp in Bangladesh and Australia's onshore immigration detention centres, governments have taken steps to prohibit or suppress refugees' usage of mobile phones. These steps have been applied on the purported basis of restricting criminal activity, as well as other security grounds.[33] Yet, many human rights organisations and refugees contend that the true intentions of these policies are to silence refugees, limit scrutiny of mistreatment, deny access to effective legal representation, and reduce public accountability.[34]

As Kurdish refugee Mostafa Azimitabar argued from the confines of immigration detention in Australia during the COVID-19 pandemic:

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[30] See Shaza Alrihawi et al, *Power and The Margins: The State of Refugee Participation* (Global Refugee-led Network, January 2022) 6.
[31] See Milner, Alio and Gardi (n 29).
[32] See Daniel Ghezelbash, 'Hyper-legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees' (2020) 68(3) *American Journal of Comparative Law* 479, 502–503, 513.
[33] For more on this reasoning in Australia, see *Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (Cth) <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6559_ems_b6612e12-dac0-411a-9055-a22c4d714941/upload_pdf/737794.pdf;fileType=application%2Fpdf>. For more on this reasoning in Bangladesh, see 'Bangladesh bans mobile phone access in Rohingya camps', *Al Jazeera* (Online, 2 September 2019) <https://www.aljazeera.com/news/2019/09/02/bangladesh-bans-mobile-phone-access-in-rohingya-camps/?gb=true>.
[34] In the Australian context, see, for example, Kaldor Centre for International Refugee Law, Submission No 23 to Senate Standing Committee on Legal and Constitutional Affairs, *Committee inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020* (15 June 2020) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ProhibitedItems/Submissions>; also Graham Thom, 'A law to deprive immigration detainees of their only contact: Australia's shame before the world', *Sydney Morning Herald* (Sydney, 31 August 2020) <https://www.smh.com.au/national/a-law-to-deprive-immigration-detainees-of-their-only-contact-australia-s-shame-before-the-world-20200830-p55qr7.html>. In the Bangladeshi context, see Human Rights Watch, 'Bangladesh: Internet Blackout on Rohingya Refugees' (News release, Human Rights Watch, 13 September 2019) <https://www.hrw.org/news/2019/09/13/bangladesh-internet-blackout-rohingya-refugees>. At the time of writing, steps to prohibit refugees' use of mobile phones in both the Bangladeshi and Australian contexts had been revoked.

> What they're doing is trying to break us – to disconnect us with other people. And how can I talk with my lawyer and keep the government to account. We need to continue to show people what the Australian government is doing is wrong. That's why they're going to confiscate our phones.[35]

Similarly, from the confines of detention in Manus Island, Behrouz Boochani stressed the importance of his access to a smartphone, telling a journalist via WhatsApp in 2016 that 'without access to technology the Australian government could do anything to us, even kill us, and no one would know'.[36]

Examples such as these demonstrate that the issue of refugee participation and voice is often a source of intense controversy and contestation. As academics Kate Pincock, Alexander Betts and Evan Easton-Calabria note, states and other actors are generally willing to support the economic participation of refugees when it is consistent with a broader aim of enabling refugees to live autonomously, however the political participation of refugees in decision-making processes is treated by states with greater ambivalence.[37]

For political scientists, this ambivalence (or contestation) is reflective of the tensions between the political claims of individual non-citizens and sovereign states, as well as the tensions between different political traditions, namely liberalism and nationalism. While liberalism, as Katy Long argues, 'stresses the fundamental rights, freedoms, and equality of all mankind', nationalism 'insists on the rights of distinct self-constituting political communities to self-government within a territorial state' and 'with establishing criteria for membership'.[38] These two political traditions are not necessarily incompatible with one another, however they do regularly find

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[35] Paul Gregoire, 'Call Minister Tudge to Save Refugees' Phones: An Interview With Mostafa Azimitabar', (Blog post, Sydney Criminal Lawyers, 23 August 2020) <https://www.sydneycriminallawyers.com.au/blog/call-minister-tudge-to-save-refugees-phones-an-interview-with-mostafa-azimitabar/>.

[36] Cited in Claire Reilly, 'Disconnected and desperate: How Australia keeps refugees in tech limbo', *CNET* (Online, 17 August 2016) <https://www.cnet.com/tech/mobile/how-australia-keeps-refugees-disconnected-refugee-crisis/>; also, Maria Rae, Rosa Holman and Amy Nethery, 'Self-represented witnessing: the use of social media by asylum seekers in Australia's offshore detention centres' (2018) 40(4) *Media, Culture and Society* 479, 485–489.

[37] Kate Pincock, Alexander Betts and Evan Easton-Calabria, *The Global Governed? Refugees as Providers of Protection and Assistance* (Cambridge University Press, 2020) 2.

[38] Katy Long, *The Point of No Return: Refugees, Rights and Repatriation* (Oxford University Press, 2013) 20.

discord when the state perceives its accountability towards its citizens in opposition to the claims of refugees. The political tensions underpinning the inclusion of refugees in decision-making processes is an ongoing consideration throughout this thesis.

### 1.2 Key issues and challenges

The inclusion of refugees in formal decision-making forums throws up several complex and challenging issues for the design and development of international refugee law and other institutional responses. One of the more obvious issues relates to deciphering what participation refers to in the various decision-making scenarios of the international refugee regime. As will become clear in the following chapters in Part I, the concept of participation in decision-making is not precisely defined in international law. Further, there is no settled definition as to what constitutes participation in practice.

In recent years, there have been some notable attempts to define meaningful refugee participation. In 2020 for example, the Global Refugee-led Network, in collaboration with Asylum Access, drafted guidelines to influence sector-wide practice in this area. In this document, these two organisations defined meaningful refugee participation as:

> When refugees — regardless of location, legal recognition, gender, identity and demographics — are prepared for and participating in fora and processes where strategies are being developed and/or decisions are being made (including at local, national, regional, and global levels, and especially when they facilitate interactions with host states, donors, or other influential bodies), in a manner that is ethical, sustained, safe, and supported financially.[39]

In a similar manner, albeit with some conceptual differences, political scientist James Milner argued in June 2021 that 'there is relative agreement, or at least a lack of active opposition among states' for meaningful refugee participation to be defined as occurring:

> when refugees from diverse backgrounds have sustained influence in all fora where decisions, policies, and responses that impact their

[39] *Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action* (n 2) 7.

> lives are being designed, implemented, and measured in a manner that is accessible, broad, informed, safe, free, and supported.[40]

Both these definitions are useful entry points for beginning to understand the broad parameters of meaningful refugee participation. For some stakeholders, this level of understanding may be sufficient for their purposes. Yet, as the authors of these definitions recognise, these definitions also raise as many questions as they resolve. How, for example, should each of the many elements of these definitions be interpreted? Are there other elements or concepts that also need to be considered? How are human rights interconnected with these participatory elements? The list of questions goes on.

At a general level, this thesis draws upon scholarship from a variety of social sciences disciplines to help unpack and classify some of the different modes of participation that are relevant to the international refugee regime. Among these classifications, administrative law theorist Peter Cane suggests that formal participation in decision-making can take three principal forms, namely: (1) *popular participation*, which centres around voting in elections and access of participants to the electoral franchise; (2) *contributory participation*, where participants have the opportunity to directly influence a decision either before or while it is being made; and (3) *contestatory participation*, where participants have the opportunity to contest or challenge, usually through some judicial or administrative review process, a previous decision.[41]

This thesis examines to some extent refugees' limited access to the electoral franchise (popular participation), and canvasses some of the opportunities available to refugees to contest decisions that affect them (contestatory participation). However, the central focus of this thesis is rather concerned with how refugees can more meaningfully be included in formal decision-making processes both before and at the time a decision is made, or what

[40] James Milner, 'The Politics and Practice of Refugee Participation in the Governance of the Global Refugee Regime' (Research Paper, Canadian Political Science Association Annual Conference, 31 May 2021) <https://carleton.ca/lerrn/wp-content/uploads/Milner-CPSA-paper-refugee-participation-May-2021.pdf> 13. One of the central differences between these two definitions is that the former does not make any explicit reference as to whether there is a need for participation to influence the decision-making process in order for it to be meaningful.

[41] Peter Cane, 'Participation and Constitutionalism' (2010) 38(3) *Federal Law Review* 319, 320. Cane acknowledges that the term contestatory participation is borrowed from philosopher and political theorist Philip Pettit. Pettit refers to this mode of participation as the editorial dimension of democracy: see Philip Pettit, 'Democracy, Electoral and Contestatory' (2000) 42 *Nomos* 105, 117–123.

Cane would consider to be the contributory participation of refugees. This research decision has been made both to contain the scope of the research, as well as to reflect the current focus of many legal and policy commitments in this area.

A second challenge that arises in relation to refugee participation is representativeness. Refugees form a diverse population group. Around the world, there are millions of refugees located in a variety of different contexts. These refugees experience distinct structural challenges, whether in camps or urban settings, on the move or in protracted situations. Refugees also have different needs, depending on their gender, age, sexuality, or personal circumstances, among other attributes. Indeed, UNHCR estimates that at the end of 2019, 85 per cent of the global refugee population were hosted in developing countries, while 40 per cent were younger than 18 years of age, and some 153,300 were unaccompanied or separated children.[42] How can the international legal and policy framework effectively engage with the diversity of refugees' aspirations and concerns? How can refugees be truly represented in the design and implementation of refugee law and policy?

A third challenge to the participation of refugees in decision-making processes is membership. Who should be entitled to participate in decision-making processes? Who decides who participates? Who is excluded from participating, and who excludes themselves? When referring to a refugee, this research thesis adopts as a starting point the international legal definition contained in the 1951 *Convention relating to the Status of Refugees* ('1951 Refugee Convention').[43] Under Article 1A(2) of the 1951 Refugee Convention, as modified by the 1967 *Protocol relating to the Status of Refugees* ('1967 Protocol'),[44] a refugee is defined as someone who is outside their country of origin and unable or unwilling to return or to avail themselves of that country's protection owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. This definition has proven, as Jane McAdam indicates, 'capable of dynamic interpretation', in that 'the rules of treaty interpretation have allowed the (Refugee) Convention to

[42] UNHCR, *Global Trends: Forced Migration in 2019* (UNHCR, 2020) 2, 9.
[43] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).
[44] *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

adapt to evolving conceptions of human rights law', such as gender-based persecution.[45]

Where appropriate, this thesis also recognises regional definitions that extend the scope of refugee status to include, *inter alia*, persons fleeing more generalised violence. In Africa, for example, the definition of a refugee under the binding 1969 *Convention governing the Specific Aspects of Refugee Problems in Africa* also applies to 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.[46] In Latin America, a similar provision has also been adopted in the non-binding 1984 *Cartagena Declaration on Refugees,*[47] which many Latin American states have subsequently codified into their respective national laws.[48]

However, there is considerable debate among refugees and others as to who should be entitled to participate in decision-making, and whether the definitions contained in the 1951 Refugee Convention or the other regional instruments are appropriate for this purpose. For example, at the inaugural Global Summit of Refugees held in 2018, refugee representatives

[45] See Jane McAdam, 'Editorial: The Enduring Relevance of the 1951 Refugee Convention' (2017) 29(1) *International Journal of Refugee Law* 1, 2; also, James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2014) 5–12; also, Guy S Goodwin-Gill, 'Editorial: The Dynamic of International Refugee Law' (2013) 25(4) *International Journal of Refugee Law* 651, 661–666.

[46] *Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) Art 1(2). For more on the implementation of this regional definition in national refugee laws in Africa, see David James Cantor and Farai Chikwanha, 'Reconsidering African Law' (2019) 31(2) *International Journal of Refugee Law* 182.

[47] *Cartagena Declaration on Refugees* (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984) in 'Annual Report of the Inter-American Commission on Human Rights' (1984-85) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190–3.

[48] Tristan Harley, 'Regional Cooperation and Refugee Protection in Latin America: A 'South-South' Approach' (2014) 26(1) *International Journal of Refugee Law* 22, 24. The European Union also now has legislation in place to provide 'subsidiary protection' to those who would face a real risk of serious harm if returned, which includes a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. However, technically this does not extend the scope of refugee status in the European Union, but rather creates a subsidiary status to persons who fall within the ambit of the legislation. See *Council Directive 2011/95/EU 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* [2011] OJ L 337/9 ('Recast Qualification Directive') Art 15(c).

themselves noted 'the problems created by categories and labels that exclude particular groups of forcibly displaced people who may not fit the "refugee definition"' for the purposes of participation in decision-making processes.[49]

In response, these refugee representatives recommended that decision-making processes should include 'refugees and others forcibly displaced', including 'anyone who has been forced to flee and seek safety elsewhere, including those who may not be recognised as refugees by local authorities'.[50] Beyond this, there are also questions as to whether persons with past lived refugee experience shall be included or not, or whether participation should be reserved for persons with current refugee experience. There are also questions as to when participation should be individualised, or when it should be limited to or focused on engaging refugee-led organisations or refugees' chosen representatives.

A fourth challenge that arises in relation to refugee participation is access. If refugees are to be given a greater say in decision-making, then there needs to be far greater understanding as to the barriers refugees currently face in relation to participating in decision-making processes. There also needs to be consideration as to how these barriers are best addressed and overcome. What obligations do states and other actors have, if any, to positively enable refugees to be able to participate in decision-making? Further, at what stages of the policy development cycle and in which forums do refugees need to be heard? A fifth challenge relates to the scope of decision-making. In which decisions specifically should refugees have a say? And on what basis is it decided that refugees should be able to participate in some decision-making processes and not others, and who gets to decide?

### 1.3 Positionality and purpose

This thesis does not seek to conclusively resolve these questions. As a researcher from Australia with no lived experience of forced displacement or persecution, it would be inherently contradictory, and indeed emblematic of the problem, were I to seek the final say as to how refugees should be included in decision-making processes in any given context. Rather, this thesis seeks to reflect on these questions and examine how some of these questions are being addressed in law and practice. It is hoped that this

[49] Global Summit of Refugees, *Policy Discussion and Outcomes Paper* (August 2018) <http://www.networkforrefugeevoices.org/uploads/1/0/9/9/109923753/gsor_outcomes_and_policy_paper_final.pdf> 2.
[50] Ibid.

reflection and analysis will contribute to the ongoing conversation as to what participation involves for refugees and how it should be addressed in international law and policy more broadly.

In presenting this research, this thesis has a few different audiences in mind. For practitioners and policymakers, this research will hopefully assist the development, implementation and review of initiatives, policies and laws which seek to more meaningfully include refugees in decision-making processes. For scholars of refugee and forced migration studies, including those from different disciplinary backgrounds, it is hoped that this research will not only provide a substantive academic contribution to the issues at hand, but will also inform and contribute to the growing academic and juridical consideration of the participation of affected groups in decision-making more broadly. Most importantly in my opinion however, I hope that this research will be beneficial to refugees themselves, particularly when making decisions as to how best to pursue participatory projects and determining appropriate practices and solutions.

As these aims make clear, this thesis is not written from a position of pretend or purported neutrality. Like much research in the area of refugee and forced migration studies, this thesis strives to meet the 'dual imperative' of producing research that is both academically rigorous while at the same time relevant to policymakers and refugees alike.[51] This decision has been made because while I appreciate the intrinsic value of academic research, I believe that research that explores human subjects who are often experiencing suffering should in some way seek to alleviate that suffering, particularly in a world of limited financial resources.[52]

This normative purpose is consistent with what is referred to as a human rights-based approach to research. This approach, as Rhona Smith outlines, has three key requirements. First, it aims to 'result in research which advances the realisation of human rights', either by building upon understandings of human rights or by examining their impacts in practice.[53] Second, it aims to 'respect human rights standards and principles', most

[51] See Karen Jacobsen and Loren B Landau, 'The Dual Imperative in Refugee Research: Some Methodological and Ethical Considerations in Social Science Research on Forced Migration' (2003) 27(3) *Disasters* 185; also, Rosemary Byrne and Thomas Gammeltoft-Hansen, 'International Refugee Law between Scholarship and Practice' (2020) 32(2) *International Journal of Refugee Law* 181, 189–193. For a contrary view, see Oliver Bakewell, 'Research Beyond the Categories: The Importance of Policy Irrelevant Research into Forced Migration' (2008) 21(4) *Journal of Refugee Studies* 432.
[52] Jacobsen and Landau (n 51) 186.
[53] Rhona Smith, 'Human rights based approaches to research' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge, 2018) 6, 9.

importantly by ensuring that the research does no harm.[54] Third, it aims to strengthen the capacity of rights holders, particularly by furthering understanding of human rights standards and practices.[55]

Lastly, the focus, aims and outcomes of this research have also been shaped by my own experiences. These experiences include as a legal practitioner; consultant in international refugee law and policy; and student of history and law. Both before and during this research project, I had the opportunity to work, consult or volunteer with several organisations working to improve and enhance the protection provided to refugees.[56] In this work, I observed persons with lived refugee experience expressing their desire to be more than just storytellers and to have an active role in making decisions that affect them. I also observed some of the practical challenges and complex ethical questions organisations faced when seeking to include refugees in their policies and programmes. How, for example, do civil society and international organisations know that the refugees they are speaking to are representative of their communities? What does greater decision-making authority for refugees mean for these organisations' own institutional mandates? What intrinsic authority do civil society organisations have to speak on behalf of refugees, if any at all? My decision to pursue this research topic was in part influenced by these observations.

### 1.4 Limitations and scope

Like any research project, this thesis is subject to a number of limitations. First, this thesis focuses on participation in decision-making processes with respect to *refugees*. Although it is hoped this thesis will have relevance for participatory projects involving other affected persons or groups, there is no detailed consideration as to what possible measures could be employed to enhance the participatory rights or platforms of other affected groups in this study. This includes other forcibly displaced persons, such as internally displaced persons (IDPs) or persons forcibly displaced by the adverse impacts of climate change.[57] Further, while this research draws upon some

[54] Ibid 9–10.
[55] Ibid 10–11.
[56] These organisations include UNHCR, the World Refugee Council (now World Refugee and Migration Council), the Asia Pacific Refugee Rights Network, Act for Peace, the Asia Pacific Network for Refugees and the Hong Kong Refugee Advice Centre (now Justice Centre Hong Kong).
[57] For an important study in this area, see The Brookings Institution and University of Bern Project on Internal Displacement, *Moving Beyond Rhetoric: Consultation and Participation with Populations Displaced by Conflict or Natural Disasters* (Overseas Development Institute, October 2008)

developments that have occurred in relation to the participation of women, children, Indigenous persons and persons with disabilities to inform and tease out some of the issues related to participation and decision-making, the thesis similarly is not a comparative study of the different approaches taken towards these distinct groups.

Second, this research thesis, as flagged above, focuses on the participation of refugees in formal decision-making processes, generally before or at the time a decision is being made. For the purposes of this thesis, these formal decision-making processes are understood as the processes established by laws and/or institutions to reach particular outcomes in relation to refugees. These processes primarily revolve around decisions relating to law and policy reform, the design and implementation of durable solutions and other relocation decisions, and the delivery of programmes and services that affect the rights of refugees. The institutions involved in these formal decision-making processes are most likely to feature nation states, refugee-led organisations, international organisations and civil society organisations, although this list is not intended to be exhaustive and it is recognised that such categorisations also create challenges, both conceptually and in practice.[58] Although there is some consideration as to how refugees may informally influence decision-making processes from outside of these formal mechanisms, this is not the focus of this research thesis. This limitation is significant but considered necessary to contain the scope of the thesis.

In practice, the political agency of refugees can be found in all manner of places, not just formal decision-making processes. It can be seen in acts as diverse and innovative as authoring books from detention centres with encrypted WhatsApp messages,[59] or using public platforms gained through success in sports, the arts, the sciences or business. It can also be seen through refugee protests. In 2021, there were numerous examples of refugees exercising their political agency in a range of protests across the globe. This included Afghan refugees protesting their protracted

<https://www.brookings.edu/research/moving-beyond-rhetoric-consultation-and-participation-with-populations-displaced-by-conflict-or-natural-disasters/>.

[58] For example, a refugee-led organisation may be formalised in the sense that it has established and adopted an internal constitution and has assigned roles and responsibilities within the organisation for addressing issues related to refugees. However, such an organisation may find it difficult to formally register the organisation in the context it operates due to various political, legal, or administrative barriers.

[59] See Behrouz Boochani, *No Friend but the Mountains: Writing from Manus Prison* (Picador, 2018).

displacement in Indonesia,[60] refugees in Australia protesting their indefinite detention,[61] and Syrian refugees in Denmark protesting the cancellation of their residency permits.[62]

Refugees have also, as several academics note, 'voted with their feet'.[63] They have made independent and collective decisions in different contexts to abandon camps and move to urban centres, even when such decisions have resulted in foregoing particular legal protections or humanitarian assistance. They have also chosen to voluntarily return to their homes, to try to make a start at rebuilding their communities, even in situations where it may not be safe to do so. Even the decision to leave their country of origin and travel sometimes great distances in search of protection is often framed as a 'silent appeal for substitute protection of their human rights'.[64]

Each of these choices reflect refugees' political and individual agency, where agency is understood as the capacity of refugees 'to reflect on their position, devise strategies and take action to achieve their desires'.[65] At times, these actions have in turn influenced responses from states,

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[60] Yuddy Cahya Budiman, 'Afghan refugees in Indonesia call for expedited resettlement', *Reuters* (Jakarta, 24 August 2021) <https://www.reuters.com/world/asia-pacific/afghan-refugees-indonesia-call-expedited-resettlement-2021-08-24/>.

[61] Saba Vasefi, 'Refugee hunger strike at Melbourne detention centre ends after 17 days with detainees in hospital', *The Guardian* (Melbourne, 7 July 2021) <https://www.theguardian.com/australia-news/2021/jul/07/refugee-hunger-strike-at-melbourne-detention-centre-ends-after-17-days-with-detainees-in-hospital>. For a historical overview of Australia's use of immigration detention for refugees, see Savitri Taylor, 'Step by Step: The insidious evolution of Australia's asylum seeker regime since 1992' in Jordana Silverstein and Rachel Stevens (eds), *Refugee Journeys: Histories of Resettlement, Representation and Resistance* (Australian National University Press, 2021) 193, 194–198.

[62] Synne Furnes Bjerkestrand, 'Syrian refugees protest Denmark's attempt to return them', *Al Jazeera* (Copenhagen, 2 June 2021) <https://www.aljazeera.com/news/2021/6/2/syrian-refugees-protest-against-denmarks-attempt-to-return-them>.

[63] See Aristide R Zolberg, 'The Roots of American Refugee Policy' (1988) 55(4) *Social Research* 649, 659; also, Charles B Keely, 'How Nation-States Create and Respond to Refugee Flows' (1996) 30(4) *International Migration Review* 1046, 1058; also, Jeff Crisp, '"Who has counted the refugees?" UNHCR and the politics of numbers' (New Issues in Refugee Research Working Paper No 12, UNHCR, June 1999) <https://www.unhcr.org/en-au/research/working/3ae6a0c22/counted-refugees-unhcr-politics-numbers-jeff-crisp.html> 8; also, Jeff Crisp, 'An Inside Account of UNHCR's Urban Refugee Policy', *News Deeply/The New Humanitarian* (Geneva, 14 April 2017) <https://deeply.thenewhumanitarian.org/refugees/community/2017/04/14/an-inside-account-of-unhcrs-urban-refugee-policy>.

[64] Jason M Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, 2017) 1.

[65] Oliver Bakewell, 'Some Reflections on Structure and Agency in Migration Theory' (2010) 36(10) *Journal of Ethnic and Migration Studies* 1689, 1694. See also Ćetta Mainwaring, 'Migrant agency: Negotiating borders and migration controls' (2016) 4(3) *Migration Studies* 289.

international organisations and civil society organisations, including legal and policy reform. However, these actions are also shaped by broader, more rigid structural barriers, such as the erection of border walls or the denial of visa applications, which limit the options refugees can take. These structural barriers often pose considerable risks to the refugees involved. This can be seen sombrely, for example, in the thousands of people who have died while undertaking sea journeys in search of protection,[66] or in the thousands of refugees who fall victim to human trafficking.[67]

Finally, while this research considers a broad range of decision types that warrant refugee participation – either because they are already legally required or because they are considered normatively desirable – a third limitation of this thesis is that it does not explore in any detail the decision-making processes related to the status determination of refugees. This decision has been made in part to limit the scope of this thesis, but also because the subject of refugee status determination ('RSD') has already been the subject of considerable scholarly attention within refugee and forced migration research. This attention includes two prominent international legal textbooks on the subject,[68] as well as numerous journal articles and legal commentaries exploring RSD in detail.[69] Among these materials, scholars have considered RSD in different regional and national contexts,[70] as well as the specific application of RSD in relation to particular groups of refugees, such as women, children, LGBTIQ+ refugees and refugees with disabilities.[71]

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[66] See, for example, UNHCR, *Desperate Journeys: Refugee and Migrant Children arriving in Europe and how to Strengthen their Protection* (UNHCR, October 2019) <https://reliefweb.int/sites/reliefweb.int/files/resources/71703_0.pdf>.

[67] See Devon Cone and Melanie Teff, *Searching for Safety: Confronting Sexual Exploitation and Trafficking of Venezuelan Women and Girls* (Refugees International, August 2019) <https://www.refugeesinternational.org/reports/2019/8/2/searching-for-safety-venezuela-trafficking>.

[68] See Hathaway and Foster (n 45); also, Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 4th ed, 2021).

[69] See, in particular, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR, February 2019) <https://www.unhcr.org/en-au/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

[70] See, for examples, Tamara Wood, 'Who Is a Refugee in Africa? A Principled Framework for Interpreting and Applying Africa's Expanded Refugee Definition' (2019) 31(2-3) *International Journal of Refugee Law* 290; also, Azadeh Dastyari and Daniel Ghezelbash, 'Asylum at Sea: The Legality of Shipboard Refugee Status Determination Procedures' (2020) 32(1) *International Journal of Refugee Law* 1.

[71] See, for examples, Pobjoy (n 64); Jane Freedman, 'Women Seeking Asylum: The Politics of Gender in the Asylum Determination Process in France' (2008) 10(2) *International Feminist Journal of Politics* 154; Moira Dustin, 'Many Rivers to Cross: The Recognition of LGBTQI Asylum in the UK' (2018) 30(1) *International Journal of Refugee Law* 104; Mary

Nevertheless, while the focus of this thesis is on the participation of refugees in other types of decisions-making processes, it is important to note that RSD procedures are generally the most common (and often only) forum through which refugees have the formal opportunity to exert their voice in decision-making processes.[72] Prior to the COVID-19 pandemic, UNHCR estimated that in 2019 over 1.3 million refugees received a substantive decision as a result of an RSD procedure.[73] These procedures usually take place upon entry to a state of asylum, during which a border official, tribunal member, judge, bureaucrat or UNHCR officer makes a determination as to whether the individual involved satisfies the criteria of a refugee as defined in the respective jurisdiction.

While refugees normally have the opportunity to speak with decision-makers during these procedures – and often have a shared evidentiary burden with the court or tribunal to present evidence relating to their claims – their testimony is generally limited to the confines of the narrow legal question at hand, namely whether they satisfy the legal definition of a refugee. Broader discussions as to refugees' ongoing needs and aspirations, whether related to education, work, healthcare or anything else that affects them, are rarely canvassed or considered in RSD procedures, even if it may be reasonably practical and efficient to do so. Indeed, the admission of evidence relating to the refugees' employment or education aspirations within these proceedings is often interpreted by the decision-maker as evidence that the individual may be seeking entry into the state of asylum for reasons other than a well-founded fear of persecution.[74]

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Crock, Christine Ernst and Ron McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2012) 24(4) *International Journal of Refugee Law* 735.

[72] Although, it is important to note that individual status determination procedures are often not undertaken in large-scale refugee situations where they are considered 'impractical, impossible or unnecessary'. Instead, an approach known as *prima facie* recognition of refugee status may be employed where groups of individuals are declared refugees based on 'readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum seekers, their country of former habitual residence': see UNHCR, *Guidelines on International Protection No 11: Prima Facie Recognition of Refugee Status* (UNHCR, 5 June 2015) <https://www.unhcr.org/en-au/publications/legal/558a62299/guidelines-international-protection-11-prima-facie-recognition-refugee.html> 2.

[73] UNHCR, *Global Trends: Forced Migration in 2019* (UNHCR, 2020) 44. This number is distinct from the number of asylum applications.

[74] See, for example, the experience of former asylum applicant Tina Dixson: Ariel Bogle, 'A Facebook post can change your life: Documents reveal how social media is used by immigration officials', *ABC News* (Online, 28 June 2020) <https://www.abc.net.au/news/science/2020-06-29/home-affairs-protection-visa-use-of-facebook-social-media/12391620>.

## 1.5 Research outline

This thesis is divided into three parts. The first part of this thesis (chapters 2 and 3) focuses on how refugee participation in decision-making is and can be understood. Chapter 2 begins by examining the scope of extant legal requirements on states and international organisations to consult with or include refugees in decisions that directly affect them. This largely doctrinal exercise traces for the first time the sources of participatory obligations in international law relating to refugees. In particular, the chapter examines the extent of participatory rights relating to refugees found in international refugee law specifically, as well as in international human rights law more broadly. This methodological approach is consistent with the established legal position that international refugee law should be interpreted in a dynamic and holistic manner that takes into account other international human rights instruments.

Chapter 3 complements this legal analysis by unpacking further the conceptual meaning and scope of refugee participation in decision-making from a range of different disciplinary perspectives. This is important because understandings of participation do not always take their bearings from legal doctrine. The chapter considers different ways scholars have sought to classify levels of engagement relevant to understandings of participation, as well as the types of decisions that may or should require input from refugees as important stakeholders in decisions affecting their rights. The chapter also analyses the normative justifications and motivations underpinning participatory approaches to refugee policy making. In other words, why do various stakeholders pursue increased participation of refugees in decision-making? Are these motivations consistent with a human rights-based approach to refugee protection?

The second part of this thesis (chapters 4, 5 and 6) examines in what ways and to what extent have refugees been included in different decision-making areas in practice. Chapter 4 commences this analysis by exploring the participation of refugees in the development of international law and policy. In particular, the chapter examines a concrete case study that has been largely overlooked in academic analysis so far. This case study is the contributions of refugees to the development of early international refugee law and policy between the years of 1921 and 1955. This chapter demonstrates that, contrary to widely held assumptions, persons with lived refugee experience during this period exercised significant influence and thought leadership in the development of international refugee law and policy.

Chapter 5 follows this analysis by considering to what extent and in what ways refugees have been able to participate in decisions relating to the relocation of refugees from one sovereign jurisdiction to another, referred to as *relocation decisions*. The chapter begins by considering decisions pertaining to the voluntary repatriation of refugees to their country of origin, and it follows by examining decisions related to the resettlement of refugees from a state of asylum to a third state. This chapter highlights that the international legal and policy framework governing these decision-making areas has developed in such a way that it provides limited opportunities for refugees to participate in these decision-making processes. From a human rights-based perspective, this is problematic because these decisions will almost certainly impact on the rights of refugees.

Chapter 6 concludes the second part of the thesis by examining the participation of refugees in decisions relating to the delivery of programmes and services that affect the rights of refugees. The chapter begins by analysing in what ways and to what extent UNHCR has included refugees in the design and implementation of its programmes and services at the local level. The chapter then addresses emergent trends in relation to the recognition and funding of refugee-led organisations, and the transition among some NGOs towards greater inclusion of refugees within their organisational leadership. Some of these developments have emerged in response to the impacts of the COVID-19 pandemic. Like the other decision-making areas discussed in the previous chapters, this chapter reveals that the international legal and policy framework remains insufficiently developed to ensure the meaningful participation of refugees in the delivery of programmes and services on the ground.

In response to these findings, the third part of this thesis (Chapter 7) looks forward towards different approaches and policy reforms that could further enable the meaningful participation of refugees in the design and implementation of policies that affect them. Chapter 7 begins by considering how participatory approaches in the international refugee regime could be improved based on the international legal standards already in place. In particular, the chapter focuses on how various barriers to refugee participation can be addressed and overcome to facilitate more meaningful refugee participation. The chapter then explores the merits of different international law reforms options that could be pursued to further influence approaches to meaningful refugee participation. Among these reform options, the chapter argues in favour of developing a new legal instrument committing states and other stakeholders to more

comprehensively recognising the rights of refugees to be heard in decisions that materially impact their human rights.

### 1.6 Significance and originality

The significance and originality of this thesis stems in part from its detailed study of the international legal and policy framework governing the participation of refugees in decision-making processes. This is the first occasion that a survey of this scope and focus has been conducted in forced migration research. The thesis provides original analysis as to the current extent of legal requirements on states and international organisations to consult with or include refugees in decisions that directly affect them. The thesis presents new evidence that shows how and to what extent refugees have been able to participate in different decision-making areas in practice. The thesis also proposes novel reforms for consideration to improve the international legal and policy framework relating to refugee participation.

Beyond this, the significance and originality of this thesis stems from its main argument. Over the coming chapters, this thesis demonstrates that despite recent commitments towards meaningful refugee participation among states and other stakeholders, the international legal and policy framework governing refugee participation has insufficiently provided for this to occur in practice. Whether it is in in relation to decisions regarding the development of law and policy, the transfer of refugees from one jurisdiction to another, or the delivery of programmes and services for refugees, refugees are frequently excluded from having a say in matters that impact their human rights. This exclusion of refugees from meaningful participation in decision-making processes has real-world consequences. Therefore, if states and other stakeholders are to realise commitments to meaningfully include refugees in decisions that impact them, it is important that these deficiencies are remedied.

# || PART I ||

# PARTICIPATION IN LAW AND THEORY

# || 2 ||

# LAWS RELATING TO REFUGEE PARTICIPATION

## Introduction

A key aim of the first part of this thesis is to examine the different ways in which the participation of refugees in decision-making processes is and can be understood. This chapter addresses this aim by identifying, as accurately as possible, the nature and scope of any international legal obligations relating to the participation of refugees in decision-making processes. Chapter 3, which follows, builds on this analysis by providing further conceptual clarity as to different levels and types of refugee participation that can occur in decision-making, and the motivations underpinning different participatory approaches in the international refugee regime.

The task of identifying and clarifying the nature and scope of international legal obligations relating to refugee participation is important for a number of reasons. First, as calls for the participation of refugees in decision-making grow, it is necessary to know what states and potentially other actors are already obligated to do, as well as what they may be restricted from doing. Second, knowledge of relevant obligations and commitments is also fundamental for any advocacy which sources its authority in international law generally, and international human rights instruments in particular.[1] Third, this task is also a necessary prerequisite for the analysis undertaken in the third part of this thesis, particularly in the section related to reform. Considerations as to the benefits and detriments of any law reform option cannot be made without clear understanding of where the law currently stands.

[1] As Anne T Gallagher and Fiona David note, 'for those concerned with using international law to shape the behaviour of States, normative precision is not a luxury but an operational necessity. States must understand exactly what international law requires of them if the international legal system is to have any hope of influencing and attaching consequences to their actions': see Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press, 2014) 14.

In one of its key policy documents relating to refugee participation – the *UNHCR Tool for Participatory Assessment in Operations* – UNHCR has claimed that refugees' 'right to participate in decisions on matters that affect their lives is enshrined in human rights instruments and UNHCR policy and guidelines, in particular the Agenda for Protection'.[2] But is this really the case? Is a right for refugees to participate in decision-making really enshrined in human rights instruments? If so, where can this right be found specifically in international law? If not, what do human rights instruments state about refugee participation?

UNHCR policies are rightly given considerable weight in the interpretation of international refugee law around the world, even though they are not binding on states as a matter of treaty interpretation.[3] However, in this case, UNHCR provides very few clues as to what evidence it relies upon to make the above claim. The document does not reference any international human rights instruments specifically, and the citation provided to support the claim only references three goals/objectives found in UNHCR's non-binding *Agenda for Protection* initiative.[4] Since the development of UNHCR's *Tool for Participatory Assessment in Operations*, the organisation similarly has not issued any comprehensive legal interpretation on the scope of such a 'right to participate' relating to refugees.

Other legal sources also do not provide much clarification as to the extent of refugees' participatory rights. In comparison to the specialised international human rights regimes related to women, children, persons with disabilities

[2] UNHCR, *The UNHCR Tool for Participatory Assessment in Operations* (UNHCR, 2006) <https://www.refworld.org/docid/462df4232.html> ('*UNHCR Tool for Participatory Assessment in Operations*') 1. Like all UNHCR policy documents, the *Agenda for Protection* is a non-binding document. UNHCR developed this document following 18 months of consultations with states and other actors between 2000 and 2002. See UNHCR, *Agenda for Protection* (UNHCR, 2003) <http://www.unhcr.org/en-au/protection/globalconsult/3e637b194/agenda-protection-third-edition.html> ('*Agenda for Protection*').

[3] See 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, 212; also, James C Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 3, 10.

[4] *UNHCR Tool for Participatory Assessment in Operations* (n 2) 72, Fn 1. The three goals/objectives referenced from the *Agenda for Protection* relate to empowering refugee communities to meet their own protection needs; the achievement of self-reliance, and meeting protection needs of refugee women and children. However, when probed further, there is no mention of any explicit right to participate among these goals/objectives, or any others, in UNHCR's *Agenda for Protection*. These goals/objectives are also either limited to the participation of women and children specifically or the narrower consideration of the participation of refugees in the design and development of *self-reliance* programmes. See *Agenda for Protection* (n 2).

and Indigenous persons – where there exists substantial legal commentary related to the scope and meaning of participatory obligations towards rights holders[5] – no scholar, court or institution has sought to comprehensively undertake this doctrinal exercise to date with respect to refugees. UNHCR has commissioned two independent studies on the political rights of refugees which provide guidance as to some of the relevant laws.[6] However, these studies primarily focus on the participation of refugees in elections, peace processes and political organisations, and do not consider other decision-making scenarios relevant to this subject matter, such as the extent to which states or other actors are required to take into account the views of refugees when making laws or policies that affect them. Further, due to their publication dates, these texts do not address recent legal developments that are significant to contemporary understandings of refugee participation.

To answer these questions more fully, this chapter analyses the scope of participatory rights relating to refugees that are found in both international refugee law and international human rights law more broadly. This methodological approach is consistent with the established understanding that international refugee law should be interpreted in a dynamic and holistic manner that takes into account, as James Hathaway notes, the 'amalgam of principles drawn from both refugee law and the (human rights) Covenants'.[7] This approach is also consistent with a good faith interpretation of the relevant legal instruments discussed in this chapter, taking into account their human rights objects and purposes.[8]

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[5] See, for example, Stephen Young, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (Routledge, 2020); also, S James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67(4) *University of Toronto Law Journal* 435; also, Valentina Della Fina, Rachele Cera and Giuseppe Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer, 2017).

[6] See Ruma Mandal, 'Political Rights of Refugees' (Research Paper, UNHCR Legal and Protection Policy Research Series, November 2003); also, Geoff Gilbert, 'Political Participation of Refugees in Their Country of Nationality' (Research Paper, UNHCR Legal and Protection Policy Research Series, November 2018).

[7] See James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005) 9; also, Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) 10-11; also, Goodwin-Gill (n 3) 207; also, Bruce Burson and David James Cantor, 'Introduction: Interpreting the Refugee Definition via Human Rights Standards' in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition Comparative Legal Practice and Theory* (Brill Nijhoff, 2016) 1.

[8] Article 31(1) of the1969 *Vienna Convention on the Law of Treaties* provides 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 their context and in the light of its object or purpose'. See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('VCLT'). For an analysis of the reasons why recourse to the broader framework of international human right law should be made when

Accordingly, this chapter commences by examining the scope of obligations and commitments relating to refugee participation that fall within the international legal instruments explicitly designed for refugees. This includes analysis of the 1951 *Convention relating to the Status of Refugees* ('1951 Refugee Convention')[9], the 1967 *Protocol relating to the Status of Refugees* ('1967 Protocol') [10] and the 1950 *Statute for the Office of the United Nations High Commissioner for Refugees* ('UNHCR Statute').[11] It also includes analysis of more recent non-binding instruments, namely the 2016 *New York Declaration for Refugees and Migrants* ('New York Declaration')[12] and the 2018 *Global Compact on Refugees.*[13]

The chapter then considers the nature and scope of other relevant legal obligations to refugee participation found in broader international human rights instruments. In particular, the chapter examines several civil and political rights relevant to participation that are codified in the *1966 International Covenant on Civil and Political Rights* ('ICCPR').[14] Finally, the chapter analyses other specialized international human rights instruments that have mandated the inclusion of certain groups in the design and implementation of decisions that affect them, particularly women, children and persons with disabilities. These latter human rights instruments have implications for certain groups of refugees (such as refugee women, refugee children and refugees with disabilities), as well as the states and organisations mandated to protect them. They also showcase other ways in which participation has been addressed in international law and institutional design more broadly.

This chapter argues that, contrary to UNHCR's prior claim in its *Tool for Participatory Assessment in Operations*, refugees do not currently have a

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considering the rights of refugees, see Jason M Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, 2017) 35–37; also, Hugo Storey, 'The Human Rights Approach to the Refugee Definition: Rising Sun or Falling Star?' (2022*) International Journal of Refugee Law* (forthcoming).

[9] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

[10] *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[11] *Statute of the Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/428(V) (14 December 1950).

[12] *New York Declaration for Refugees and Migrants*, UNGA Doc A/RES/71/1 (3 October 2016)

[13] *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2 August 2018) ('Global Compact on Refugees').

[14] *International Covenant on Civil and Political* Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22.

specific right to participate in decisions that affect their lives that is explicitly enshrined in international human rights instruments. Nevertheless, recognition of the need, as a matter of law, to include refugees in decision-making processes has evolved significantly, and several non-binding international legal instruments have now recognised the normative value of refugee participation and have begun to articulate associated non-binding principles and commitments. Further, civil and political rights related to participation, as well as consultative rights related to specific groups of rights-holders (women, children and persons with disabilities), also offer some rights-based protections for refugees to participate in decision-making processes that need to be taken into account.

### 2.1 The 1951 Refugee Convention and the 1967 Protocol

If a clear and explicit right of refugees to participate in decisions that affect them existed in international human rights law, then one place it could potentially be found is in the 1951 Refugee Convention. This Convention, along with the 1967 Protocol, continues to represent the clearest source of legal authority relating to the rights of refugees. The Convention not only establishes grounds for eligibility for protection by defining a 'refugee' under international law,[15] but it also sets 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), and access to the courts (Article 16).

Further, the 1951 Refugee Convention also codifies in international law protection from *refoulement*. This protection, as found in Article 33(1) of the 1951 Refugee Convention, is a central obligation in the international refugee regime. It prohibits states from expelling or returning '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'. While this protection does not equate to a right of refugees to receive or be granted asylum in any circumstance, it does require states at a minimum to implement fair and efficient procedures and protections to ensure that

[15] Under Article 1A(2) of the 1951 Refugee Convention, as modified by the 1967 Protocol, a 'refugee' is defined as a person who 'owing 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'.

refugees are not returned to a place where they face a real risk of persecution or other serious harm.[16]

Yet, despite the range of rights set out above, the Refugee Convention does not specifically address the participation of refugees in decision-making processes in any form. There is neither direct mention of participation in any particular Convention provision, nor can any participatory or consultative right be inferred or implied through an interpretation of any of the provisions.[17] The absence of any mention of participation, explicit or implicit, means that states parties are not obligated to consult with refugees in decisions implemented under the Convention, unless such obligations are required by other sources of law. However, at the same time, such participation is also not prohibited or discouraged either.

The Refugee Convention is also largely silent on the political rights of refugees in countries of asylum. The Refugee Convention contains a right of association for refugees, and provides generally under Article 2 that refugees are required to respect the laws of the country of asylum.[18] However, other rights, such as the right to political expression and the electoral franchise, are not explicitly canvassed.[19] The decision not to codify political rights of refugees in the Convention was partly due to a desire among the drafters to emphasise 'the social and humanitarian nature of the problem of refugees', as the Preamble to the Convention states. However, it also related to disagreement among the drafters as to what extent such political rights should be addressed.

For instance, during debate on the draft right of association, the *travaux préparatoires* (official preparatory works) reveal that some delegates expressed concern that restrictive provisions relating to political activities may deprive refugees of rights provided in other international instruments.[20]

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[16] This understanding recognises that the obligation of *non-refoulement* found in the 1951 Refugee Convention is now complemented by other human rights laws which prohibit the return of persons to places where they face a real risk of being subjected to torture; cruel, inhuman or degrading treatment or punishment; arbitrary deprivation of life; or other irreparable harm.

[17] One possible exception to this is Article 16 (1) of the 1951 Refugee Convention, which provides that refugees 'shall have free access to the courts of law on the territory of all Contracting States'. As discussed in Chapter 3, the capacity of refugees to challenge decisions made can be considered an example of *contestatory* participation.

[18] Article 2 of the Refugee Convention provides that 'every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order'.

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

[20] UN ECOSOC, *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*

The 1948 *Universal Declaration of Human Rights* ('UDHR')[21] was first and foremost on the drafters' minds,[22] but there was also contemplation that such political rights may be enunciated in the future.[23] Other delegates, in contrast, expressed concern over potential adverse consequences if provisions recognising political rights were formulated too broadly, for they could allow refugees or other foreigners to interfere in the politics of the host state.[24] In the emerging Cold War context, this anxiety was particularly directed towards ensuring that trade unions would not be under foreign control and that refugees would not be serving 'the interests of some other country'.[25]

In this political environment, the right to association that was ultimately adopted does not address refugee involvement in political associations. Article 15 of the Refugee Convention 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.[26]

This provision has a narrower focus than the right to association found in the UDHR and the subsequent ICCPR.[27] Importantly for the purposes of this thesis' subject matter, the provision does not substantively advance the political rights of refugees in decision-making processes that affect them.

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*January 1950, at 2:30 p.m.*, UN Doc E/AC.32/SR.10 (1 February 1950) ('*Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Tenth Meeting*') [40].

[21] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('UDHR'). Although non-binding, many of the rights contained in the UDHR are now considered customary international law.

[22] The 1951 Refugee Convention expressly refers to the UDHR in its Preamble.

[23] This is reflected in Article 5 of the Refugee Convention, which provides that 'Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'. Additionally, the development of a covenant on human rights was already being prepared and negotiated, which later would lead to the drafting of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR'). See Ben Saul, 'Introduction: The Drafting of the International Covenant on Economic, Social and Cultural Rights, 1948–1966' in Ben Saul (ed), *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires, Volume I* (Oxford University Press, 2016) xciv.

[24] *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Tenth Meeting* (n 20) [40], [48].

[25] Ibid [47].

[26] 1951 Refugee Convention art 15 (emphasis added).

[27] ICCPR art 22.

Like the 1951 Refugee Convention, the 1967 Protocol similarly does not address the question of refugee participation in any substantive way. The Protocol's purpose was to legally remove the temporal and geographical restrictions that applied to the definition of a refugee as set out in the 1951 Refugee Convention. Previously, when the 1951 Refugee Convention entered into force in 1954, eligibility for refugee status 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. The 1967 Protocol removed these restrictions to ensure that eligibility for refugee status applies universally and on an ongoing basis. However, the Protocol did not seek to address any other substantive issues.

What explains the absence of any reference to refugee participation in the 1951 Refugee Convention and the 1967 Protocol? In part, it reflects the decision at the time, as discussed above, to avoid the political aspects of refugee protection. This certainly influenced the choice not to codify the political rights of refugees in the 1951 Refugee Convention. However, this does not necessarily explain why the issue of refugee participation was not at least discussed or considered. As is revealed in greater detail in Chapter 4, refugees and persons with lived refugee experience played significant roles in the development of the 1951 Refugee Convention. This participation in the drafting of the 1951 Refugee Convention provides some evidence that states at the time at least implicitly valued the input of persons with lived refugee experience in these law-making processes. The extensive negotiations that took place prior to the adoption of the 1951 Refugee Convention also provided refugees and other stakeholders with the opportunity to at least propose such protections for consideration by states.

Instead, the absence of such a proposal or provision relating to refugee participation is more likely a result of the different understandings of the roles and possibilities of international law that existed at the time when these laws were developed. In contrast to contemporary understandings of international law – where there are now several examples of consultative obligations in international human rights instruments related to the individual and group rights of women, children, Indigenous persons and persons with disabilities – states and other actors did not fully contemplate the role that international law could play in establishing obligations to consult with refugees in decisions that affect them during the post-Second World War period of international law-making. Refugees clearly sought to participate in international law and policy making at the time, but practically

no actor considered the potential of international law to secure or guide this involvement.

### 2.2 The 1950 UNHCR Statute

A third important legal instrument that explicitly deals with the treatment and rights of refugees under international law is the 1950 UNHCR Statute. This statute was adopted by the UN General Assembly on 14 December 1950 as an Annex to Resolution 428 (V), and establishes the functions of UNHCR, as well as its relationship with the UN General Assembly and the UN Economic and Social Council. In particular, the Statute tasks UNHCR with the function of 'providing international protection, under the auspices of the United Nations, to refugees' and of 'seeking permanent solutions for the problem of refugees'.[28]

However, like the 1951 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 undertaken by UNHCR. Academics and UNHCR have read into the Statute an implied consultative obligation in relation to the specific issue of repatriation.[29] This obligation emerges because under the Statute UNHCR can only facilitate and promote the durable solution of repatriation in situations when such repatriation is considered 'voluntary'.[30] Yet, beyond this, there is no broader consultative obligation found in the UNHCR Statute in relation to refugees.

Under the Statute, UNHCR is mandated to consult with multiple actors in order to fulfil its function of providing international protection to refugees. 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

[28] UNHCR Statute, Chapter 1, [1].
[29] See UNHCR, *Handbook: Voluntary Repatriation: International Protection* (UNHCR, 1996); also, Guy S Goodwin-Gill, 'Voluntary Repatriation: Legal and Policy Issues' in Gil Loescher and Laila Monahan (eds), *Refugees and International Relations* (Oxford University Press, 1989) 255.
[30] UNHCR Statute, Chapter 1, [1], Chapter 2, [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*, 10. UNHCR has also stressed that 'the decision to repatriate voluntarily is an individual one': UNHCR, *Update on voluntary repatriation* (UNHCR, EC/67/SC/CRP.13, 7 June 2016) [2]. The practical implementation of this obligation, including its interpretation, is discussed more fully in Chapter 5.1.

further provides that the High Commissioner shall also request the opinion of an advisory committee on refugees, if it is created, 'when difficulties arise, and for instance with regard to any controversy concerning the international status of these persons'.[31] However, this advisory committee was designed to consist 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'.[32] There is no legal requirement that this advisory committee include refugees, nor has there been any regular practice of including refugees in this committee, which since 1958 has been known as the Executive Committee of the High Commissioner's Programme (ExCom).[33]

In 1997, states demonstrated some willingness to expand the governance structure of ExCom to enable some participation from non-governmental organisations (NGOs). However, the scope of this participation has been limited. Notably, NGOs are permitted to make one collective observer statement on each agenda item, 'with the selection of the organization to speak to be made by the NGOs themselves on the basis of expertise or direct knowledge of the matter under consideration'.[34] These statements are currently coordinated by the International Council of Voluntary Agencies.[35] There is also some demonstrated practice of governments including NGO representatives as part of their individual state delegations. However, beyond this, NGOs are not provided with opportunities to speak individually or to raise questions outside of the coordinated statement.

The requirement that NGOs speak in a single voice makes it challenging for the diversity of viewpoints among NGOs to be properly canvassed in these

[31] UNHCR Statute, Chapter 1, [1].
[32] Ibid Chapter 1, [4].
[33] 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* (Oxford University Press, 4th ed, 2021) 489–491.
[34] UNHCR Standing Committee, *Report on the Informal Consultations on Non-Governmental Organization (NGO) Observer Participation in the work of the Executive Committee of the High Commissioner's Programme and its Standing Committee* (UNHCR, EC/47/SC/CRP.39, 30 May 1997) ('*Report on the Informal Consultations on Non-Governmental Organization (NGO) Observer Participation*') Annex 1; see also, generally, Alison Corkery, 'The Contribution of the UNHCR Executive Committee to the Development of International Refugee Law' (2006) 6 *Australian International Law Journal* 97.
[35] See International Council of Volunteer Agencies and UNHCR, *A Guide for NGOs Participating in UNHCR's Annual Consultations with NGOs* (ICVA, 2016) <https://www.icvanetwork.org/system/files/versions/Guide-for-NGOs.pdf> 23–24; also, UNHCR Executive Committee, *Rules of Procedure*, 67th sess, UN Doc A/AC.96/187/Rev.8 (21 October 2016) [41].

discussions. At the time of ExCom's initial decision, a report prepared by UNHCR's Standing Committee indicated that their reasons for limiting NGO participation were 'the importance of maintaining the inter-governmental character of their decision-making processes, their well-established tradition of work by consensus, and the efficiency of their working methods'.[36] The Standing Committee also emphasised 'the need to maintain the tradition of the Standing Committee in respect to the confidentiality of statements by individual delegations'.[37] Refugees, if seeking to be meaningfully included in ExCom's annual sessions, may face similar barriers to enhanced and more meaningful participation.

Finally, there is also debate as to the extent to which UNHCR can facilitate the political participation of refugees under its mandate. This debate arises because Paragraph 2 of the UNHCR Statute provides that

> The work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees.

While some legal commentary suggests that this paragraph 'includes the idea of facilitating participation by refugees on their own terms' in order to ensure that UNHCR is 'impartial in all situations',[38] the discussions that took place in the UN General Assembly prior to the adoption of the Statute indicate that states did not consider consultation with refugees as being relevant to this paragraph at this time. Instead, the inclusion of the paragraph in the Statute was designed to overcome clear political differences between states – particularly regarding the protection or repatriation of nationals from the Soviet Union[39] – and to avoid the politicisation of UNHCR by states (rather than by refugees).[40]

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[36] *Report on the Informal Consultations on Non-Governmental Organization (NGO) Observer Participation* (n 34) 34.
[37] Ibid.
[38] Gilbert (n 6) 26.
[39] At the time, the Soviet Union and its allied states voted against the establishment of UNHCR's office because they perceived such a measure as being designed by Western states (particularly USA, UK and France) to delay or prevent the repatriation of nationals from USSR, Poland, Czechoslovakia and other countries. The delegate of the USSR stated that these nationals included those who 'fought … against the people and government of their country', as well 'other traitors who are refusing to return home to serve their country together with their fellow citizens'. See UNGA, *General Assembly, 5th Session: 325th Plenary Meeting, Thursday, 14 December 1950, Flushing Meadow*, UN Doc A/PV.325 (14 December 1950) ('*325th Plenary Meeting*') [72]–[75], [81].
[40] See, for example, the submission by the French delegate, noting that 'The Committee sought to deal with the problem exhaustively, in an effort to reconcile differences; its aim was to withdraw the question completely from the sphere of political controversy and to

In any case, the reference to UNHCR's 'non-political character' in UNHCR's Statute should be interpreted cautiously so as to avoid a manifestly absurd outcome which would prohibit UNHCR from fulfilling its central protection functions towards refugees. The provision of protection to refugees inevitably requires UNHCR to engage with political actors such as governments and NGOs, and in political processes such as peace processes and repatriation negotiations.[41] Further, as the definition of a refugee in the UNHCR Statute makes clear, UNHCR is also mandated to provide international protection to refugees whose eligibility is based on a well-founded fear of persecution due to (amongst other grounds) their 'political opinion'.[42] Each of these functions of UNHCR were clearly intended by the states that adopted the UNHCR Statute,[43] and remain a central function to UNHCR's work.[44]

### 2.3 The 2016 New York Declaration and the 2018 Global Compact on Refugees

In comparison to the above binding legal instruments – which largely overlooked the idea of including refugees in policymaking and responses to displacement – the commitments made in the more recent non-binding New York Declaration and the Global Compact on Refugees clearly advance the recognition of the importance of including refugees in decision-making processes that affect them. These instruments identify refugees as a legitimate stakeholder in the design and implementation of refugee

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view it solely in a social and humanitarian context. It felt that the statute of the High Commissioner's Office should be accepted not by the largest number but by a very large number, so as to ensure that the Commissioner enjoyed all the authority he needed for successful co-operation with governments': Ibid [88].

[41] See Gilbert (n 6) 26–27, 35–36; also, David Forsythe, 'UNHCR's mandate: the politics of being non-political' (New Issues in Refugee Research Working Paper No 33, UNHCR, March 2001) 1.

[42] The definition of a refugee found in the UNHCR Statute shares many similarities with the 1951 Refugee Convention, although it has never included any temporal or geographical restrictions. See UNHCR Statute, Chapter 2, [6] for the full text.

[43] The UNHCR Statute was adopted by 35 votes to five, with 11 abstentions: *325th Plenary Meeting* (n 39) [64].

[44] In 1975, Louise Holborn argued that 'the inclusion of this clause within the Statute definition has had the effect of requiring the HC (High Commissioner) to take cognizance of the political situations which produce refugees, while at the same time his mandate requires that his actions must be non-political. In other words he must minister to the human needs of refugees without taking sides in the political controversies that made them refugees'. See Louise W Holborn, *Refugees: A Problem of Our Time – The Work of The United Nations High Commissioner for Refugees, 1951-1972 Volume 1* (Scarecrow Press, 1975) 89.

responses, and, for the first time, set out commitments from states in international law and policy towards enhanced refugee participation.

As discussed in the introduction to this thesis, the New York Declaration articulates the need for a 'multi-stakeholder approach' to refugee protection, as part of its comprehensive refugee response framework.[45] 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.[46] Importantly, refugees are identified as a relevant actor within this framework, although their participation is given no greater priority or importance than the other stakeholders mentioned in the New York Declaration.

One provision 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.[47] 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 Global Compact on Refugees, which is a non-binding international legal instrument that emerges from the New York Declaration,[48] also contains provisions regarding the participation of refugees in decision-

[45] New York Declaration [69].
[46] Ibid. For more on the general opportunities and risks associated with this multi-stakeholder approach, see Tristan Harley, 'Innovations in Responsibility Sharing for Refugees' (World Refugee Council Research Paper No 14, 28 May 2019) <https://www.worldrefugeecouncil.org/sites/default/files/documents/WRC%20Research%20Paper%20no.14.pdf> 10–11.
[47] UNGA, *Report of the Fifty-Fourth Session of the Executive Committee of the High Commissioner's Programme, Conclusion on Protection from Sexual Abuse and Exploitation*, UN Doc A/AC.96/987 (10 October 2003) [24].
[48] New York Declaration (n 12) 'Annex I: Comprehensive refugee response framework', [19]. For more on the non-binding character of the Global Compact on Refugees, see Geoff Gilbert, 'Not Bound but Committed: Operationalizing the Global Compact on Refugees' (2019) 57(6) *International Migration* 27.

making processes. Adopted by 181 UN Member States at the United Nations General Assembly on 17 December 2018,[49] the Global Compact on Refugees extends and develops commitments to refugee participation by setting out pathways to or examples of best practice. Most notably, paragraph 34 of the Global Compact on Refugees 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 marginalised from such processes.

However, beyond this, 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 have only committed to 'explore' how best to include refugees in relevant fora, and consultative processes are only proposed 'wherever possible', and without clarification as to their scope and nature.[50] Members of host communities are also placed on equal footing with refugees in paragraph 34, yet there is no clear definition in the Global Compact on Refugees or international refugee law

[49] The Global Compact on Refugees 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 UNGA, *Reports of the Third Committee*, UN Doc A/73/PV.55 (17 December 2018) 10.

[50] During the development of the Global Compact on Refugees, some civil society organisations, such as the Irish-based international NGO, the Social Change Initiative, sought to strengthen this commitment by advocating for clearer governance mechanisms with refugees, but changes of this nature were ultimately not adopted: see The Social Change Initiative, *Strengthening Refugee Participation in the Global Compact on Refugees* (UNHCR, 12 April 2018) <https://www.unhcr.org/en-au/events/conferences/5ad9eaf57/strengthening-refugee-participation-global-compact-refugees.html>.

more broadly as to who these host community members are, or how they will be constituted and involved.[51]

In other paragraphs of the Global Compact on Refugees, additional commitments are made in relation to the participation and leadership of particular groups of refugees, namely women, children, adolescents, youth, persons with disabilities and older persons.[52] These commitments share many normative similarities with the commitments found in the New York Declaration, and at times they overlap. Given that the Global Compact on Refugees is designed to complement the New York Declaration, and not replace it, a good faith interpretation of these provisions requires them to be interpreted collectively.[53] One notable addition in the Global Compact on Refugees in relation to women is a commitment 'to support the institutional capacity and participation of national and community-based women's organizations'.[54] This commitment recognises the importance of capacity building in relation to many participatory endeavours, particularly for groups and organisations that are often underrepresented.

The Global Compact on Refugees also 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'.[55] These forums, which have been established in the Global Compact on Refugees, are planned to take place every four years at the ministerial level with UN Member States and other stakeholders. The first Global Refugee Forum occurred in December 2019 in Geneva. These forums provide some opportunity for refugees to seek concrete pledges from states and other actors towards particular protection initiatives as desired. They also provide possibilities for some monitoring and review of commitments. [56]

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[51] Host communities are generally distinct from refugees in that they have not left their country of origin and, as a consequence, have access to distinct political rights and in certain contexts may be able to participate politically within the governance processes of their own country.

[52] Global Compact on Refugees [13], [74]–[77].

[53] New York Declaration, 'Annex I: Comprehensive refugee response framework' [19].

[54] Global Compact on Refugees [75].

[55] Global Compact on Refugees [106].

[56] To facilitate the inclusion of refugees in the Global Refugee Forums, the Global Compact on Refugees also proposed the development of a digital platform by UNHCR that is 'accessible to all'. However, the purpose of this platform was designed 'to enable the sharing of good practices, notably from an age, gender, disability, and diversity perspective, in the application of the different elements of the global compact', and not to raise concerns about the implementation of current practices or the absence of effective practices all together: Global Compact on Refugees [106].

In sum, the commitments made in the New York Declaration and the Global Compact on Refugees clearly progress the recognition of refugees as important stakeholders in decision-making processes that affect them. These commitments go beyond the binding legal instruments relating to refugees discussed above and recognise the value that refugees can bring to the design and implementation of refugee responses. These commitments are also in line with the UN Sustainable Development Goals, which were developed by the UN General Assembly in 2015 and are hoped to be achieved by 2030.[57] In particular, Target 16.7 seeks to 'ensure responsive, inclusive, participatory and representative decision-making at all levels'.[58]

However, the commitments in the New York Declaration and the Global Compact on Refugees do not go so far as to establish clear principles or practices for the meaningful participation of refugees in decision-making. When examining these commitments in detail, it is clear that such provisions could provide greater clarity and go further to build moral, political, and ultimately legal authority for the participation of refugees in the design and implementation of policy. This is required for states and other actors to be able to effectively work towards realising their commitments to refugee participation under these instruments.

For instance – although Indigenous peoples are normatively distinct from refugees,[59] and their aspirations and entitlements at international law differ[60] – several articles of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')[61] highlight a more inclusive or substantive approach towards participatory rights.[62] Notably, article 18 provides that:

[57] See *Transforming our World: The 2030 Agenda for Sustainable Development*, UN Doc A/RES/70/1 (25 September 2015) 'Sustainable Development Goals and targets'.
[58] In relation to women, Target 5.5 also specifies that it aims to 'ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life'.
[59] 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.
[60] 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.
[61] *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2007).
[62] 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.

> 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 aside 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'.[63]

### 2.4 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.[64] 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'.[65] It includes a web of 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

[63] 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.
[64] See Hathaway (n 7) 9; McAdam (n 7) 10–11; Goodwin-Gill (n 3) 207.
[65] Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, UN Doc A/HRC/31/62 (12 January 2016) [14]–[15].

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 for non-citizens such as refugees. As Ruma Mandal notes, 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'.[66]

The clearest source of international law in relation to the civil and political rights of all persons is the ICCPR. This covenant entered into force on the 23 March 1976 and there are now 173 states party to the covenant.[67] The obligations found in the covenant are binding on all states party.[68] Articles 17, 19, 21, and 22 of the ICCPR recognize 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.[69] This interpretation is also consistent with the non-discrimination clause found in Article 2 of the ICCPR, which commits states 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'.[70]

There are, however, permissible limitations to these civil and political rights, 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

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[66] Mandal (n 6) 1.

[67] United Nations Treaty Collection, *Status of the International Covenant on Civil and Political Rights* (Web Page, UNTS, 15 December 2021) <https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND>.

[68] This can be contrasted with the non-binding UDHR.

[69] Human Rights Committee, *General Comment No 31: Article 2: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) [10]; also, Human Rights Committee, *General Comment No 15: The Position of Aliens under the Covenant*, 27th sess, UN Doc HRI/GEN/1/Rev.7 (11 April 1986) [1]. The Human Rights Committee is the body of 18 independent experts elected by states to monitor states' implementation of the ICCPR. In addition to its monitoring work, the Committee publishes interpretative comments on the content of human rights provisions, known as general comments.

[70] Article 2 of the ICCPR also provides a list of prohibited distinctions including 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. While nationality is not mentioned specifically, this list is understood as being non-exhaustive and nationality is likely to fall within its ambit. See Ziegler (n 19) 49.

protection of the rights and freedoms of others'. Similarly, the right to freedom of expression, found in article 19 of the ICCPR, is also subject to certain restrictions. Article 19(3) of the ICCPR provides that these restrictions are those that are provided by law and are necessary for 'respect of the rights or reputations of others' or 'for the protection of national security or of public order (*ordre public*), or of public health or morals'. The practical application of these restrictions has been the subject of substantial legal analysis and judicial review.[71]

Article 25 of the ICCPR, which guarantees 'the right and the opportunity … to take part in the conduct of public affairs, directly or through freely chosen representatives', as well as the right 'to vote and to be elected at genuine periodic elections' and 'to have access… to public service', further differs from the above rights in that it is expressly limited to 'every citizen'. This is the only provision in the ICCPR which refers explicitly to the rights of citizens, as opposed to 'all persons' or 'everyone'. While Nahuel Maisley suggests that article 25 may provide non-citizens a right to participate in international law-making,[72] the more common reading of this article, taking into account the ordinary meaning of the terms, is that non-citizens are excluded from its ambit.[73]

The legal implications of Article 25 of the ICCPR for refugees differ depending on the frame of reference. For refugees seeking to participate in political processes in the country of asylum, Article 25 means that while states are able to grant non-citizen residents such as refugees the right to vote and participate in elections, they are not obliged to do so under international law. This exclusion is often considered reflective of the privileged position afforded to citizenship, the assumed allegiance between a citizen and the nation state, and contemporary understandings of representative democracy.[74] However, for refugees seeking to participate in

[71] See, for example, Human Rights Committee, *General Comment No 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), including the numerous references to relevant case law contained within.
[72] 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.
[73] 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*, 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996) ('*General Comment 25*'). See also Human Rights Council, *Factors that impede equal political participation and steps to overcome those challenges: Report of the Office of the United Nations High Commissioner for Human Rights*, 27th sess, UN Doc A/HRC/27/29 (30 June 2014) [34]–[40].
[74] Mandal (n 6) [62]; Guy S Goodwin-Gill, *Free and Fair Elections* (Inter-Parliamentary Union, 2nd ed, 2006) 93, 102–103.

the political processes of their country of nationality, Article 25 may offer some rights-based protections.

As the United Nations Human Rights Committee has indicated in General Comment 25 in relation to Article 25,

> States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote.[75]

Although not dealing expressly with overseas voters or refugees, this comment can be interpreted as requiring states to take effective measures to enable citizens to vote, even when they are not in their country of origin and may have obtained refugee status elsewhere. Limitations placed on this right due to not being resident in the country can only be imposed if they meet a reasonableness threshold.[76]

The impact of these international laws is that refugees benefit from some political rights under international human rights law, regardless of where they reside. In particular, these include the rights to privacy, freedom of opinion, expression, association and peaceful assembly. These rights, subject to their limitations, may provide important protections for refugees seeking to be involved in decision-making processes. However, international human rights law does not provide refugees with a right to access the electoral franchise in countries other than their own. Some scholars have argued that providing voting rights to recognised refugees in countries of asylum is 'normatively desirable' given the 'civic limbo' they experience and the common duration of protracted refugee situations.[77] There are also some exceptional instances of refugees being provided with voting rights in national or local elections when residing in countries of

[75] *General Comment 25* (n 73) [11].
[76] On the question of whether such a limitation is reasonable, Mandal argues that 'it does not seem reasonable to exclude refugees from voting in their country of origin, particularly if this rewards persecutory activities on the part of the authorities there': Mandal, 'Political Rights of Refugees', [16]. Further, Geoff Gilbert argues in relation to Article 25 and the political rights of refugees that 'for the relevant rights to be effective and inclusive … refugees need to be included as citizens of the state, even if they are outside the territory at the time, acknowledging, though, that there may be political and practical difficulties in fulfilling this in practice': Gilbert (n 6) 23.
[77] Ziegler (n 19) 194; David Owen, 'Citizenship and the Marginalities of Migrants' (2013) 16(3) *Critical Review of International Social and Political Philosophy* 326, 332.

refuge.[78] However, these practices are certainly not the norm, nor are they legally required.

### 2.5 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 have been codified since the formation 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.[79]

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.[80] This provision reflects the importance of recognising, as the Inter-American Court of Human Rights has advised, the 'needs of a child as a true legal person, and not just as an object of protection'.[81] It also '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'.[82]

Similarly, the 2006 *Convention of the Rights of Persons with Disabilities* ('CRPD') 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'.[83] This article is complemented by many other important provisions within the CRPD which seek to ensure the equal participation of persons with disabilities in all facets of civil, political,

[78] Mandal (n 6) [62]–[63].
[79] For more on the rights of individuals under international human rights law, see Bruno Simma, 'Sources of International Human Rights Law: Human Rights Treaties' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press, 2017) 871, 877–881.
[80] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[81] *Juridical Status and Human Rights of the Child*, Advisory Opinion OC-17/02, Inter-American Court of Human Rights (28 August 2002) [28].
[82] Pobjoy (n 8) 55.
[83] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

economic, social and cultural life.[84] Like the discourse surrounding the participatory rights of children, these legal developments have similarly been framed as 'a profound paradigm shift in international human rights law whereby persons with disabilities are not "objects" to be cared for but rather "subjects" enjoying human rights and fundamental freedoms on an equal basis with others'.[85]

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'.[86] Further, the UN Security Council Resolution 1325 from October 2000, which is central to the Women, Peace and Security agenda, urges UN Member States 'to ensure increased representation of women at all decision making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict'.[87] Refugee and displaced women are specifically mentioned in Resolution 1325 and, as Elizabeth Ferris notes, were actively involved in the drafting process.[88]

Each of these legal obligations has implications for states and organisations mandated to protect refugees. For example, the United Nations Committee

[84] Participation is mentioned on 17 occasions within the CRPD. This includes, *inter alia*, in the Convention's preamble and purpose (Art. 1), as a general principle (Art. 3), and as a political right (art. 23). The Convention also highlights the importance of participation of persons with disabilities in the monitoring of the Convention's implementation.
[85] Aguilar (n 65) [17].
[86] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981). The extent to which this provision applies to non-citizens, such as women refugees, is unclear. Broadly, the Committee on the Elimination of Discrimination against Women has specified that the obligations of States parties to CEDAW apply 'without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory': see Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010) [12]. However, in a separate, previous general recommendation specifically looking at article 7, little guidance was offered as to its application towards non-citizens: see Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No. 23: Political and Public Life*, UN Doc A/52/38/Rev.1 (1997) 61–70.
[87] *Resolution 1325 (2000): Adopted by the Security Council at its 4213th meeting, on 31 October 2000*, SC Res, UN Doc S/RES/1325 (31 October 2000).
[88] 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.

on the Rights of the Child further specified in 2005 that Article 12 of the CRC requires that the views and wishes of unaccompanied and separated children, including child refugees, be taken into account when determining matters such as guardianship, care and accommodation requirements, legal representation, and the identification of 'a durable solution that addresses all of their protection needs'.[89] These requirements now form part of UNHCR's Guidelines on Determining the Best Interests of the Child, and need to be adhered to among states parties to the CRC.[90]

Further, in the context of the women, peace and security agenda, the UN Committee on the Elimination of Discrimination against Women has recommended that States parties to CEDAW

> promote the meaningful inclusion and participation of internally displaced and refugee women in all decision making processes, including in all aspects related to the planning and implementation of assistance programmes and camp management, decisions relating to the choice of durable solutions and processes related to post conflict processes.[91]

This recommendation applies both to citizens and non-citizens without discrimination, and includes, among other things, the meaningful participation of women refugees in durable solutions such as voluntary repatriation processes.

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[89] See Committee on the Rights of the Child, *General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin*, 39th sess, UN Doc CRC/GC/2005/6 (1 September 2005) [25], [79]. This requirement under Article 12 is interconnected with the requirement under Article 3 of the CRC that the best interests of the child be a primary consideration.

[90] See UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (UNHCR, May 2008) 14, 31, 59–61, 68. For the revised version, see UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (UNHCR, 2021) <https://www.refworld.org/pdfid/5c18d7254.pdf> ('*2021 UNHCR Best Interests Procedure Guidelines*'). Under the 2008 guidelines, UNHCR was required to undertake an individualised Best Interests Determination for children falling under its competence when a decision related to either identifying a durable solution for a child or arranging temporary care arrangements, or when the decision may result in the possible separation of a child from his or her parents against their will. The 2021 Guidelines have relaxed these requirements, arguably providing fewer opportunities for individualised child participation in decision-making processes, particular with regards to the identification of durable solutions. See *2021 UNHCR Best Interests Procedure Guidelines* 29, 70–71.

[91] Committee on the Elimination of Discrimination against Women, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc CEDAW/C/GC/30 (1 November 2013) [57].

Finally, in relation to refugees with disabilities, ExCom has encouraged 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' in accordance with the participatory rights set out in the CRPD.[92] UNHCR has also published a guidance manual that explicitly connects participation and non-discrimination as being integral components to the protection of persons with disabilities. This manual defines participation 'as working in partnership with persons of concern, putting people at the center of decision- making, as well as supporting their capacities and efforts as agents of change in their families and communities'. [93]

As these examples make clear, each of these participatory obligations are certainly not peripheral to the proper functioning of the international refugee regime. Although these laws do not necessarily deal with all decision-making scenarios that affect refugee women, refugee children and refugees with disabilities, there is a need to consider how these participatory rights are best implemented by states and incorporated into protection services on the ground. This is particularly important given that women, children and persons with disabilities usually collectively represent the majority of all refugee populations in any given context. These cross-cutting rights also highlight some of the other methods through which participation has been addressed in international law and institutional design in relation to particular groups.

## Conclusion

This chapter has analysed the nature and scope of the various international legal obligations that relate to the participation of refugees in decision-making processes. In particular, the chapter has explored the extent of participatory rights relating to refugees found in international refugee law specifically, as well as in international human rights law more broadly. The chapter has also examined specific mentions of consultative obligations, as well as the web of interconnected rights that make such participation possible. This approach has been taken because the legal dimensions of participation in decision-making need to be understood both dynamically,

[92] UNGA, *Report of the Sixty-First Session of the Executive Committee of the High Commissioner's Programme, Conclusion on Refugees with Disabilities and Other Persons with Disabilities*, UN Doc A/AC.96/1095 (12 October 2010) [13](e).
[93] UNHCR, *Working with Persons with Disabilities in Forced Displacement* (UNHCR, 2011) 4, 9. See also Mary Crock et al, *The Legal Protection of Refugees with Disabilities: Forgotten and Invisible?* (Edward Elgar, 2017).

taking into account the development of laws and norms in human rights law over time, as well as holistically, taking into account all relevant obligations.

By adopting this methodological approach, this chapter has found that while no explicit legal requirement mandating the participation of refugees in decision-making processes currently exists in international law, there are several civil and political rights that are relevant to the participation of refugees in decision-making that need to be taken into account in practice. Subject to some limitations, these include the right to freedom of assembly, the right to freedom of association, the right to privacy, among others. There are also various consultative rights related to specific groups of rights-holders (women, children and persons with disabilities) that also offer some rights-based protections for refugees to participate in decision-making processes that need to be considered by states and other relevant stakeholders.

Finally, several 'soft law' commitments, including the New York Declaration and the Global Compact on Refugees, have advanced the recognition of the importance of including refugees in decision-making processes that affect them. These instruments not only categorise refugees as a legitimate stakeholder in the design and implementation of refugee responses, but, for the first time, they also set out commitments, albeit non-binding, from states towards enhanced refugee participation. These commitments are significant, but require greater clarity and further attention from states, international actors and others for them to be realized effectively.

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# UNPACKING REFUGEE PARTICIPATION IN DECISION-MAKING

## Introduction

As the previous chapter demonstrated, legal recognition of the need to include refugees in decision-making processes that affect them has advanced considerably since the mid-twentieth century. While no explicit legal obligation requiring the participation of refugees in decision-making processes exists in international law currently, several non-binding international legal instruments have now acknowledged the instrumental value of refugee participation and have begun to outline associated non-binding principles and commitments.

These commitments are most clearly seen in the two most significant international instruments developed in relation to refugees in recent years, namely the 2016 *New York Declaration for Refugees and Migrants* ('New York Declaration')[1] and the 2018 *Global Compact on Refugees* ('Global Compact on Refugees').[2] Both of these instruments have been adopted by the majority of UN Member States, and both contain commitments to facilitating the meaningful participation of refugees in decision-making processes. Other international human rights instruments also complement our understanding of the need to include rights holders in decisions that affect their rights.

Yet, despite these legal developments, there still remains significant ambiguity as to what participation in decision-making processes can refer to in the context of the international refugee regime, and how these commitments may be implemented in practice. The commitments found in these legal instruments emphasise the value and need for enhanced refugee participation. However, they do not precisely detail the levels of participatory engagement required in different decision-making scenarios. Further, they do not demarcate the types of decisions that demand or require participation, or even the rationales underpinning the pursuit of such laws. This ambiguity is problematic for the development of law and policy,

[1] *New York Declaration for Refugees and Migrants*, UNGA Doc A/RES/71/1 (3 October 2016).
[2] *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2 August 2018).

because without attention to the distinctive types and aims of participation, participatory undertakings risk being oversimplified or implemented inappropriately or ineffectively. Further, there is the possibility that various stakeholders utilise the same language of participation to refer to very different things in practice.[3]

This chapter seeks to provide a more comprehensive understanding of the types and aims of participatory initiatives as they relate to the international refugee regime. Going beyond the legal analysis of participation elucidated in the previous chapter, this chapter draws upon concepts and insights relating to participation in decision-making from a range of social sciences disciplines. This methodological approach is taken in part because understandings of participation do not always take their bearings from legal doctrine. As such, it is necessary to consider how refugee participation in decision-making processes is understood from other vantage points. Additionally, these interdisciplinary insights offer ways to consider and analyse participatory initiatives with greater precision than currently exists under international law.

This chapter argues that while there is a tendency to consider commitments to the participation of refugees in decision-making processes as a single objective that can be uniformly applied across different settings, in practice there exists a range of different decision-making scenarios within the international refugee regime that need to be examined separately in order to consider the most appropriate or optimum level of participation for the decision at hand. Further, there a range of different rationales underpinning participatory initiatives which also influence the nature, scope and outcomes of enhanced refugee participation in decision-making.

This chapter is divided into three parts. First, the chapter commences by examining different ways scholars have sought to classify levels of engagement relevant to understandings of participation. Second, the chapter considers some of the types of decisions that may or should require input from refugees as important stakeholders in decisions affecting their rights. Finally, the chapter analyses the various motivations that drive various actors to pursue these commitments to greater refugee participation within the international refugee regime. These motivations, it is argued, often

[3] At the same time, it is recognised that international legal instruments require some flexibility in institutional design, given the range of contexts in which these commitments are designed to apply: see Barbara Koremenos, Charles Lipson and Duncan Snidal, 'The Rational Design of International Institutions' (2001) 55 (4) *International Organization* 761, 773.

reveal as much about the likely outcomes of participatory approaches as the types of participatory measures implemented.

### 3.1 Understanding Participation in Decision-Making

The concept of participation in decision-making needs to be approached with some caution in the international refugee regime due to its ability to accommodate such a broad range of meanings and motives. According to the Oxford English Dictionary, participation is defined as 'the action or fact of having or forming part *of* something'.[4] This definition is so wide-ranging that, as Majid Rahnema notes, participation can be 'either transitive or intransitive; moral, amoral or immoral; either forced or free; either manipulative or spontaneous'.[5] Political anthropologist Andrea Cornwall further highlights how participation is 'an infinitely malleable concept…[that] can be used to evoke – and to signify – almost anything that involves people'.[6] It is for this reason that participation is often labelled as a buzzword or a term of modern policy jargon that can be applied to a whole range of disparate undertakings.[7]

To help provide some clarity regarding the concept, administrative legal theorist Peter Cane offers a useful breakdown that separates participation in decision-making into three key modes. First, Cane suggests that participation can take the form of *popular participation* which, he suggests, centres around voting in elections and access of participants to the electoral franchise.[8] In some legal commentaries, this mode of participation is also referred to as indirect participation, as participants can only indirectly influence a decision by voting out the decision-makers, rather than by changing the specific decision directly.[9] As discussed in the previous chapter, refugees, having already departed their country of origin, do not usually obtain voting rights in the country where they seek asylum. Further, states are not obliged to provide such rights to the electoral franchise to non-

[4] *Oxford English Dictionary* (3rd ed, 2005) 'Participation, n.' (def 1).
[5] Majid Rahnema, 'Participation' in Wolfgang Sachs (ed) *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books, 2010) 127, 127.
[6] Andrea Cornwall, 'Unpacking 'Participation': Models, Meanings and Practices' (2008) 43 *Community Development Journal* 269, 269.
[7] See Andrea Cornwall and Karen Brock, 'What do buzzwords do for development policy? A critical look at 'participation', 'empowerment' and 'poverty reduction'' (2005) 26(7) *Third World Quarterly* 1043, 1046.
[8] Peter Cane, 'Participation and Constitutionalism' (2010) 38 (3) *Federal Law Review* 319, 320.
[9] See, for example, Catalina Devandas Aguilar, *Report of the Special Rapporteur on the rights of persons with disabilities*, UN Doc A/HRC/31/62 (12 January 2016) [23].

citizens under Article 25 of the *1966 International Covenant on Civil and Political Rights*.[10]

Second, Cane suggests participation can take the form of *contributory participation*. This is where participants have the opportunity to directly influence a decision either before or while it is being made. This may involve different types of consultative processes, although the nuances and gradations of these levels of participation are discussed below. Third, Cane suggests that participation can take the form of *contestatory participation*. This is where participants have the opportunity to contest or challenge a decision that has already been made. This may occur through judicial review processes, or other administrative review processes such as appeals to a tribunal, or complaints to an ombudsman or human rights commission.[11]

As flagged in the introduction to this thesis, this research is principally concerned with how refugees can more meaningfully be included in formal decision-making processes both before and at the time a decision is made, or what Cane would refer to as contributory participation. Nevertheless, this thesis does recognise that while these distinct modes of participation are useful descriptors, no decision is ever fully static or contained within a single mode. In fact, most decisions involve some form of contestation, which in turn may contribute to a different decision being made in the future. Further, each of the three modes of participation characterised by Cane is interrelated, and the involvement of refugees in one mode of participation – whether *popular*, *contributory* or *contestatory* – has impacts on the others. For example, one of the reasons why the participation of refugees in decision-making processes both before and at the time the decision is made is considered so important is because of the limited opportunities available to refugees to either vote in elections or effectively challenge these decisions subsequently.[12]

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[10] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

[11] Cane (n 8) 320. Cane acknowledges that the term contestatory participation is borrowed from philosopher and political theorist Philip Pettit. Pettit refers to this mode of participation as the editorial dimension of democracy: 'Democracy, Electoral and Contestatory' (2000) 42 *Nomos* 105, 117–123.

[12] As the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, stated in 2014, 'an individual's lack of citizenship or legal status does not mean that she or he should have no voice whatsoever in the political, economic or social affairs of her or his country of residence. In a sense, groups that are disenfranchised from mainstream political activities, such as voting and holding office, have an even greater need for alternative means to participate in the public sphere': see Maina Kiai, *Report of the*

### 3.2 Levels of engagement

In addition to the above, scholars have developed several typologies to help describe the levels of engagement that may occur in different participatory approaches. These typologies are most common in the disciplines of development studies, anthropology and political science – each of which have considered types of participation for several decades. However, they also can now be found in areas of legal research, albeit with less frequent usage of graphs and flow charts. Among these studies, most scholars commence with reference to Sherry Arnstein's ladder of participation that was developed in 1969 in relation to emerging ideas of citizen participation. This ladder details eight different levels of participatory engagement which, in Arnstein's own words, seeks to 'cut through the hyperbole to understand the increasingly strident demands for participation from the have-nots as well as the gamut of confusing responses from the powerholders'.[13]

On the top three rungs of the ladder, Arnstein describes three forms of participatory engagement where participants obtain either full, majority or shared decision-making power. These forms of participation are labelled 'citizen control', 'delegated power' and 'partnership'. Following this, she refers to three forms of participation that she believes reflect levels of tokenism. These are labelled 'placation', 'consultation' and 'informing'. These gradations of participation generally include substantive involvement of participants, but do not require the powerholders to heed the views of these participants. Finally, she refers to two forms of non-participation that are designed not to enable people to participate in decision-making processes, but to 'enable powerholders to 'educate' or 'cure' the participants'.[14] Arnstein labels these types of non-participation as 'therapy' and 'manipulation', and suggests they involve actions such as placing people 'on rubberstamp advisory boards for the express purpose of "educating them" or engineering their support'.[15]

While Arnstein does not mention refugees in her scholarship, she does suggest that the ladder could be applied to most participatory initiatives, as 'the underlying issues are essentially the same – 'nobodies' in several arenas are trying to become 'somebodies' with enough power to make the

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*Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, UN Doc A/HRC/26/29 (14 April 2014) [25].

[13] Sherry R Arnstein, 'A ladder of citizen participation' (1969) 35(4) *Journal of the American Institute of Planners* 216, 217.

[14] Ibid.

[15] Ibid 218.

target institutions responsive to their views, aspirations, and needs'.[16] Interestingly, several practitioners interviewed for this research referred to Arnstein's ladder when making assessments as to what meaningful and effective participation means in decision-making processes relating to refugees.[17] This suggests that her scholarship has continuing influence in the international refugee regime as well.

In addition to Arnstein's ladder, several other typologies assist in teasing out some of the nuances and gradations of participatory engagement. For example, John Farrington and Anthony Bebbington have developed two simple scales to consider and analyse the scope of participation in the context of agricultural development. The first of these scales assesses when participation occurs, distinguishing between 'deep' levels of participation, where participants are engaged temporally in all stages of the decision-making process, to 'shallow' levels of participation, where there is limited opportunity for participants to engage throughout the decision-making period.

The second of these scales considers the breadth of participation, where 'wide' participation refers to the inclusion of a broad range of participants. This is contrasted with 'narrow' participation, where only a limited number of participants or representatives are involved.[18] While 'deep' and 'wide' participation may seem to be the ideal in participatory initiatives in the abstract, in practice these ideals are balanced against various barriers to participation, as well as competing priorities. These may include, for example, financial limitations or restrictions in movement, or the need for efficient decisions to be made. Accordingly, as Andrea Cornwall suggests, 'it makes more sense to think in terms of *optimum* participation: getting the balance between depth and inclusion right for the purpose at hand'.[19]

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[16] Ibid 217.

[17] Interview with Nadine Liddy, National Manager of Multicultural Youth Advocacy Network Australia (20 November 2019); also Interview with David Keegan, CEO of Host International (3 December 2019). See also Caroline Lenette et al, '"We Were Not Merely Participating; We Were Leading the Discussions": Participation and Self-Representation of Refugee Young People in International Advocacy' (2020) 18(4) *Journal of Immigrant & Refugee Studies* 390.

[18] John Farrington and Anthony Bebbington, *Reluctant Partners: Non-governmental Organisations, the State and Sustainable Agricultural Development* (Routledge, 1993). Cited in Andrea Cornwall, 'Unpacking 'Participation': Models, Meanings and Practices' (2008) 43 *Community Development Journal* 269, 276.

[19] Cornwall (n 18) 276. Other notable typologies of participation include: Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), *Participation by Crisis-Affected Populations in Humanitarian Action: A Handbook for Practitioners* (Overseas Development Institute, 2003) <https://reliefweb.int/sites/reliefweb.int/files/resources/0094715B400BCA63C1256DEA00

In contrast to the above, legal understandings of participation tend to avoid language such as 'manipulative' participation or 'deep' participation, instead preferring concepts such as self-determination, 'free, prior and informed consent' and consultation in 'good faith' as relevant participatory benchmarks. The use of these terms within legal discourse reflects the implicit view among many legal scholars that meaningful participation relates to the extent to which certain participants exercise control and influence over a decision-making process.

In terms of participatory hierarchies within law, self-determination is generally considered the highest level of influence over a decision-making process, which in its purest conceptual form refers to a decision being made 'when every possible form of alien determination has disappeared'.[20] Below this, there are several other gradations of substantive participation where decision-making power is either shared jointly, or certain participants exercise majority control or control subject to a delegated authority. These gradations are often the subject of analysis in international law when seeking to attribute or apportion responsibility for wrongful acts.

Like other social science disciplines, legal understandings of participation also refer to consultation as a key type of participation. However, unlike Arnstein's ladder, which sees consultation as largely tokenistic, legal understandings of participation tend to look more favourably upon consultation as a more substantive form of participation. This may be in part due to the fact that within legal discourse there exists several different gradations of consultation itself. Each of these gradations seek to establish more precise commitments between decision-makers and participants. For example, arguably the highest legal threshold that is generally put forward among these consultative gradations is that of 'free, prior and informed consent'. This requires the specific approval of a particular constituent or group of constituents before a decision can be made. Discussions as to this type of power have been most prominent in relation to the participatory rights of Indigenous peoples. However, there remains significant debate as to the precise scope of this commitment in international Indigenous law, which is known as the 'veto debate'.[21]

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4796FE-alnap_civilians_2003.pdf> 22; also Jules Pretty, 'Participatory Learning for Sustainable Agriculture' (1995) 23 *World Development* 1247, 1251.

[20] Jörg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (Cambridge University Press, 2015) 26.

[21] For an overview of this debate, see Stephen Young, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (Routledge, 2020) 87–88.

There also exists the threshold of consultation in accordance with a 'good faith' requirement. While this threshold is not always precisely defined in many legal commentaries in relation to participation, it is sometimes suggested that it refers to consultation where: (a) there is a genuine opportunity for participants to influence the outcome; (b) the decision-makers are required to take into consideration the views of the participants (and demonstrate evidence of this); and (c) there is a shared objective of reaching agreement or consent.[22] More broadly, Markus Kotzur has further argued that the legal concept of good faith (*bona fides*) requires parties to deal with each other fairly and honestly, 'taking into account the just expectations of the other party/parties' and 'truthfully disclosing all relevant motives and purposes'. It also requires that parties 'refrain from taking unfair advantage'.[23]

One concrete example of a consultative threshold that incorporates consultation in good faith is found in the International Labour Organisation's 1989 *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*. Article 6(2) of this Convention requires that 'the consultations carried out … shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'.[24] This provision stakes out an obligation to try to reach agreement between the parties, based on a normative desire for consensus building between different actors who, in this case, each hold claims to self-determination (sovereign states and Indigenous peoples).[25] However, this threshold does not contain a legal obligation to reach agreement or obtain consent in all circumstances.

In another context, the Special Rapporteur on the Rights of Persons with Disabilities has similarly suggested that the principle of good faith is also applicable to the *Convention on the Rights of Persons with Disabilities*

[22] See, for example, Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10(2) *Northwestern Journal of International Human Rights* 54, 79, 84.
[23] Markus Kotzur, 'Good Faith (Bona Fide)' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2009) [20].
[24] International Labour Organisation, *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991).
[25] See S James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67(4) *University of Toronto Law Journal* 435, 449.

('CRPD').[26] In her report to the Human Rights Council in 2016, she stated that:

> good faith should be a foundation stone of all State actions during processes of dialogue and consultation with representative organizations of persons with disabilities, and should permeate States' interpretations of their own rules for participation in public decisions. Consultations must embrace transparency, mutual respect, meaningful dialogue and a sincere desire to reach consensus.[27]

Finally, there are less substantive forms of participation considered in legal typologies that focus more on attendance than on any substantive capacity of participants to influence the outcome of a decision. Examples of this include observer status in legal forums, which contains some right of participants to be informed, as well as potentially some limited right to be heard. As a general principle, the less likely it is that the participant or participants will have the opportunity to influence or exert control over the decision, the more likely such participation will be seen as either tokenistic or being used to legitimate existing power relationships.

### 3.3 Types of decisions

In addition to the levels of engagement, it is also necessary to consider the types of decisions that warrant or demand participation of refugees. In the international refugee regime, this issue is most frequently addressed by broad normative claims that refugees should either have a say in all decisions that affect them[28] or decisions that impact their lives.[29] However, there remain genuine questions as to whether these thresholds are

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[26] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
[27] Aguilar (n 9) [79].
[28] See, for example, Refugee Council of Australia, *Nothing About Us Without Us: Getting Serious About Refugee Self-Representation* (Refugee Council of Australia, July 2017) <https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/Geneva-2017_Nothing-About-Us-Without-Us-Report_Final-Report.pdf> 2; also, UNHCR, 'Key takeaways from the Global Refugee Forum', *UNHCR News* (online, 17 January 2020) <https://www.unhcr.org/en-au/news/stories/2020/1/5e21b3a74/key-takeaways-global-refugee-forum.html>; also, Multicultural Youth Advocacy Network Australia (MYAN), *Not Just "Ticking A Box": Youth participation with young people from refugee and migrant backgrounds* (MYAN Australia, October 2018) <https://myan.org.au/wp-content/uploads/2018/11/youthparticipationfinalinteractive.pdf> 3.
[29] UNHCR, *The UNHCR Tool for Participatory Assessment in Operations* (UNHCR, 2006) <https://www.refworld.org/docid/462df4232.html> ('*UNHCR Tool for Participatory Assessment in Operations*') 2; also, Global Summit of Refugees Steering Committee, 'The Global Summit of Refugees and the importance of refugee self-representation' (2018) 59 *Forced Migration Review* 62, 62.

appropriate in all circumstances, and what decisions specifically demand the participation of refugees in the decision-making process. Surprisingly, this question remains relatively overlooked to date, despite the considerable interest in refugee participation in recent years and the need for clarification of commitments. An assessment of the available literature on this question also suggests that this question appears to be of more interest to legal understandings of participation than other disciplinary approaches, possibly due to the question's implications in terms of legal accountability.

Consistent with a human rights-based approach to participation, one potential threshold for determining the types of decisions that demand the participation of refugees in decision-making processes is that refugees should participate in *all decisions which materially impact upon their human rights*. This approach, which seeks to balance important rights protections for refugees with issues of democratic expediency and state sovereignty, is consistent with already existing human rights obligations that apply to refugees.[30] It is also akin to approaches that have been taken in other areas of international human rights law, particularly international laws relating to Indigenous peoples.

For example, in relation to the issue of consent in international Indigenous law, S James Anaya – who was the UN Special Rapporteur on the Rights of Indigenous Peoples between 2008 and 2014 – and Sergio Puig explain that:

> consent by indigenous peoples, as a general rule, is required whenever their substantive rights over lands and resources, their rights to culture and religion, their right to set their own development priorities, or other internationally recognized rights *will be materially and substantially affected by the measure promoted by the state*. It follows that if the measure is ultimately designed or revised to avoid any substantial effect on indigenous peoples' rights, consent or agreement is not required.[31]

Anaya and Puig suggest that this human rights-based threshold to decision-making type is appropriate in the context of determining Indigenous peoples' consent because it is consistent with 'the basic contours of international law's human rights framework, by which human rights norms mitigate negative consequences of, but are not capable of altogether

[30] These human rights obligations are discussed in greater detail in Chapter 2.
[31] Anaya and Puig (n 25) 461 (own emphasis).

overriding, state sovereignty'.[32] They further suggest that in these situations 'the state has the burden of demonstrating either that no rights are being limited or affected or, if they are, that the limitation is permissible under international law'.[33]

An alternative approach to this issue is the approach that has been taken by the rights regime related to persons with disabilities. Article 4(3) of the CRPD requires States Parties to 'closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations' in 'the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities'. This arguably takes a broader approach to the types of decisions warranting participation, albeit with the recognition that consultation and active involvement of persons with disabilities is a different gradation of participation than that of consent canvassed above in relation to Indigenous peoples.

To assist with the interpretation of this provision, the Special Rapporteur on the Rights of Persons with Disabilities has indicated that the phrase 'concerning issues relating to persons with disabilities' in the CRPD 'should be understood broadly, to cover a wide range of legislative, administrative and other measures that may directly or indirectly affect persons with disabilities. This includes any decision-making processes, whether disability-specific or mainstream, that might have an impact in their lives'.[34] Importantly, when a dispute arises as to whether the matter under consideration directly or indirectly impacts upon persons with disabilities and thus requires consultation, the Committee argues that 'it falls to the public authorities of the States parties to prove that the issue under discussion would not have a disproportionate effect on persons with disabilities and, therefore, that no consultation is required'.[35] In other words, states parties have a positive obligation to ensure that they are compliant with the consultation obligations outlined in the Convention.

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[32] Ibid 460–461.
[33] Ibid 461.
[34] Aguilar (n 9) [64]. Another approach, drawing on the longstanding "but for" test found in tort law, could be to require the participation of refugees in any decision that would not be made *but for* the presence of refugees. However, in relation to this latter option, there has already been some concern raised about the appropriation of tort law tests into international refugee law: see Hathaway and Foster (n 3) 385–388.
[35] Committee on the Rights of Persons with Disabilities, *General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*, 20th sess, UN Doc CRPD/C/GC/7 (9 November 2018) [19].

For the purposes of this thesis, it is not necessary to resolve or decide upon a particular threshold for decisions that require refugee participation. This issue should ideally be addressed through comprehensive consultation with all relevant stakeholders with due consideration as to the substance of different types of decisions. In any case, even taking on board the human rights-based threshold, there are numerous decisions within the international refugee regime that warrant the participation of refugees in decision-making processes – either because they are already legally required, or they are normatively desirable.

Broadly, these types of decisions include the participation of refugees in the development and reform of laws and policies that materially impact upon refugees' human rights. Without being comprehensive, this may include laws and policies relating to the health or welfare of refugees, or laws and policies concerned with refugees' socio-economic rights, such as the right to work and the right to education. It would also involve decisions relating to the civil and political rights of refugees, such as the development and reform of laws relating to detention, access to the courts or the procedures regarding refugee status determination. Each of these decisions may be made at different levels of legislative governance – international, regional, national and local.

Other decisions that almost always materially impact the human rights of refugees are decisions which involve the proposed movement of refugees across international borders from one sovereign jurisdiction to another. In the international refugee regime, such relocation decisions may be pursued with the intention of resolving the protection needs of refugees on a permanent basis. The most common examples include the proposed voluntary repatriation of a refugee to their country of origin or the proposed resettlement of a refugee to a third country.[36] Alternatively, relocation decisions may be pursued even without the guarantee of durable protection. These decisions may relate to labour and education migration pathways, emergency transit mechanisms or transfers proposed for the processing of asylum applications in third countries.[37] Significantly, the participatory

[36] For the purposes of clarification, UNHCR defines resettlement as involving 'the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status'. See UNHCR, *UNHCR Resettlement Handbook* (UNHCR, 2011) <https://www.unhcr.org/46f7c0ee2.pdf> 3.

[37] Examples of these types of relocation decisions are provided in Chapter 5.

commitments that apply to each of these relocation decisions differ widely, as is discussed in greater detail in Chapter 5.

Lastly, a third group of decisions that materially impact on the human rights of refugees are decisions related to the delivery of rights-based protection programmes and services to refugees. These decisions can be made in a variety of different contexts, such as in camp-based settings or in urban centres. They may relate to the provision of food or shelter, or the allocation of financial support, for example. Often, these decisions are made in field-based settings and operational contexts, however such decisions can also be made by external actors who are distanced from the site of implementation. This is particularly the case in relation to the design and funding of such programmes, where there is often intervention from states and international donors.

While there is naturally some overlap in relation to each of these three categories of decisions – *law and policy making*, *relocation decisions* and *programme and service delivery* – they nevertheless provide a useful way to delineate between different types of decisions made. These three categories of decisions form the basis of the structure for the middle section of this thesis.

### 3.4 The motivations underpinning participatory initiatives

To understand participation in decision-making processes more fully, it is also important to examine the motivations that underpin the pursuit of participatory initiatives by various actors in the international refugee regime. These motivations will often reveal just as much about the function and likely outcome of a decision-making process as the modes and gradations of participation discussed above. Yet, as many academics note, there is often a tendency among practitioners and policymakers to pursue participatory initiatives without critical analysis as to the motivations driving such initiatives. As Frances Cleaver observed in the context of development, participation 'has become an act of faith…, something we believe in and rarely question'. [38] Similarly, Sarah White has noted that participation has obtained the status of a 'Hurrah' word which brings 'a warm glow to its users and hearers', but 'blocks its detailed examination.[39]

[38] 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, 37.
[39] Sarah White, 'Depoliticizing development: the uses and abuses of participation' in Andrea Cornwall (ed), *The Participation Reader* (Zed Books, 2011) 57, 58.

This section identifies three key motivations for pursuing more meaningful participation of refugees in decision-making processes that are likely to be seen by all actors as consistent with a human rights-based approach to participation. These reasons, which are discussed in more detail below, relate to improving decisions and outcomes; enhancing refugee agency and dignity; and promoting better forms of governance. Each of these reasons, when implemented in good faith, respects human rights standards and principles, and seeks to strengthen the capacity of rights holders. However, at the same time, this section recognises that not all reasons for pursuing greater participation of refugees in decision-making are consistent with a human rights-based approach. As Matthias Stiefel and Marshall Wolfe note, 'there are many faces of participation', and the term itself is adaptable to 'quite different ideological frames of reference'.[40]

One of the most central critiques of initiatives that seek to increase participation of refugees in decision-making processes is that rather than empowering affected communities, participation is used to legitimise existing power relations, as well as to curtail the formation of autonomous decision-making processes that may be led by refugees themselves. Drawing largely on the work of French philosopher, historian and sociologist Michel Foucault, proponents of this critique suggest that participatory initiatives, even when well-intentioned, may reinforce the interests and control of the powerful, given the multiple ways in which power relations are entrenched in social, cultural and political practices.[41] More overtly, participation can also be deliberately manipulated as a 'hegemonic device to secure compliance to, and control by, existing power structures'.[42] This type of control, Harry Taylor suggests, 'is more subtle than direct domination, taking the form of seeking the "commitment" of

[40] Matthias Stiefel and Marshall Wolfe, 'The many faces of participation' in Andrea Cornwall (ed), *The Participation Reader* (Zed Books, 2011) 19.
[41] See Bill Cooke and Uma Kothari, 'The Case for Participation as Tyranny' in Bill Cooke and Uma Kothari (eds) *Participation: The New Tyranny?* (Zed Books, 2001) 1, 14. For other Foucauldian critiques of participation as a form of power legitimisation, see Elisabeth Olivius, '(Un)Governable Subjects: The Limits of Refugee Participation in the Promotion of Gender Equality in Humanitarian Aid' (2014) 27(1) *Journal of Refugee Studies* 42; also, John Hailey, 'Beyond the Formulaic: Process and Practice in South Asian NGOs' in Bill Cooke and Uma Kothari (eds), *Participation: The New Tyranny?* (Zed Books, 2001) 88, 97–100.
[42] Harry Taylor, 'Insights into Participation from Critical Management and Labour Process Perspectives' in Bill Cooke and Uma Kothari (eds), *Participation: The New Tyranny?* (Zed Books, 2001) 122, 137.

those to be controlled and then allowing a degree of "responsible autonomy" within limits'.[43]

In the context of the international refugee regime, refugees have already expressed their concerns about the power disparities embedded in the regime, and the ways in which the discourse of participation has been used to serve interests other than their own. In particular, they have critiqued tokenistic forms of participation, where participation fulfils a cosmetic or display function in which the powerful advertise the participatory initiative to gain greater reputational legitimacy and control. For example, in its 2019 publication *Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action*, the Global Refugee-led Network emphasised that a key barrier to participation is 'tokenized participation' which 'lures the sector into believing it has done enough' and is used as 'a quick fix because it does not ask for the time, resources, and dedication that meaningful participation requires'.[44] The Global Refugee-led Network warned that 'even if many refugees are participating, it is not "meaningful" if their participation does not confer power and influence over the decisions that impact their lives'.[45]

A second critique of participatory initiatives in the international refugee regime is that rather than trying to enhance and strengthen rights-based protection, such initiatives are at times motivated by a desire to minimise or shift state or donor responsibilities for providing ongoing protection onto refugees themselves.[46] This is not inherently a bad thing, but it can in turn have significant negative consequences for refugees in situations where it leads to further shortfalls in financial support or other forms of protection.

For example, in a study examining the economic lives of Liberian refugees in the Buduburam refugee camp in Ghana, Naohiko Omata observed that

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[43] Ibid.

[44] Global Refugee-led Network, *Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action* (Asylum Access, December 2019) <https://asylumaccess.org/wp-content/uploads/2019/12/Meaningful-Refugee-Participation-Guidelines_Web.pdf> 23.

[45] Ibid 13.

[46] Proponents of this critique highlight how the greater promotion of community-based participatory initiatives since the 1990s has often emerged in the context of a broader neo-liberal economic agenda where the promotion of individual responsibility is seen as maximising market efficiency and as a way to minimise refugee dependency on 'welfare'-style payments. For more, see Claudena Skran and Evan Easton-Calabria, 'Old Concepts Making New History: Refugee Self-reliance, Livelihoods and the 'Refugee Entrepreneur'' (2020) 33(1) *Journal of Refugee Studies* 1, 17; also, Olivius (n 41) 45; also, Evan Easton-Calabria and Naohiko Omata, 'Panacea for the refugee crisis? Rethinking the promotion of 'self-reliance' for refugees' (2018) 39(8) *Third World Quarterly* 1458, 1461–1463.

UNHCR's policy of withdrawing aid in late 2009 as a means to stimulate greater self-reliance among refugees did not result in higher levels of economic wellbeing and self-reliance among the refugees in the camps. Rather, it resulted in refugees becoming dependent on overseas remittances from their personal support networks to meet their daily needs and it shifted the economic responsibility of providing protection from states to refugees and their networks. Omata concluded that policies of self-reliance such as these, which inevitably involve some forms of refugee participation in decision-making,[47] are often influenced by neoliberal thinking where 'the emphasis on refugees' individual capabilities can risk neglecting those with specific vulnerabilities and obscure the duty of the international refugee regime to provide protection for refugees'.[48] Meredith Hunter has similarly observed how the promotion of refugee self-reliance by states and international organisations can be 'self-serving', and focused more on 'the reduction of material assistance in line with falling UNHCR budgets rather than addressing the real needs of refugees'.[49]

Each of these criticisms of participatory initiatives needs to be kept in mind when both developing future initiatives that seek to more meaningfully include refugees in the decision-making process, and when assessing the success or failure of past and present initiatives. These critiques also need to be considered when considering appropriate law reform options relating to refugee participation. However, neither of these critiques necessarily cancel out the clear benefits that can arise from enhanced refugee participation in decision-making processes. They just highlight the need for caution and for a continuing critical position to be adopted to ensure that initiatives are consistent with a human rights-based approach to participation. As Cleaver has observed, participatory approaches are 'promising but inevitably messy and difficult, approximate and unpredictable in outcome. Subjecting them to

[47] While the concepts of refugee self-reliance and refugee participation are not identical, there is some overlap in terminology. UNHCR defines self-reliance as 'the social and economic ability of an individual, a household or a community to meet essential needs (including protection, food, water, shelter, personal safety, health and education) in a sustainable manner and with dignity. Self-reliance, as a programme approach, refers to developing and strengthening livelihoods of persons of concern, and reducing their vulnerability and long-term reliance on humanitarian/external assistance': UNHCR, *Handbook for Self-Reliance: Book 1: Why Self-reliance?* (UNHCR, 2006) 1. Such a definition of self-reliance inevitably involves some participation of refugees in the decision-making process, or potentially even autonomous control over decisions. For critiques of UNHCR's definition of self-reliance, including its avoidance of the political self-reliance of refugees and its focus on individual employment, see Skran and Easton-Calabria (n 46) 4–6.

[48] Naohiko Omata, *The Myth of Self-Reliance: Economic Lives Inside a Liberian Refugee Camp* (Berghahn Press, 2017) 147–148.

[49] Meredith Hunter, 'The Failure of Self-Reliance in Refugee Settlements' (2009) 2 *Polis* 1.

rigorous critical analysis is as important as constantly asserting their benefits'.[50] These potential benefits of participatory initiatives are discussed below.

### *3.4.1 Improved decisions and better outcomes*

Among legal and policy documents, one of the most commonly stated and broadly accepted goals of increased refugee participation in decision-making is its capacity to improve the effectiveness of responses. This benefit is stated not only in a wide range of policy documents published by civil society and refugee-led organisations, but also in institutional documents developed by UNHCR and non-binding legal instruments adopted by states. Paragraph 34 of the Global Compact on Refugees, for example, clearly highlights the consensus among states, at least on paper, in relation to this utilitarian goal. The paragraph recognises that 'responses *are most effective* when they actively and meaningfully engage those they are intended to protect and assist'.[51] Similarly, UNHCR has also stated in its 2006 *Tool for Participatory Assessment in Operations* that 'the participation from the outset of refugee women and men, young and old and from diverse backgrounds, in the definition of problems and the design of programmes for their benefit is crucial to serving, assisting, and protecting them and ensuring an effective operation'.[52]

Although often expressed in broad terms, the potential of increased refugee participation to improve decisions and protection outcomes consists of several different elements. These elements have been examined by several different researchers and policy institutes over the years, but are worth summarising here.[53] First, the participation of refugees in decision-making processes can improve the gathering of accurate information regarding the needs of refugees themselves. As Will Jones notes, 'refugees are the community with the most intimate and sustained contact with how systems

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[50] Cleaver (n 38) 37.
[51] *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2 August 2018) ('Global Compact on Refugees').
[52] *UNHCR Tool for Participatory Assessment in Operations* (n 29) 1.
[53] See, in particular, Active Learning Network for Accountability and Performance in Humanitarian Action (ALNAP), *Participation by Crisis-Affected Populations in Humanitarian Action: A Handbook for Practitioners* (Overseas Development Institute, 2003) <https://reliefweb.int/sites/reliefweb.int/files/resources/0094715B400BCA63C1256DEA004796FE-alnap_civilians_2003.pdf> ; also, The Brookings Institution – University of Bern Project on Internal Displacement, *Moving Beyond Rhetoric: Consultation and Participation with Populations Displaced by Conflict or Natural Disasters* (Overseas Development Institute, October 2008) ('*Moving Beyond Rhetoric*').

of protection actually function'. Further, they 'have direct access to factual information only they possess: what actually happened, what was actually safe and what they really need'.[54] Consultation with refugees can help identify those who are most vulnerable within particular communities. It can also lead to the identification of needs or issues that are unanticipated by external stakeholders. Further, it can reveal 'where coping mechanisms have already been developed, where they have not, and how different vulnerabilities are evolving for various groups'.[55]

Second, refugee involvement in decision-making processes can lead to more appropriate responses being adopted. By incorporating diverse refugee representation into the decision-making process, decision makers are more likely able to ensure that responses reflect refugees' own priorities and aspirations, and that they are implemented in culturally appropriate ways. This includes taking into account age, gender and diversity considerations. For example, Eileen Pittaway and Linda Bartomolei have documented how refugee women have sought to fill gaps in service provision in accordance with the needs and values of their communities. As they indicate, 'women run crèches, arrange care for orphaned children, provide safe spaces for women who have experienced SGBV, ensure that families are fed, run small businesses and organise basic schools'.[56] However, '[m]uch of this work is done without funding or external support' and 'these capacities, skills and abilities often go unrecognised'.[57]

Third, the inclusion of refugees in decision-making processes can lead to greater efficiency dividends for the international refugee regime. These dividends may include reduced financial expenditure, the avoidance of wasteful or duplicate programmes or services, and the minimisation of project delays. For example, in a study on the role of refugee-led organisations as providers of social protection in Uganda and Kenya, Kate Pincock, Alexander Betts and Evan Easton-Calabria highlight how apportioning funds to refugee-led organisations can be more efficient than financing international organisations as intermediaries, as refugee-led organisations generally operate at far lower cost than international non-governmental organisations.[58] Policy failures also point to lack of

[54] Will Jones, 'Refugee Voices' (World Refugee Council Research Paper No 8, February 2019) 3.
[55] *Moving Beyond Rhetoric* (n 53) 7.
[56] Eileen Pittaway and Linda Bartolomei, 'Enhancing the protection of women and girls through the Global Compact on Refugees' (2018) 57 *Forced Migration Review* 77, 78.
[57] Ibid.
[58] Kate Pincock, Alexander Betts and Evan Easton-Calabria, *The Global Governed? Refugees as Providers of Protection and Assistance* (Cambridge University Press, 2020) 4.

understanding of local conditions and context as contributing to wasted funds or duplicated processes, both which could have been remedied by consultation with refugees prior to the policy or decision being made. Additionally, as the COVID-19 pandemic has exposed in greater magnitude, refugees are often the first responders when protection is needed, and they are often more capable to implement some emergency protection services at greater speed than external actors.[59]

Fourth, responses that include refugees as participants can also lead to more sustainable protection outcomes. This includes improving partnerships and trust between refugees and other stakeholders involved in their protection. For example, UNHCR has noted in its 2006 *Tool for Participatory Assessment in Operations* that a key benefit of participation is that it improves its relationship with refugee communities and builds 'shared understanding, ownership and responsibility for achieving common operational goals'.[60] Further, studies have shown in the development context how the involvement of affected communities in the design and implementation of programmes and services leads to those communities being more likely to continue those services once external support has ceased.[61]

In an interview with Christopher Eades, the former Executive Director of the St Andrews Refugee Service based in Cairo, Egypt, Eades commented that one of the reasons 85 per cent of the staff at the organisation were refugees (out of 390 staff in total at the time) was that it was more sustainable for the organisation over the long term. He said the problem with humanitarian assistance where Western migrant experts are parachuted into the local area to provide protection services to refugees is that 'they

[59] See, for example, Eileen Pittaway and Linda Bartolomei, 'Another Set of Heroes: Refugee women making the Global Compact on Refugees real amid COVID-19, *Andrew & Renata Kaldor Centre for International Refugee Law: COVID-19 Watch* (Blog post, University of New South Wales, 2 July 2020) <https://www.kaldorcentre.unsw.edu.au/publication/another-set-heroes-refugee-women-making-global-compact-refugees-real-amid-covid-19>; also, Christa Kuntzelman and Robert Hakiza, 'Forging a new path, RLOs as Partners: Lessons from the Africa Refugee Leaders' Summit' (Reference paper for the 70th Anniversary of the 1951 Refugee Convention, UNHCR, 11 June 2021) <https://www.unhcr.org/people-forced-to-flee-book/wp-content/uploads/sites/137/2021/10/Christa-Kuntzelman-and-Robert-Hakiza_Forging-a-new-path-RLOs-as-Partners-Lessons-from-the-Africa-Refugee-Leaders-Summit.pdf> 1–4.

[60] *UNHCR Tool for Participatory Assessment in Operations* (n 29) 16.

[61] See, for example, the Asia Pacific Network of Refugees' support for Afghan refugees, discussed in Shaza Alrihawi, et al, *Power and The Margins: The State of Refugee Participation* (Global Refugee-led Network, January 2022) 7; also, Department for International Development (DFID), *Tools for Development: A handbook for those engaged in development* activity (DFID, 2003) 7.2.

tend to stay for two or perhaps three years, and then they go somewhere else, taking with them the skills and knowledge that they have acquired of the local operating context'. It is far smarter, Eades has found, 'to provide support and training and opportunities to locals and refugees who are much better placed in terms of knowledge, but also will be here for longer and are an investment for the future'.[62]

Finally, the implementation of participatory initiatives involving refugees is also said to result in the avoidance of other negative consequences that arise when participation does not occur. Will Jones, for example, notes that failures to provide refugees with formal avenues to contribute to decision-making can, in extreme cases, lead to refugees adopting unlawful and violent tactics to secure their demands to be heard. He argues that, in the case of Rwanda's Great Lakes refugee crisis, earlier recognition of refugees' needs 'could, potentially, have halted rearmament in the camps and prevented the entry of Rwandan refugees into Congolese land conflicts that played a significant role in the chain of events leading to the Second Congo War'.[63] Further, the final report from the 2016 Global Refugee Youth Consultations convened by UNHCR and the Women's Refugee Commission (WRC) documents how the marginalisation of young refugees, including from decisions that affect them, 'can increase young refugees' vulnerability to violence including sexual violence, exploitation, substance abuse, radicalisation, and recruitment into gangs or armed groups'.[64]

Each of these elements presents a compelling case as to the instrumental benefits of participation that are broadly accepted by most stakeholders in the international refugee regime, even if current practice does not match the rhetoric. Although, many advocates in favour of advancing the participatory rights of refugees tend to focus on the first four of these five elements when elaborating why participation can lead to improved decisions, avoiding discussion of the adverse outcomes that participation may prevent. This

[62] Interview with Christopher Eades, Executive Officer at the St. Andrews Refugee Service (12 November 2019).
[63] Jones (n 54) 6.
[64] UNHCR and WRC, *We Believe in Youth: Global Refugee Youth Consultations Final Report* (UNHCR, September 2016) <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2016/09/We-Believe-in-Youth-Global-Refugee-Youth-Consultations-Final-Report.pdf> 11. This report draws in part on research undertaken with respect to young Syrians (including Syrian refugees), where it was recommended that providing young Syrians with non-violent avenues to affect positive change can facilitate resilience to recruitment to extremist groups. See Meg Aubrey et al, *Why Young Syrians Choose to Fight: Vulnerability and resilience to recruitment by violent extremist groups in Syria* (International Alert, 2016) <www.international-alert.org/sites/default/files/Syria_YouthRecruitmentExtremistGroups_EN_2016.pdf> 26.

advocacy choice may be in part because emphasis on radicalisation and violence can appear as threatening and inconsistent with advocacy efforts seeking to peacefully redistribute power in the international refugee regime towards refugees themselves. There may also be some concern as to how this emphasis plays into perceptions of refugees as security risks and troublemakers given the increasing securitisation of asylum.

### *3.4.2 Agency, empowerment and human dignity*

A second reason often advanced for pursuing greater and more meaningful participation of refugees in decision-making is that participation in and of itself contributes to the preservation and/or restoration of refugees' agency, empowerment and human dignity. This reasoning suggests that through the process of engagement, refugees themselves benefit from the development of new skills, including greater capacity to express their views in civic discussions and added confidence to realise their aspirations.[65] They also benefit from the restoration of some of their political and individual agency, where they gain opportunities 'to reflect on their position, devise strategies and take action to achieve their desires'.[66] Participation in decision-making can in turn influence feelings of 'belonging',[67] foster positive psychological attitudes,[68] and strengthen conceptions of political and social membership.[69]

Ideas surrounding the empowering benefits of participation for refugees can be traced to similar ideational developments in the discourse and work of development actors. In the 1970s, the development sector 'was obliged', as Rajid Mahnema notes, 'to recognize a structural crisis'.[70] Many 'top-down' development projects had invested billions of dollars in initiatives that had failed to accomplish their proposed objectives. These development projects in many instances seemed to make the problems of inequality and underdevelopment even worse. In September 1973, Robert S McNamara, President of the World Bank Group at the time, conceded that 'the (previous) decade of rapid growth has been accompanied by greater maldistribution of income in many developing countries, and that the

[65] For more, see *Moving Beyond Rhetoric* (n 53) 10; also, Aguilar (n 9) [28].
[66] Oliver Bakewell, 'Some Reflections on Structure and Agency in Migration Theory' (2010) 36 *Journal of Ethnic and Migration Studies* 1689, 1694.
[67] See Carol Pateman, *Participation and Democratic Theory* (Cambridge University Press, 1970) 27.
[68] Mattias Iser, 'Recognition' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University, Summer 2019 Edition) <https://plato.stanford.edu/archives/sum2019/entries/recognition/>.
[69] Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge University Press, 2017) 73.
[70] Rahnema (n 5) 127, 129.

problem is most severe in the countryside'.[71] He added that 'the basic problem of poverty and growth in the developing world can be stated very simply. The growth is not equitably reaching the poor. And the poor are not significantly contributing to growth'.[72]

In response to these underwhelming outcomes, development actors began to reflect on the reasons for these unanticipated results and started to attribute failure to the fact that 'the populations concerned were kept out of all the processes related to their design, formulation and implementation'.[73] Reflecting this belief and the need for action, in May 1975 the UN Economic and Social Council adopted a resolution on 'Popular participation and its practical implications for development', where it recommended states to, among other things:

> Adopt measures, including structural changes and institutional arrangements, that will facilitate the contribution of the people to the development effort, their equitable sharing in the benefits derived therefrom and their involvement in making decisions on those matters which directly affect their economic advancement and social progress.[74]

Over time, an 'empowerment approach' to development soon emerged, which, as John Freidmann noted, placed 'emphasis on autonomy in the decision-making of territorially organized communities, local self-reliance (but not autarchy), direct (participatory) democracy, and experiential social learning'.[75]

The international refugee regime has not been isolated from these shifts in thinking about participation and development. Particularly during the 1990s, UNHCR latched onto many of these ideas and similarly sought to promote refugee participation in its operations due to the flow-on benefits it perceived in terms of refugees' dignity, self-esteem, self-reliance and empowerment. For example, since 1998 the organisation has articulated a community-based development approach to its work with refugees and

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[71] Robert S McNamara, 'Address to the Board of Governors' (Speech, Nairobi, 24 September 1973) <http://documents.worldbank.org/curated/en/930801468315304694/Address-to-the-Board-of-Governors-by-Robert-S-McNamara> 10.
[72] Ibid.
[73] Rahnema (n 5) 129.
[74] *Resolution 1929 (LVIII) Popular participation and its practical implications for development*, ESC Res, UN Doc E/RES/1929(LVIII) (6 May 1975).
[75] John Friedmann, *Empowerment: The Politics of Alternative Development* (Blaxwell, 1992) vii.

peoples of concern to UNHCR which, in the organisation's own words, seeks to 'empower refugees', 'treating them as resourceful and active partners in all assistance and protection activities'.[76] Some of the key objectives of this community-based development approach are to reinforce 'dignity and self-esteem of refugees' and to assist them to achieve 'a higher degree of self-reliance'.[77]

Similarly, several interviewees for this research project expressed their belief that the participation of refugees in decision-making created additional benefits in terms of agency, empowerment and human dignity. CEO of Host International, David Keegan, for example, stated:

> There is a direct correlation between self-agency and mental wellbeing/coping. This is very much tied up in our use of the word dignity. People who feel that they have choice, are valued and can contribute in a meaningful way are more future-oriented and optimistic. I see this in every country that we work.[78]

Keegan made this observation based upon his experience and expertise as a social worker assisting refugees in the Asia Pacific region, including providing social support to refugees detained in Nauru under an agreement between the Nauruan and Australian governments.[79]

The Global Compact on Refugees also makes some references to participation and empowerment, particularly in relation to women, girls and youth. For example, paragraph 77 of the Compact highlights that:

> The empowerment of refugee and host community youth, building on their talent, potential and energy, supports resilience and eventual solutions. The active participation and engagement of refugee and host community youth will be supported by States and relevant stakeholders, including through projects that recognize, utilize and develop their capacities and skills, and foster their physical and emotional well-being.

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[76] UNHCR, *Reinforcing a Community Development Approach* (UNHCR, EC/51/SC/CRP.6, 15 February 2001) [1], [4].
[77] Ibid. In relation to refugee women, UNHCR has also argued that 'Participation itself promotes protection. Internal protection problems are often due as much to people's feelings of isolation, frustration, lack of belonging to a structured society and lack of control over their own future as they are to any other form of social problem': UNHCR, *Guidelines on the Protection of Refugee* Women (UNHCR, 1991) [12].
[78] Interview with David Keegan, CEO of Host International (3 December 2019).
[79] For further background on this context, see Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (New South Books, 2016).

This commitment clearly links the meaningful participation of refugee and host community youth to the language of empowerment, skills-building and well-being in a manner consistent with understandings articulated in the development discourse. Further, there is a clear framing of empowerment as a concept that relates primarily to the psychological state of mind of refugees, rather than the literal transfer of power to these refugee groups.[80]

In addition to its empowering qualities, the participation of refugees in decision-making processes has also been framed in terms of the realisation of a moral duty connected to human dignity. While the concept of human dignity has been subject to much debate within the fields of legal philosophy and international human rights law,[81] and is often expressed in vague terms in international refugee law and policy,[82] several moral and political philosophers highlight that human beings possess an inherent equal dignity by virtue of their status as persons.[83] 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'.[84] For refugees, this entitlement is seen to correspond to a moral right to have a say in decisions that impact their human rights.

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[80] This is consistent with UNHCR's interpretation that 'Empowerment is not something that is "done" to people; it is the process by which individuals in the community analyse their situation, enhance their knowledge and resources, strengthen their capacity to claim their rights, and take action to achieve their goals'. See UNHCR, *A Community-based Approach in UNHCR Operations* (2008) 20.

[81] See Paolo G Carozza, 'Human Dignity' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013) 345; also, Megan Bradley, 'Return in Dignity: A Neglected Refugee Protection Challenge' (2009) 28 (3-4) *Canadian Journal of Development Studies* 371, 377–379.

[82] For example, UNHCR's *Handbook on Voluntary Repatriation: International Protection* notes that the 'concept of dignity is less self-evident than that of safety. The dictionary definition of "dignity" contains elements of "serious, composed, worthy of honour and respect." In practice, elements must include that refugees are not manhandled; that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights': UNHCR, *Handbook on Voluntary Repatriation: International Protection* (1996) ('*Handbook on Voluntary Repatriation*') 2.4. This is discussed further in Chapter 5.3.

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

[84] 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.

Among the representatives of civil society organisations interviewed for the purposes of this research, many suggested that their commitments to meaningful refugee participation in decision-making were based on a moral belief that it was the right thing to do, rather than based on binding or non-binding legal commitments. Eades, from the St Andrews Refugee Service in Cairo, suggested that his organisation's commitment to include refugees in the governance of the organisation was based on an 'internal commitment' towards this objective, rather than a legal requisite. He added:

> It is often a reaction to our operating context. One thing that we say quite a lot is that you wouldn't accept a woman's organisation that is led by men. And yet within the humanitarian sector we are 30 or 40 years behind that thinking, because we routinely accept humanitarian assistance and humanitarian aid organisations being set up, led and delivered, with all decisions made by persons who do not have lived experience of forced displacement.[85]

Similarly, Evan Jones, Programme Coordinator of the Asia Pacific Refugee Rights Network, suggested:

> We think of refugee participation as something that we inherently need to do, not something that is based on formal obligations…There is a moral or ethical obligation to incorporate refugees in decision-making as a fundamental component of preserving refugee rights.[86]

In academic literature, connections between refugee participation and human dignity are also increasingly drawn upon to advocate for stronger participatory obligations on the basis that they are normatively desirable. For example, in his research on voting rights of refugees, Ruvi Ziegler argues that refugees should be afforded voting rights in countries where they seek asylum for the period in which they hold refugee status in part because it reaffirms the human dignity of refugees.[87] Ziegler contends that while the source of human dignity may be incompletely theorised,[88] failure

[85] Interview with Christopher Eades, Executive Officer at the St. Andrews Refugee Service (12 November 2019).
[86] Interview with Evan Jones, Programme Coordinator at the Asia Pacific Refugee Rights Network (2 October 2019).
[87] Ziegler (n 69) 70, 196.
[88] Ibid 70. See also Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655, 679; Cass R Sunstein, 'Incompletely Theorized Agreements' (1995) 108(7) *Harvard Law Review* 1733, 1735–1736.

to enfranchise refugees reinforces their non-membership and exclusion, and 'can be interpreted as an insult, a form of dishonour, or denigration'.[89] He suggests that the provision of voting rights not only manifests human dignity, but it also has an 'autonomy-enhancing effect' which demonstrates human agency,[90] and is a political affirmation of the principle of intrinsic equality.[91]

Similarly, Serena Parekh, drawing on Hannah Arendt, has argued that 'stateless people' (defined philosophically in her work as including refugees) experience both a legal/political harm (loss of citizenship), and an ontological harm in the diminishment of their political agency. Parekh claims that our moral obligations extend to rectifying both harms, which requires reintegrating individuals into 'the common world' where they 'can speak and act' with meaning and 'be judged as speaking and acting agents'.[92] Failure to do so, Jill Stauffer writes, can result in an 'ethical loneliness': 'the experience of having been abandoned by humanity compounded by the experience of not being heard'.[93]

### *3.4.3 Good governance, legitimacy and accountability*

Finally, a third reason often put forward for increasing the meaningful participation of refugees in decision-making processes is that it contributes to improved governance, including by enhancing the legitimacy of decisions and making decision-makers more accountable. Proponents of this reasoning suggest that by ensuring the effective participation of refugees, decision-making institutions are more likely to be recognised as acting with legitimate authority.[94] They are also in turn seen as more trusted by the community, including by refugees themselves. At the same time, participation in decision-making plays an important accountability function, whereby those affected by a decision can more directly scrutinise the

[89] Ziegler (n 69) 71. See also Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98(3) *Proceedings of the Aristotelian Society* 307, 314.
[90] Ziegler (n 69) 67–69.
[91] Ibid 71. See also Robert Dahl, *On Democracy* (Yale University Press, 1998) 64.
[92] Serena Parekh, 'Beyond the Ethics of Admission: Stateless People, Refugee Camps and Moral Obligations' (2014) 40 *Philosophy and Social Criticism* 645, 647, 659. See further Patrick Hayden, *Political Evil in a Global Age: Hannah Arendt and International Theory* (Routledge, 2010) 65.
[93] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 1.
[94] Legitimacy in this context simply refers to the idea that 'institutions act and be understood to act with authority that is accepted as proper and moral and just': Kenneth Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society' (2000) 11(1) *European Journal of International Law* 91,113.

justifications of those making the decision, and decision-makers are required to act more transparently in relation towards those that they govern.[95]

Ideas concerning these governance benefits of participation are intrinsically bound up in the rich and diverse understandings of concepts such as the rule of law, due process, pluralism and participatory democracy. In different ways, these understandings seek to analyse and give moral, legal, and political clarity to the relationship between decision-makers and those affected by decisions, as well as the role of governance systems more broadly. While the breadth of these understandings and debates cannot be captured comprehensively here, among these understandings some scholars focus on the instrumental benefits of better governance, 'in the sense that procedures should be designed to ensure accurate or appropriate outcomes'.[96] Other scholars focus on the intrinsic values of improved governance which, like those examined above, have links to human dignity and respect. From this frame, 'accurate decisions themselves constitute an important element of fair treatment, which in turn constitutes an important element of respect for persons'.[97]

In addition, some scholars suggest that the inclusion of those affected by decisions in decision-making processes is linked to notions of due process. Devika Hovell, for example, suggests that legal understandings of due process should be understood in far broader terms than simply the mechanical application of procedural rights (namely the right to notice, the right to a hearing, the right to reasons, the right to appeal to an independent tribunal, the right of public access to information and the right to a judicial remedy). Instead, Hovell argues that due process is a 'peculiar form of dialogue' between decision-making authority and those affected by decisions, where the central aim is to enhance legitimacy.[98] One approach to

[95] This is based on an understanding of accountability that includes not only the opportunity for individuals to seek redress for rights violations or other grievances, but also the opportunity to participate in transparent and open decision-making processes. This approach is broadly consistent with the idea that accountability is a 'principle which requires public authorities to explain their actions and be subject to scrutiny': see Andrew Le Seur, 'Accountability' in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (Oxford University Press, 2009) <https://www.oxfordreference.com/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-14?rskey=1QXOpE&result=13>.

[96] Trevor R S Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18(3) *Oxford Journal of Legal Studies* 497, 499.

[97] D J Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon, 1996) 78.

[98] Hovell does not provide a single definition of legitimacy in this context, but suggests that the concept can be understood in a multitude of ways, whether by reference to Habermas'

this dialogue, Hovell suggests, is a 'public interest model of law', where 'increased opportunities for participation in decision making strengthen the bonds of rational consent between individuals and decisions', and 'respect for decision-making authority is negotiated, not won by subordination to formal rules'.[99]

During the development of international refugee law in the mid-twentieth century, states and international organisations such as UNHCR did not seek to install formal accountability measures to refugees for decisions that affected them. As discussed in the previous chapter, neither the 1950 UNHCR Statute nor the 1951 Refugee Convention established any legal avenues for refugees to participate in or contest decisions in relation to the protection of their rights under international law, other than access to courts under article 16 of the 1951 Refugee Convention.[100] Further, while refugees and persons with lived refugee experience participated in and contributed to the development of international refugee law, these participants were not intended to be representative of the diverse communities of refugees in existence, and their involvement was not explicitly related to an accountability function.[101]

Nevertheless, there has been some shift in thinking in this regard. When implementing its 2006 *Tool for Participatory Assessment in Operations*, UNHCR stressed the importance of 'being accountable to the populations that UNHCR serves' as one of the overarching goals of the tool.[102] In the context of this document, these 'populations' are understood to mean refugees, internally displaced persons, returnees and other persons of concern to UNHCR. In the 2016 'Grand Bargain' initiative, UNHCR, along

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claim of a "worthiness to be recognized", a Franckian "reference to a community's evolving standards", or Beetham's requirement that decision-making authority should find its foundation in "beliefs shared by both dominant and subordinate": 'Due Process in the United Nations' (2016) 110 (1) *American Journal of International Law* 1, 3–4.

[99] Ibid 7.

[100] The Convention does not provide refugees with direct access to international courts or any type of international dispute resolution procedure to seek redress for breaches of their rights under the Convention at the international level. Article 38 of the 1951 Refugee Convention provides that 'Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute': *1951 Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954). Article 34 (1) of the *Statute of the International Court of Justice* makes clear that 'only states may be parties in cases before the Court': *Statute of the International Court of Justice*, opened for signature 26 June 1945 (entered into force 24 October 1945).

[101] This is discussed in more detail in Chapter 4.

[102] *UNHCR Tool for Participatory Assessment in Operations* (n 29) 7. This is discussed in more detail in Chapter 6.1.2.

with several other international organisations, states, and non-governmental organisations, also committed to a 'participation revolution', on the basis that including the voices of the most vulnerable can 'create an environment of greater trust, transparency and accountability'.[103] This approach to accountability is significant given that UNHCR's source of authority is empowered by states, and its international legal personality derives directly from the United Nations.[104]

Among civil society organisations, there is also now increasing emphasis on the governance benefits that arise from ensuring decision-makers are accountable to those refugees affected by decisions. As part of what has been coined the 'accountability revolution',[105] civil society initiatives such as the Humanitarian Accountability Partnership, One World Trust and Sphere have established humanitarian standards that prioritise the participation of affected communities in decision-making processes in relation to their governance and accountability functions.[106] The 2010 Humanitarian Accountability Partnership Standards, for example, identify participation and informed consent as a standard principle, and define accountability as the 'process of taking into account the views of, and being held accountable by, different stakeholders, and primarily the people affected by authority or power'.[107] Sphere's Humanitarian Charter similarly acknowledges 'that our fundamental accountability must be to those we seek to assist'.[108] These standards are non-binding, but nonetheless are

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[103] *The Grand Bargain – A Shared Commitment to Better Serve People in Need* (Istanbul, 23 May 2016) <https://interagencystandingcommittee.org/system/files/grand_bargain_final_22_may_final-2_0.pdf>. This is discussed further in Chapter 6.2.2.

[104] See Guy S Goodwin-Gill, 'The Office of The United Nations High Commissioner for Refugees and the Sources of International Refugee Law' (2020) 69(1) *International and Comparative Law Quarterly* 1, 4. For more on UNHCR's understanding of accountability, see Volker Türk and Elizabeth Eyster, 'Strengthening Accountability in UNHCR' (2010) 22(2) *International Journal of Refugee Law* 159, 160–162.

[105] See, for example, Humanitarian Practice Network, 'The Accountability Revolution', *Humanitarian Practice Network* (Web page, October 2003) <https://odihpn.org/magazine/editors-introduction-the-%C2%91accountability-revolution%C2%92/>; also, Volker Turk and Elizabeth Eyster, 'Strengthening Accountability in UNHCR' (2010) 22(2) *International Journal of Refugee Law* 159, 161.

[106] See Humanitarian Accountability Partnership, *The 2010 HAP Standard in Accountability and Quality Management* (HAP International, 3rd ed, 2010) 5; Monica Blagescu, Lucy de Las Casas and Robert Lloyd, *Pathways to Accountability: The GAP Framework* (One World Trust, 2005) 4.3; Sphere Association, *The Sphere Handbook: Humanitarian Charter and Minimum Standards in Humanitarian Response* (Sphere Association, 4th ed, 2018) ('Sphere Handbook').

[107] See Humanitarian Accountability Partnership, *The 2010 HAP Standard in Accountability and Quality Management* (HAP International, 3rd ed, 2010) 1.1.

[108] Sphere Handbook (n 106) [12].

designed for consideration and adoption by all humanitarian organisations, including those working with refugees.

Further, civil society advocates are also beginning to recognise that, in terms of promoting accountability, refugees are often more powerful advocates for their own protection than other intermediaries. This is arguably because of the additional pressure they place on decision-makers to directly reckon with their moral claims and rights-based demands. As Evan Jones has observed,

> Pressure is not always coming from the right places. NGOs come with messages and often correct messages, but there is no reason for governments to listen to them and to take action. But when they have their "constituents" sitting in front of them, who are organised and able to articulate their messages in ways that they may be receptive to, then it is much harder for governments to ignore.[109]

Similarly, from the confines of detention in Manus Island, author and journalist Behrouz Boochani reflected that:

> I am convinced that if the refugees in Manus Prison were provided opportunities to form and present a different perception of our character, we would be able to challenge the system in more profound ways.[110]

Both comments highlight how the participation of refugees can serve an important governance function in the international refugee regime, making decision-makers more directly accountable to responding to the moral and legal claims of refugees.

## Conclusion

The above analysis demonstrates that the concept of participation in decision-making needs to be approached with some care in the international refugee regime due to its ability to accommodate such a wide range of meanings and motives. It is quite possible that various stakeholders employ the same rhetoric of participation to refer to very different things in practice. This is possible because of the ambiguity that still currently exists in

[109] Interview with Evan Jones, Programme Coordinator at the Asia Pacific Refugee Rights Network (2 October 2019).
[110] Behrouz Boochani, *No Friend but the Mountains: Writing from Manus Prison* (Picador, 2018) 373.

relation to refugee participation in decision-making processes in law, as well as its tendency to be used as a buzzword in policymaking contexts. For the proper functioning of the international refugee regime, this ambiguity is problematic. Without demarcation as to the types of decisions that demand or require participation, or precision as to the levels of participatory engagement required in different decision-making scenarios, participatory initiatives may be implemented inappropriately or ineffectively.

To help provide greater conceptual clarity to understandings of participation in decision-making, this chapter has aimed to tease out the different types and aims of participatory initiatives as they relate to the international refugee regime. Focusing on contributory forms of participation, as defined by Cane, the chapter has sought to classify levels of engagement related to participation, as well as some of the types of decisions that may or should require input from refugees as important stakeholders in decisions affecting their rights. Finally, the chapter has examined different drivers that motivate various stakeholders to pursue these commitments to greater refugee participation within the international refugee regime, highlighting how these motivations also influence participation in practice.

The purpose of this conceptual unpacking has been to develop clearer understanding of the ways in which participation is and can be understood. This analysis complements the legal dimensions of refugee participation examined in the previous chapter, and it assists in developing the tools to consider and analyse participatory initiatives with greater precision than what occurs currently. Importantly, this analysis reveals that while there is a tendency to think of commitments to the participation of refugees in decision-making processes as a single objective that can be uniformly applied across different settings, in practice there exists a range of different decision-making scenarios within the international refugee regime that need to be examined separately in order to consider the most appropriate or optimum level of participation for the decision at hand.

In the next part of this thesis, some of these different decision-making scenarios are analysed in greater detail, with consideration as to how they operate in practice. This includes analysis of the participation of refugees in the development of law and policy making (Chapter 4), the participation of refugees in the selection and implementation of relocation decisions (Chapter 5), and the participation of refugees in the delivery of programmes and services that affect the rights of refugees (Chapter 6).

# || PART II ||

# PARTICIPATION IN PRACTICE

# || 4 ||

# REFUGEE PARTICIPATION IN THE DEVELOPMENT OF LAW AND POLICY

## Introduction

One of the central areas of refugee decision-making that this thesis argues warrants the participation of refugees in the decision-making process, either directly or through their representative organisations, is the development and reform of laws and policies that materially impact upon refugees' human rights. These laws and policies may be developed at any level of governance – international, regional, national or local. They can also canvass a broad range of civil, political and socio-economic rights, such as healthcare, education, employment, freedom from detention, among others. Participation in these decision-making processes includes participating in the creation of new laws and policies related to refugees, as well as participating in any repeal, consolidation or codification of laws and policies already in existence.

It is one of the realities of the modern international refugee regime that, despite the recognised benefits of refugee participation in these types of decision-making processes,[1] refugees have been rarely involved in the creation and reform of laws and policies that affect them. Where such examples do exist, they tend to be identified as 'firsts' rather than as standard practice. For example, in June 2020 the Canadian Minister of Immigration, Refugees and Citizenship, Marco Mendicino, announced that, as part of 'Canada's ongoing commitment to exploring innovative solutions', it would establish an advisory role for a former refugee to attend the Canadian government's international refugee protection meetings alongside the Canadian delegation.[2] This is the first time that such an

[1] These benefits are discussed in more detail in Chapter 3.4.

[2] Government of Canada, 'Canada continues to explore innovative solutions for refugees', *Immigration, Refugees and Citizenship Canada* (News Release, 25 June 2020) <https://www.canada.ca/en/immigration-refugees-citizenship/news/2020/06/canada-continues-to-explore-innovative-solutions-for-refugees.html>. Minister Mendicino also endorsed the establishment of a Canadian Refugee Advisory Network, which he suggested would 'amplify the voices of refugees so that they can better shape the policies that affect them' and 'strengthen Canada's contributions to the international refugee system': The

arrangement has been formalised by a national delegation. Similarly, following the conclusion of the first ever Global Refugee Forum in December 2019, UNHCR emphasised that 'the pivotal role of refugees in both preparing for and participating in the forum has set an important precedent that we will build upon for the future'. UNHCR reported that among the 3000 participants to attend the event, 'crucially, 70 refugees participated from 22 countries of origin and 30 host countries'.[3] In other words, less than 2.5 per cent of participants at the forum were refugees.

In the absence of widespread or even substantial practice of including or consulting with refugees in this area of decision-making, this chapter examines a concrete case study of refugee participation in law and policy making that is illustrative of how participation can occur in practice in this area of governance and the potential benefits that can arise from this type of inclusion. This case study is the participation of refugees in the development of early international refugee law and policy between the years of 1921 and 1955. Although historical, this case study has continuing relevance for the international refugee regime given the enduring influence of the rights, norms and policies relating to refugees that were developed at this time. This case study also arguably represents the most substantial inclusion of refugees in the development of international law and policy making that has occurred to date.

During the period between 1921 and 1955, persons with lived refugee experience exercised significant influence and thought leadership in the development of international refugee law and policy making. While it is important not to overstate this influence – refugees as a categorised group held no formal decision-making power, and negotiations on matters of international law were, and still are, largely inter-State affairs – persons with lived refugee experience drew on their personal experiences and expertise in law and policy during this time to inform the drafting and deliberation of key international instruments such as the 1933 *Convention relating to the International Status of Refugees* ('1933 Refugee Convention')[4] and the 1951 *Convention relating to the Status of Refugees*

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Local Engagement Refugee Research Network, 'LERRN Announces Plans for Refugee Advisory Network', *LERRN: The Local Engagement Refugee Research Network* (Press Release, 20 June 2020 <https://carleton.ca/lerrn/?p=1956>.

[3] UNHCR, 'Summary of participation and pledges at the Global Refugee Forum', *UNHCR* (Web page, January 2020) <https://www.unhcr.org/5e20790e4>. During the three-day forum, persons with lived refugee experience featured on most of the panels that were convened.

[4] *1933 Convention relating to the International Status of Refugees*, opened for signature 28 October 1933, 159 LNTS 3663 (entered into force 13 June 1935).

('1951 Refugee Convention').[5] They also were substantively involved in the responses coordinated by international organisations such as the League of Nations and UNHCR. This involvement included serving in several senior leadership and advisory roles within these organisations at this time. Even the initial idea of creating a binding international law treaty to deal specifically with refugees was first proposed by a refugee in 1927, writing on behalf of what would now be considered a refugee-led organisation.[6]

Surprisingly, these contributions have been largely overlooked until now and are not commonly known among the various stakeholders involved in the international refugee regime. Among academic scholarship, most legal analysis of the development of international refugee law has tended to focus on the role of states as the key architects in legal development. This is consistent with positivist understandings of international law, which gives primacy to those actors with law-making powers, namely states.[7] Within the paradigm of modern legal positivism, personal experiences of individual participants, especially those experiences that may evoke emotions such as fear and trauma, are suppressed because they are seen as undermining law's claims to legitimacy through its associations with objectivity and neutrality.[8] The rules of treaty interpretation under international law further reinforce this statist focus, as the contributions of non-state actors are given virtually no legal weight in identifying how a treaty's meaning is to be interpreted in international law, unless these contributions are reflected in the final text of the treaty or are formally recorded in the official preparatory works.[9]

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[5] *1951 Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

[6] At the time, these organisations were generally referred to as either private organisations or voluntary organisations, which included civil society organisations as well. See Introductory chapter for discussion as to what constitutes a refugee-led organisation.

[7] For more on how legal positivism has influenced the development of legal history, see David Ibbetson, 'Historical Research in Law', in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 863, 870.

[8] For more on the exclusion of emotion from law and the conceptual underpinnings of modern legal positivism, see Renata Grossi, *Looking for Love in the Legal Discourse of Marriage* (Australian National University Press, 2014) 3–9; also, Renata Grossi, 'Law, emotion and the objectivity debate' (2019) 28(1) *Griffith Law Review* 23.

[9] Under article 31 of the *Vienna Convention on the Law of the Treaties* ('VCLT'), 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'. Article 32 of the VCLT provides that 'recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable': *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

Further, within the disciplines of history and anthropology, most scholars looking at the contributions of refugees have more recently tended to focus on bottom-up participatory initiatives involving refugees, rather than top-down treaty-making processes.[10] In the few studies where there has been a focus on individuals in the early history of international refugee law, scholars have either emphasised the professional diplomatic experience of these persons as being central to their leadership in these organisations,[11] or alternatively have emphasised the Jewish roots of these intellectual traditions.[12] Refugee experience of participants is on occasions acknowledged, but there have been few attempts to reflect on the significance of this.

Beyond this, this oversight may also be partly explained by the broader trend that has largely rendered invisible the contributions of refugees to their own protection.[13] This is in part because the most readily accessible (and actively published) sources for analysis are those which emphasise the contributions of states, international organisations and civil society organisations. However, it is also due to a culturally-developed phenomenon of viewing refugees as 'victims' or passive, vulnerable subjects, rather than as significant agents of change.[14] This phenomenon has emerged despite many of the key thinkers of international law and refugee

[10] For further analysis of refugee and forced migration history 'from below', see Jérome Elie, 'Histories of Refugee and Forced Migration Studies' in Elena Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 23, 30–31.

[11] For example, writing about the origins of UNHCR, Gil Loescher notes that 'The role of individuals in UNHCR's early history and the leadership provided from the Office's first four high commissioners were essential to its success and influence during this period. All of these leaders had a UN political background, which increased the likelihood that they would be successful, particularly since the Office relied on the support of the UN secretaries-general and the UN General Assembly to expand its operations and authority': 'UNHCR's Origins and Early History: Agency, Influence, and Power in Global Refugee Policy' (2017) 33(1) *Refuge* 77, 84.

[12] See, for example, Gilad Ben-Nun, 'The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention' (2013) 27(1) *Journal of Refugee Studies* 101; also, Omry Kaplan-Feuereisen and Richard Mann, 'At the Service of the Jewish Nation: Jacob Robinson and International Law' (2008) 58(8/10) *Osteuropa: Impulses for Europe: Tradition and Modernity in East European Jewry* 157.

[13] Recent examples to rectify this issue include Kate Pincock, Alexander Betts and Evan Easton-Calabria, *The Global Governed?: Refugees as Providers of Protection and Assistance* (Oxford University Press, 2020); also Dick Williams, *A bridge to life in the UK: Refugee-led community organisations and their role in integration* (UK Refugee Council, 2018).

[14] Peter Gatrell, 'Refugees - What's Wrong with History?' (2017) 30(2) *Journal of Refugee Studies* 170, 175; also, 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.

protection having lived experienced of forced displacement, such as Hugo Grotius and Hannah Arendt.

The contributions of refugees to the creation of international law discussed in this chapter are significant because they not only reorient our understanding of the ways in which international law pertaining to refugees has been developed and negotiated to date, but also because they provide a practical example of how refugees can more meaningfully be included in the creation of laws and policies that affect them going forward, particularly at the level of international governance. While care is needed given that the international refugee regime has grown and changed considerably since its origins, this case study provides insights into some of the possibilities and practicalities of more meaningful participation of refugees in the development of international law and policy.

This chapter is divided into four parts. First, the chapter considers some of the contributions of refugees in the preliminary responses to refugee displacement in the years between the two world wars, and the development of the first binding international convention relating to refugees – the 1933 Refugee Convention. Second, the chapter analyses some of the contributions of persons with lived refugee experience to the drafting and development of the 1951 Refugee Convention. Third, the chapter examines the contributions of Gerrit Jan van Heuven Goedhart – the first High Commissioner of UNHCR, and a leader with lived refugee experience – to the foundational years of UNHCR. Finally, the chapter provides commentary on the significance of these contributions and examines the relevance of these contributions for contemporary understandings of participatory refugee initiatives in law and policy making. As part of this commentary, the chapter also emphasises the gendered nature of the participation of refugees in these law and policy-making processes, which was largely consistent with broader social and political trends at this time.

## 4.1 Contributions of refugees to international refugee law and policy in the interwar years

The historical record from the early international responses to refugees in the first half of the twentieth century suggests that refugees contributed to the development of international refugee law and policy more substantively than previously recognised. In some ways, this approach to law and policy making occurred as a matter of practical necessity, rather than as a result of deliberate institutional design. With the exception of some early humanitarian organisations already in existence such as the American Red

Cross, many international non-governmental organisations mandated to provide protection to refugees had not yet been established at that time, and refugees, including their constituent groups, largely filled the role as first responders.[15] States and international organisations similarly relied on refugees' knowledge and expertise to identify needs and assist with the design and implementation of solutions.

In 1921, when the newly established League of Nations recognised that the issue of refugees demanded a coordinated international response and appointed the Norwegian explorer Fritjof Nansen as first High Commissioner for Russian Refugees, Nansen quickly recognised the need to consult with refugee communities and took action to establish an advisory committee, known as the Advisory Committee of Private Organisations, to inform the trajectory of the League of Nations' responses to Russian refugees. This committee consisted of both newly established civil society organisations – organisations that sought to provide services to refugees and/or advocate on their behalf – as well as organisations led and controlled by refugees.[16] Within a year, this advisory committee was already regularly reporting to the League of Nations on some of the practical needs of refugees across different European nations. At the time, this advice focused heavily on the provision of work rights to assist with integration of refugees within host countries, as well as the provision of identity documents to ensure a protected legal status for refugees in countries of asylum and in the event that they needed to travel further. This latter area of advice contributed to the creation in July 1922 of the 'Nansen passports', which

[15] Although the contributions of refugees to their own protection have often been underreported, John Hope Simpson undertook a survey between 1937 and 1939 that recorded that from 1917 onwards Russian refugees 'established for themselves a large number of organizations for the assistance of their members'. This included the Russian Zemstvos and Towns Relief Committee (Zemgor), the old Russian Red Cross and the Federation of Russian Wounded and War Invalids abroad. Similarly, Simpson noted that 'from the beginning of the emergency down to the present time, Armenians themselves have made the most substantial contribution to the relief of their own people'. For more on this history, see John H Simpson, *The Refugee Problem: Report of a Survey* (Oxford University Press, 1939) 172, 180–185; also, Peter Gatrell, *The Making of the Modern Refugee* (Oxford University Press, 2013) 57. For analysis of the development of refugee humanitarianism during this period, see Michael Barnett, 'Refugees and Humanitarianism' in Elena Fiddian-Qasmiyeh et al (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, 2014) 241, 245.

[16] Claudena Skran, for example, records that 'some private voluntary organizations that engaged in refugee relief were primarily composed of refugees and often spoke out on refugee issues. Other organizations had an overtly political purpose and also claimed to represent refugees': *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford University Press, 1995) 78.

were named after the High Commissioner and provided a more secure legal status for refugees.[17]

Over time, the involvement of refugees in the decision-making processes of the refugee agencies operating under the League of Nations continued to increase. Historian Claudena Skran recorded that by 1934 four of the thirteen delegates sent to host countries by the High Commissioner for Refugees and the Nansen International Office were refugees or naturalised refugees, as were four of the five correspondents.[18] Further, 'representatives from leading Russian and Armenian refugee organizations filled two of the twelve places on the Governing Body of the Nansen Office'.[19] Skran added that:

> Although refugees were in a minority on the Governing Body, they had added influence because one of them always served on the Managing Committee, a group of three that actually supervised the operations of the Nansen Office. In addition, five of the nine technical advisers to the Nansen Office represented refugee organizations. The presence of these refugee delegates within the League of Nations itself helped to shape the form of refugee assistance.[20]

One of the most significant contributions to emerge from these consultative arrangements between refugees and the League of Nations during the interwar years was the idea proposed by the Russian refugee and jurist, Jacques L Rubinstein, to develop a binding international convention with respect to refugees. On 7 September 1927, Rubinstein, on behalf of the

[17] Initially, the Nansen passports provided refugees with identity documents in host countries, however the capacity of refugees to depart and return to these host countries was limited. In 1926, the Nansen passports were amended to address this issue. Interestingly, in France, Russian and Armenian refugee-led organisations were vested in 1930 with some administrative responsibilities for verifying Nansen passport applications and preparing related identity documents, with 'official confirmation' provided by the representative of the newly established Nansen International Office. This arrangement was made between the French Minister of Foreign Affairs, the Nansen International Office and the Russian and Armenian organisations. For more on this arrangement, see Simpson (n 15) 267–268, 299–301. For more on the history of the Nansen passports generally, see Louise W Holborn, 'The Legal Status of Political Refugees, 1920-1938' (1938) 32(4) *The American Journal of International Law* 680, 684; also, Claudena Skran, 'Historical Development of International Refugee Law' in Andreas Zimmermann (ed), *The 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 3, 7–14.

[18] The Nansen International Office was established in 1930, following the sudden death of Nansen.

[19] Skran (n 16) 84; also, Simpson (n 15) 210.

[20] Skran (n 16) 84.

Russian organisations represented on the Advisory Committee of Private Organisations, recommended a treaty of this kind to be developed under the auspices of the League of Nations.[21] This proposal was supported by Nansen, who in turn submitted it to the Assembly of the League of Nations for consideration. In June 1928, an inter-governmental conference was convened to deliberate on the scope and terms of such a convention. However, at the time, states were not willing to commit to binding obligations with respect to refugees, and instead adopted the non-binding 1928 arrangement relating to the Legal Status of Russian and Armenian Refugees.[22]

In 1931, the President of the Inter-governmental Advisory Committee for Refugees of the Council of the League of Nations, Monsieur de Navailles, resurrected the idea of a binding convention,[23] and, on 28 October 1932, the Governing Body of the Nansen International Office appointed a three person 'Committee of Experts' to 'consider the advisability of a Convention to ensure the protection of refugees, and to consider certain questions raised regarding the application of the Arrangements of 1922, 1924, 1926, and 1928'.[24] Significantly, two of the three persons appointed to this committee had lived refugee experience. These were the legal scholar and former refugee Baron Boris Nolde, who had escaped in 1919 from Russia to France after the Russian revolution, and the initial proponent of the idea, Rubinstein.[25] The other appointee was de Navailles, who led the revival of the convention initiative.

During the following year, this Committee of Experts exercised considerable influence and thought leadership on the development of the 1933 Refugee Convention. First, in January 1933 the Committee devised a

[21] Jacques L Rubinstein, 'The Refugee Problem' (1936) 15(5) *International Affairs* 716, 727–728.
[22] *No. 2005 - Legal status of Russian and Armenian refugees,* 30 June 1928, 89 LNTS 53. For more on this arrangement, see Holborn (n 17) 687; also, James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) 33(2) *International and Comparative Law Quarterly* 348, 354–357.
[23] *Resolutions et Voeux Adoptes a la Suite des Rapports de la Sixieme Commission, 25 September 1931,* 92 *League of Nations Official Journal, Special Supplement* 35, 38. De Navailles also worked for the Ministry of Foreign Affairs for the French government.
[24] Robert J Beck, 'Britain and the 1933 Refugee Convention: National or State Sovereignty' (1999) 11(4) *International Journal of Refugee Law* 597, 605.
[25] Nolde had also served as vice-president of the Russian Red Cross Society in Emigration and was a member of the Central Juridical Commission for Studying the Status of Russian and Armenian Émigrés. For more on the life and work of Nolde, including his strong focus on legal positivism and his escape from Russia, see Peter Holquist, 'Dilemmas of an Official with Progressive Views - Baron Boris Nolde' (2007) 7(1) *Baltic Yearbook of International Law* 233.

'simplified procedure' to strategically enable the treaty to be adopted more rapidly than the standard processes would normally allow. This approach was subsequently endorsed by the League on 22 May 1933.[26] In 1936, reflecting on this strategy, Rubinstein stated:

> On this occasion different tactics from those of 1928 were employed. There was no attempt to please everybody at the cost of sacrificing the text of the plan; the majority rule was not applied. All provisions supported by several votes were retained and the governments regarding them as unacceptable were invited to make reservations.[27]

Second, the members of the Committee played an active role in both the drafting of the initial text, as well as in the deliberations that took place during the Inter-governmental Conference held to discuss the draft Convention between 26-28 October 1933. Rubinstein in particular took a leading role with his colleagues at the Inter-governmental Advisory Commission in drafting a preliminary version of the document for consideration by states.[28] Significantly, by the time conference participants agreed upon the final form of the Convention on 28 October 1933, many of the provisions of the final text still closely resembled the draft that Rubinstein and his colleagues had prepared.[29] Further, while de Navailles was elected President of the Inter-governmental Conference, both Rubinstein and Nolde actively participated in these inter-state negotiations as non-state representatives, featuring frequently in the official transcript of the conference.[30] Another refugee, Levon Pachalian, also participated on behalf of the Central Committee for Armenian Refugees.

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[26] *Report of the Governing Body of the Nansen International Office for Refugees*, A. 12.1934, 3. Cited in Beck (n 24) 608.
[27] Rubinstein (n 21) 727–728.
[28] Skran (n 16) 285; Beck (n 24) 609.
[29] Beck noted that 'Articles I through 16 of the final Convention very closely tracked the draft Convention. As its Article 1, the final Convention included a definition of 'refugee,' though the final Convention essentially followed the draft convention's definition. Article 8 on Industrial Accidents (Draft Article 9) and Article 12 on Education (Draft Article 12) reduced the level of refugee treatment from a 'nationals' standard to, respectively, 'the most favourable treatment ... accord[ed] to the nationals of a foreign country' and 'treatment as favourable as other foreigners in general.' Articles 17 through 23 of the final treaty, which did not figure in the draft, included specific provisions on the treaty's signature, ratification, accession, entry into force, denunciation, its efficacy over colonies, protectorates, and overseas territories, and its amenability to reservation': Beck (n 24) 609–610 Fn 71.
[30] *Proces Verbaux de la Conference Intergouvernementale Pour Les Refugies*, C. 113.M.41.1934. Cited in Beck (n 24) 609.

The significance of the 1933 Refugee Convention to contemporary international refugee law has been stressed by several academics over the years.[31] Yet, most scholars have not mentioned the substantial contributions of refugees to its development,[32] nor reflected on the significance of this. Although only eight states ratified the Convention,[33] limiting its operational impact at the time, the 1933 Refugee Convention represents one of the first binding international treaties dealing with the human rights of persons (second only to the 1926 Slavery Convention).[34] It is also the first occasion where the right to protection from *refoulement* is articulated in international refugee law.[35] The obligation of *non-refoulement*, which prohibits states from returning refugees to any place where their life or freedom is threatened, is now recognised as a central principle of international refugee law. In addition, the 1933 Refugee Convention also codified important socio-economic rights for refugees, including the right to work. This was consistent with Rubinstein's belief that 'the right to work is a natural corollary of the right to asylum, a truth too often forgotten'.[36] That refugees and persons with lived refugee experience contributed to the development and implementation of these core tenets of international refugee law remains pertinent today.

[31] See James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 87–91; also, Peter Fitzmaurice, 'Between the wars – the Refugee Convention of 1933: A contemporary analysis' in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar, 2012) 236.

[32] Exceptions to this are Simpson (n 15); Skran (n 16); and Beck (n 24). Simpson, in particular, noted in 1939, without elaborating much further, that 'it is above all the Russian refugees who have developed since the (First World) War what may be called the jurisprudence of refugeedom and contributed to political philosophy and practice a concept of the refugee as novel and creative as the concepts of minority and mandate'. See Simpson (n 15) 108.

[33] These states were Belgium, Bulgaria, Czechoslovakia, Denmark, France, Italy, Norway and the United Kingdom. Many of these contracting states also made several reservations. See 'Refugees' (1934) 122 *League of Nations Official Journal, Special Supplement* 106; also, Skran (n 17) 24.

[34] Hathaway (n 31) 87.

[35] At the time, refugees and advocates were concerned about the increasing forcible expulsion of refugees from host countries, including at the borders, and sought to contract states to implement effective guarantees to prohibit such practice. For the text of the provision, see Article 3 of the 1933 Refugee Convention. For commentary on this, see Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 4th ed, 2021) 242.

[36] Rubinstein (n 21) 729.

## 4.2 Contributions of refugees to the drafting of the 1951 Refugee Convention

In a similar manner to the 1933 Refugee Convention, the historical record of the development of the 1951 Refugee Convention in the aftermath of the Second World War also reveals that refugees or persons with lived refugee experience played a more substantial role in the drafting of the convention than the histories of the era have given credit. Like before, this participation did not take the form of refugees being formally consulted as a recognised group with legal authority in their own right. Rather, persons with lived refugee experience occupied senior leadership roles within international organisations that enabled them to contribute to the drafting and deliberation on the text of the treaty. To a limited extent, non-governmental organisations also had the opportunity to participate in official discussions, with some of these organisations being led by representatives who had lived experience of forced displacement. Additionally, at least one state representative involved in the entire treaty process also had experience of being forcibly displaced.

On 8 August 1949, when the United Nations Economic and Social Council (ECOSOC) established an Ad Hoc Committee on Statelessness and Related Problems comprising 13 states to 'consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons', one of the first steps taken by the United Nations Secretariat prior to the first meeting of the Committee was to arrange for a preliminary draft of the convention to be prepared as a starting point for discussion.[37] Although this draft convention was formally provided by the UN Secretary-General, much of the drafting work of this document was actually completed by the legal division of the International Refugee Organisation ('IRO'), which had been established by the UN in December 1946 as a non-permanent organisation mandated to provide protection to and assist the repatriation, resettlement and integration of refugees still displaced after the Second World War.

[37] *Resolution 248 (IX) B*, ESC Res, UN Doc. E/1553 (8 August 1949). This resolution followed on from the study UN ECOSOC completed on 1 August 1949 on statelessness and related problems. See UN ECOSOC, *Study on the Position of Stateless Persons. Presented by the Secretary-General. Volume 1*, UN Doc E/1112 (1 February 1949); also, UN ECOSOC, *Study on the Position of Stateless Persons. Presented by the Secretary-General. Volume II*, UN Doc E/1112/Add.1 (16 May 1949).

At the time, many of the IRO lawyers responsible for penning this initial draft had, as Irial Glynn records, 'personal experience of asylum'.[38] In particular, the individual who according to the archival record completed most of this preliminary drafting work[39] – Paul Weis – had lived experience of being interned in Dachau concentration camp from November 1938 to April 1939, before fleeing to Britain in 1939 and becoming a naturalised British subject in 1947.[40] Some of the other personnel who assisted Weis included Rubinstein, who (as discussed previously) was a former Russian refugee who played a prominent role in the drafting of the 1933 Refugee Convention sixteen years earlier, and the Swiss jurist Gustave Kullman. Although Kullman did not have direct refugee experience, his wife, Maria Mikhailovna Zernova Kullmann, had also been forced to flee Russia after the 1917 Revolution.[41]

The initial draft that these IRO lawyers prepared and presented to the Ad Hoc Committee for its first meeting on 3 January 1950 played a key role in shaping the scope, substance and strategy of the treaty negotiations in several ways. First, they established the strategy that would be taken throughout the drafting process. They outlined that the Convention should be adopted by the greatest number of states possible, and thus it was important to prepare a 'realistic' draft,[42] that did not impose upon states 'obligations greater than those which they are prepared to accept', but at the same time ensured that the Convention did not fall short 'of what some States might be prepared to grant'.[43] Second, they articulated the importance of developing a definition of a refugee that reflected the diversity of refugee experiences, suggesting different pathways for pursuing this. At the time, the immediate history of the Holocaust haunted the drafters, but there was

[38] Irial Glynn, 'The Genesis and Development of Article 1 of the 1951 Refugee Convention' (2011) 25(1) *Journal of Refugee Studies* 134, 136.
[39] Although the UN Secretariat vested Kullman with the overall responsibility for the preparation of the Ad Hoc Committee draft of the 1951 Refugee Convention, evidence from Weis' personal archive reveals that it was actually Weis who completed most of this preliminary drafting work, in both the English and French versions of the text: Paul Weis Archive PW/PR/IRO-6 Doc. 32 at 3. Cited in Ben-Nun (n 12) 107. The Weis archive is now housed in the Bodleian Social Science Library at the University of Oxford.
[40] Ivor Jackson, 'Paul Weis', *The Independent* (London, 18 February 1991) 13; also, Sarah J A Flynn, 'The Weis Archive and Library Collection at the Refugee Studies Programme' (1996) 9(1) *Journal of Refugee Studies* 89, 89–90.
[41] Glynn (n 38) 136.
[42] Quote of Gustave Kullman. Cited in Glynn (n 38) 136.
[43] UN ECOSOC, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, UN Doc E/AC.32/2 (3 January 1950).

still recognition, as Rubinstein recorded, that 'not all refugees represented people displaced by war'.[44]

Third, the drafters ensured the inclusion of several socio-economic rights in the draft. Perhaps in part due to Rubinstein's influence, several of these provisions were modelled on provisions from the 1933 Refugee Convention. Lastly, they made arguably the most explicit statement found in the entirety of the drafting documents as to the purpose and importance of the principle of *non-refoulement*, stating that 'the turning back of a refugee to the frontier of the country where his life or liberty is threatened on account of his race, religion, nationality or political opinions… would be tantamount to delivering him into the hand of his persecutors'.[45] This statement has subsequently been referenced to inform important case law precedents,[46] as well as UNHCR advisory opinions.[47]

Despite these contributions, in comparison to the drafting process of the 1933 Refugee Convention, the IRO draft was subject to far greater scrutiny, debate and revision than the relatively straightforward two-day formal deliberation that the 1933 Refugee Convention received. Between the first meeting of the Ad Hoc Committee on 3 January 1950 and the adoption of the Convention on 28 July 1951, almost every provision of the 1951 Refugee Convention was closely analysed and questioned, as the extensive historical materials of this period demonstrate. These deliberations took place firstly during the discussions of the Ad Hoc Committee between January and August 1950, and then later during UN ECOSOC meetings and meetings of the UN General Assembly. Finally, extensive discussions occurred at the Conference of Plenipotentiaries held in July 1951 in the lead up to the treaty's adoption.

Throughout these discussions, states clearly exercised ultimate decision-making power in the determination of international refugee law. This can be seen most notably by the removal of any references to the right to seek asylum in the text (which the IRO draft had initially included), along with the addition of temporal and geographical limitations to the refugee

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[44] *Rubinstein Letter to Weis*, 3 February 1950, PW/PR/IRO/6. Cited in Glynn (n 38)138.
[45] UN ECOSOC, Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General, UN Doc. E/AC.32/2 (3 January 1950) 46.
[46] See, for example, *Sale v. Haitian Centers Council*, 509 US 155 (1993), dissenting judgment of Blackmun J.
[47] See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol** (UNHCR, 2007) <https://www.refworld.org/docid/45f17a1a4.html> [30].

definition. Nevertheless, persons with lived refugee experience continued to make notable interventions which influenced some of the outcomes of the text. Among them, Weis appeared as the representative for the IRO during this process, before taking on the role of Legal Advisor at UNHCR when the IRO disbanded.[48] As discussed in the following section, the High Commissioner, Gerrit Jan van Heuven Goedhart, also appeared on behalf of UNHCR.

Another prominent participant with lived refugee experience throughout this process was the representative for the Israeli state – the Jewish international lawyer Jacob Robinson.[49] Although not an Israeli citizen nor part of the Israeli political establishment, Robinson was selected to represent Israel throughout the process following his extensive experience in international law, including his work in relation to the protection of minorities during the years of the League of Nations and his work assisting the prosecutorial team during the Nuremberg Trials.[50] Born in Lithuania, Robinson also had personal experience of political persecution, having been a member of the Lithuanian parliament before an army coup d'état in 1926 led to Jews and other minorities being prohibited from participating in further political activity. He also had been forced to flee Lithuania in May 1940, shortly prior to the Soviet occupation of the country. He recorded in an interview that he and his family were able to reach safety in New York, after fleeing across several European countries and boarding a vessel in Lisbon.[51]

During the deliberations on the 1951 Refugee Convention, Robinson made frequent submissions on many of the treaty's provisions. These submissions not only influenced the drafting of the text at the time, but they have also continued to guide the interpretation of the treaty in accordance with the rules of treaty interpretation under international law. For example, in relation to the scope of the refugee definition, Robinson clearly noted that the definition did not extend to persons fleeing natural disasters or other environmental problems. He stated that 'it was difficult to imagine that fires, floods, earthquakes or volcanic eruptions, for instance, differentiated

[48] Although not discussed in this chapter, Weis also contributed to the development of the 1967 Protocol.
[49] To avoid confusion, it is worth noting that Jacob Robinson's brother, Nehemiah Robinson, also participated in the Conference of Plenipotentiaries as an NGO representative and later published the first legal commentary of the 1951 Refugee Convention in 1955.
[50] For more on Robinson's prior legal experience, see Kaplan-Feuereisen and Mann (n 12); also, Ben-Nun (n 12) 105–106. Robinson also had a close working relationship with Weis, as he had served as his direct supervisor when they both worked at the World Jewish Congress in the period after the Second World War.
[51] Kaplan-Feuereisen and Mann (n 12) 166.

between their victims on the grounds of race, religion or political opinion'.[52] He also specified that the instrument did not 'cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities unless they were otherwise covered by article 1 of the Convention'.[53]

These submissions have contributed to understandings of the object and purpose of Article 1A(2) of the Refugee Convention, and have also informed more recent debates about the appropriateness of the Convention to respond to persons displaced by climate-change related events. These submissions also highlight that not all contributions of refugees or persons with lived refugee experience have sought to progressively expand the protection of refugees under international law, and indeed, some contributions have sought to restrict or limit these protections.

Beyond this, Robinson also played a central role in strategically securing passage of some key rights contained in the Convention. As Ben-Nun has recorded, Robinson effectively negotiated with states to overcome concerns in relation to the application of the non-discrimination clause, ultimately drafting the version of the article that was finally adopted and masking some of the discontent among dissatisfied states. This achievement, as Ben-Nun notes, 'cannot be underestimated' as 'no such clause regarding non-discrimination between different refugees, or between refugees and other aliens, had existed in previous international instruments'.[54] Further, during the second session of the Conference of Plenipotentiaries, Robinson also strategically secured procedural acceptance that the draft of the treaty prepared by the Ad Hoc Committee (with significant input from Weis) be used as the base text for discussion.[55] This procedural victory was significant as the French government had also prepared a draft for consideration which was more restrictive in terms of refugee rights.

While there is no record of Robinson discussing his personal experience of displacement during these deliberations, Robinson was nevertheless cognisant at the time that although he formally represented Israel during the negotiations, his refugee experience was also relevant, particularly in relation to the moral legitimacy this evoked. For example, in a telegram written to the Israeli Foreign Minister Sharett on 1 August 1951, Robinson noted that he had been unable to attend the ceremony to first sign the

[52] *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records*, 22nd meeting, UN doc. A/CONF.2/SR.22 (26 November 1951).
[53] Ibid.
[54] Ben-Nun (n 12) 113.
[55] Ibid 111.

Convention on 28 July 1951 because it was scheduled on the Sabbath. However, he indicated that he had informed the President of the Conference Knud Larsen of this scheduling issue, and the President 'expressed his regret that I would not be among the first signers, particularly because I represented, in his view, not only a government, but also morally the refugee as such'.[56]

Finally, refugees also contributed to the drafting and deliberation of the 1951 Refugee Convention as representatives of non-governmental organisations during the discussions. One of the most notable civil society interventions, given its impact on the final text of the Convention, was that put forward by the Rabbi Isaac Lewin on behalf of the Jewish non-governmental organisation Agudas Israel World Organisation. Lewin, who had escaped to New York following the German occupation of Poland in 1939, was invited to speak at the Ad Hoc Committee on the request of the representative of USA, Louis Henkin.[57] On this occasion, Lewin proposed a new wording and structure of what is now Articles 32 and 33 of the Convention, which was selected by the Committee as the best draft for the basis of further discussion. In this draft, Lewin proposed a procedural guarantee, namely that 'the refugee shall be entitled to submit evidence to clear himself and to appeal to be represented before the competent authority', which was ultimately retained in the final text.[58]

Significantly, external archival evidence suggests that Lewin at the time also sought to provide some religious underpinning to the significance of the provisions, reciting 'long quotations from the book of Amos' in relation to the issues of expulsion and refoulement.[59] However, none of these religious statements were documented in the official UN transcripts of the meeting. This evidence suggests that some caution is needed when reviewing official records of the *travaux préparatoires*, as they are not verbatim transcripts of what was discussed.[60] It is not beyond the realm of possibility that further discussions as to individuals' personal experiences or reflections were left out of the official transcript of proceedings because

[56] Cited in Gilad Ben-Nun, 'The British–Jewish Roots of Non-Refoulement and its True Meaning for the Drafters of the 1951 Refugee Convention' (2014) 28(1) *Journal of Refugee Studies* 93, 112.
[57] Ibid 102.
[58] UN ECOSOC, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Nineteenth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, at 11 a.*m., UN Doc. E/AC.32/SR.19 (8 February 1950) [53].
[59] Ben-Nun (n 56) 103–104.
[60] Jane McAdam, 'Interpretation of the 1951 Refugee Convention', in Andreas Zimmermann (ed), *The 1951 Refugee Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011) 75, 100.

they were either not considered significant or not considered desirable for inclusion within a legal positivist discourse seeking neutral, objective statements of law and intent.

Another notable civil society contribution was the intervention of Toni Sender, who spoke at the Conference of Plenipotentiaries on behalf of the International Confederation of Free Trade Unions. Sender had previously served as a socialist politician in the German Weimar government but was forced to flee Germany in 1933 due to the rise of Nazism.[61] As one of the few female representatives at the Conference of Plenipotentiaries, she re-raised attention to the decision made by the State delegates not to include sex as one of the grounds on which discrimination was prohibited under Article 3 of the 1951 Refugee Convention.[62] She also raised her concern about the temporal limits placed on the eligibility for refugee status, noting that 'it would be both illogical and inhuman to restrict protection to the victims of past persecution' given that previously 'it often took a very long time to introduce supplementary legislation, which was not infrequently passed too late to meet urgent needs'.[63] Although neither of these submissions led to changes in the final text of the 1951 Refugee Convention (the temporal limitation was removed in the 1967 Protocol), Sender's submissions nevertheless contribute to understandings of the gendered and political context in which the convention was negotiated.

### 4.3 Contributions of Gerrit Jan van Heuven Goedhart to the foundational years of UNHCR, 1950-1955

A third significant contribution of refugees to the development of international refugee law and policy was the involvement of refugees in the early years of UNHCR. It is one of the lesser reported facts of the international refugee regime and the history of UNHCR that the first High Commissioner of UNHCR, Gerrit Jan van Heuven Goedhart, had lived experience of being forcibly displaced as a consequence of Nazism and the Second World War.[64] Prior to his appointment as High Commissioner in

[61] For more on Sender's political background and experience of forced displacement, see Richard Critchfield, 'Toni Sender: Feminist, socialist, internationalist' (1992) 15 (4–6) *History of European Ideas* 701; also, 'Toni Sender, 75, Socialist Leader: Reichstag Foe of Nazis Dies', *New York Times* (New York, 27 January 1964) 25.
[62] *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records*, 33rd meeting, UN Doc A/CONF.2/SR.33 (30 November 1951) 7.
[63] *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records*, 20th meeting, UN Doc A/CONF.2/SR.20 (26 November 1951) 7.
[64] For example, Van Heuven Goedhart's experience of forced displacement is not mentioned in UNHCR's brief biography of his life: UNHCR, 'Gerrit Jan van Heuven Goedhart (Netherlands): 1951–1956', *UNHCR* (Web page) <https://www.unhcr.org/en-

1950, Van Heuven Goedhart was forced to flee the Netherlands in 1944 for fear of persecution by German-occupied forces. At the time, Van Heuven Goedhart was working as co-editor of the underground newspaper *Het Parool*, which was circulated by the Dutch Resistance during the German occupation of the Netherlands between 1940 and 1945. While working at the newspaper, 37 of his colleagues were executed, and several others were arrested and interned in concentration camps.[65] His brother was also executed,[66] and the German forces offered a reward for Van Heuven Goedhart's capture. Ultimately, Van Heuven Goedhart was able to escape and seek refuge in London, where he was appointed Minister of Justice in the Netherlands Government in exile.

The historical record of Van Heuven Goedhart's tenure as the first High Commissioner of UNHCR suggests that, rather than trying to downplay the significance of this personal life experience on his work and thinking in relation to refugee protection, Van Heuven Goedhart often made key interventions which drew on this personal experience of forced displacement.[67] For example, on 13 December 1950, when the General Assembly considered his potential appointment as the first High Commissioner, Van Heuven Goedhart submitted a *curriculum vitae* which explicitly mentioned that he had served in the resistance movement in the Netherlands and had escaped to England in 1944.[68] Clearly, Van Heuven Goedhart saw some value in including this information for consideration by Member States, alongside his later experience as Chairman of the Netherlands Delegation to the General Assembly. In contrast, the other candidate recommended by the UN Secretary-General for consideration, the American J. Donald Kingsley, had served as the Director-General of the

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au/gerrit-jan-van-heuven-goedhart-netherlands-19511956.html>. A similar version of this biography is also found in UNHCR, *The State of the World's Refugees, 2000: Fifty Years of Humanitarian Action* (Oxford University Press, 2000) Annex 11, 326.

[65] 'Dr. Van Heuven Goedhart: Tireless Worker for Refugees', *The Times* (London, 10 July 1956) 13.

[66] Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press, 2001) 52.

[67] This approach is distinct from that taken by Paul Weis, who rarely mentioned or discussed his personal experience of displacement in his published or recorded works. See, for example, Paul Weis, 'Legal Aspects of the Convention of 25 July 1951 Relating to the Status of Refugees' (1953) 30 *British Yearbook of International Law* 475; also, Paul Weis, 'The International Protection of Refugees' (1954) 48(2) *American Journal of International Law* 193; also, Paul Weis, 'Development of Refugee Law' (1982) 3 *Michigan Yearbook of International Legal Studies* 27.

[68] *Election of the High Commissioner for Refugees: Note by the Secretary General*, UN Doc A/1716 (13 December 1950) 2.

International Refugee Organisation, but had no lived experience of displacement.[69]

Further, Van Heuven Goedhart also referred to his personal experience of displacement to inform debate during the drafting of the 1951 Refugee Convention. In particular, during discussion on the draft article of what is now Article 31 of the Refugee Convention on 'Refugees unlawfully in the country of refuge', Van Heuven Goedhart discussed his escape to England to reinforce support for immunity for refugees from penalties in situations where they are required to transit through other countries in search of protection. The *travaux préparatoires* of the 14th meeting of the Conference of Plenipotentiaries recorded Van Heuven Goedhart stating that:

> in 1944, he had himself left the Netherlands on account of persecution and had hidden in Belgium for five days. As he had run the risk of further persecution in that country, he had been helped by the resistance movement to cross into France. From France he had gone on into Spain, and thence to Gibraltar. Thus, before reaching Gibraltar, he had traversed several countries in each of which the threat of persecution had existed.[70]

Van Heuven Goedhart argued that 'it would be very unfortunate if a refugee in similar circumstances was penalized for not having proceeded direct to the country of asylum'.[71] Ultimately, the version of Article 31(1) finally adopted prohibits states parties from imposing penalties on refugees, on account of their illegal entry or presence, provided that they are 'coming directly from a territory where their life or freedom was threatened', 'present themselves without delay' and 'show good cause for their illegal

[69] It is unclear from the historical record how much importance UN Member States at the General Assembly placed on this personal experience when appointing Van Heuven Goedhart instead of Kingsley, particularly given that the vote was conducted by secret ballot. Historical analysis of this appointment undertaken so far has focused on the political tensions between the United States, who preferred their own citizen Kingsley, and British and Commonwealth states, who favoured a candidate from a more neutral country. See Loescher (n 66) 51–52; also, Gilad Ben-Nun, 'The Expansion of International Space: UNHCR's Establishment of its Executive Committee ("ExCom")' (2017) 36(1) *Refugee Survey Quarterly* 1, 8. The New York Times did however discuss Van Heuven Goedhart's personal experience of displacement in its reporting of his appointment: 'Dutch Editor gets U.N. Refugee Post', *New York Times*, (New York, 15 December 1950) 21. For more on Kingsley's experience, see 'Donald Kingsley, Aided U.N. Agency', *New York Times* (New York, 2 June 1972) 41.

[70] This record is a summary of Van Heuven Goedhart's statement, rather than a verbatim transcript: *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records*, 14th meeting, UN doc. A/CONF.2/SR.14 (22 November 1951).

[71] Ibid.

entry or presence'.[72] The *travaux préparatoires*, of which Van Heuven Goedhart's statements as High Commissioner form part, assist in interpreting the clauses 'coming directly' and 'good cause' in a manner which prohibits states from penalising refugees in situations where they transit through one or more countries because they are either still at risk or no protection is available.[73]

In addition to these direct references to his personal experience, Van Heuven Goedhart's experience as both a refugee and the head of an international organisation also likely influenced his thinking on the importance of consulting with refugees in decisions that affect them and the trajectory of UNHCR's work in the early years. For example, speaking at the beginning of his tenure about the need for UNHCR to establish field offices in all countries where large numbers of refugees reside, Van Heuven Goedhart stressed the importance of direct communication between UNHCR and refugees for the effective implementation of UNHCR's mandate: 'If the international protection of refugees is to mean anything', Goedhart stated, 'it must mean that refugees are at least able to see and talk to a representative of the authority which is supposed to be protecting them'.[74] For the five years that Van Heuven Goedhart served as High Commissioner, he devoted significant time and energy towards establishing and securing funding for these branch offices. In accordance with UNHCR's mandate, these field offices were located not only in Europe, but also in locations such as Cairo, Bogotá and Hong Kong.[75] This field-based approach to protection remains a core component of UNHCR's work.

Similarly, Van Heuven Goedhart also sought to cultivate an understanding and perception of refugees within international law and policy making that

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[72] For more on the drafting history of this provision, see Guy S 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, 191–193.

[73] See ibid 255-256; also, *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999] 4 All ER 520 (UK) 16–26.

[74] Gerrit Jan Van Heuven Goedhart, 'Address to the 7th Session of the General Council of the International Refugee Organization' (Speech, UNHCR, 9 April 1951) <https://www.unhcr.org/en-au/admin/hcspeeches/3ae68fce0/address-dr-gerrit-jan-van-heuven-goedhart-united-nations-high-commissioner.html>.

[75] For more on the establishment of UNHCR's field offices, see *Report of the United Nations High Commissioner for Refugees*, UN GAOR, 9th sess, Supp No.13, UN Doc A/2646(SUPP) (1 January 1954) ('*Report of the United Nations High Commissioner for Refugees*') [39]–[48]; also, Gerrit Jan van Heuven Goedhart, 'Speech at the meeting of Swiss Aid to Europe' (Speech, UNHCR, 19 February 1953) <https://www.unhcr.org/en-au/admin/hcspeeches/3ae68fb630/speech-made-dr-gerrit-jan-van-heuven-goedhart-united-nations-high-commissioner.html>.

reinforced their agency and economic potential, rather than seeing them as passive victims in need of humanitarian aid. Following his acceptance, on behalf of UNHCR, of the 1954 Nobel Peace Prize, Goedhart stated in December 1955 that:

> The refugee problem has nothing to do with charity. It is not the problem of people to be pitied but far more the problem of people to be admired. It is the problem of people who somewhere, somehow, sometime had the courage to give up the feeling of belonging, which they possessed, rather than abandon the human freedom which they valued more highly.[76]

Consistent with this thinking on the individual agency of refugees, Van Heuven Goedhart and UNHCR introduced several initiatives to support the economic self-reliance and integration of refugees during these early years of UNHCR's work. These initiatives included housing schemes in areas in need of employment, where refugees not only 'helped with the building of their future homes', but also committed to 'repay the cost of the houses over a stipulated period and provision has been made that the money repaid will be used to benefit other refugees'.[77] These housing schemes were primarily implemented in Germany and Austria, and were designed to transition refugees out of refugee camps in the area.[78] The initiatives also included funding for vocational training, ranging from apprenticeships to university scholarships, as well as small business loans to assist refugees establish new enterprises, particularly in the agricultural sector.[79] Many of these initiatives were financially supported through public-private partnerships, particularly with the support of the Ford Foundation, on the proviso that were 'designed to help refugees to help themselves rather than to remedy their situation temporarily'.[80] Several of these ideas resemble contemporary approaches to refugee self-reliance and integration, including those found in the New York Declaration and the Global Compact on Refugees.[81]

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[76] Gerrit Jan van Heuven Goedhart, 'Refugee Problems and their Solutions' (Speech, UNHCR, Oslo, 12 December 1955) <https://www.unhcr.org/en-au/admin/hcspeeches/3ae68fb918/refugee-problems-solutions-address-dr-gerrit-jan-van-heuven-goedhart-united.html>.
[77] *Report of the United Nations High Commissioner for Refugees* (n 75) [224].
[78] Ibid. See further, *Report of the United Nations High Commissioner for Refugees: Addendum*, UN GAOR, 9th sess, Supp No.13B, UN Doc A/2646/ADD.2(SUPP) (1 January 1954).
[79] Ibid.
[80] Ibid [220].
[81] See *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (3 October 2016) ('New York Declaration') Annex 1: Comprehensive refugee response framework, [13]; also, *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2 August 2018)

### 4.4 Commentary

The historical evidence examined in the previous three parts of this chapter reveal that refugees and persons with lived refugee experience played a far more substantive role in the development of international refugee law and policy than previously acknowledged. Although refugees held no formal decision making power as a categorised group, in the years between 1921 and 1955 refugees and persons with lived refugee experience not only actively participated in the formal deliberations of the 1933 Refugee Convention and the 1951 Refugee Convention, but they also played key roles in the initial drafting of these instruments. Further, refugees and persons with lived refugee experience also held senior leadership positions within international organisations, civil society organisations and refugee-led organisations established at the time to provide protection for refugees. Their involvement in these organisations often influenced the focus and direction of this work.

The contributions of refugees to the development of early international refugee law and policy are significant because they shift our understanding of the ways in which international refugee law was developed and negotiated. In particular, these contributions challenge the idea that early international refugee law was solely negotiated based on the different, and at times competing, political agendas of nation States. Breaking away from the 'theoretical straight jacket' of the nation state, [82] it is clear that refugees and persons with lived refugee experience clearly played influential roles in designing some of the strategies employed during these treaty-making periods, which altered the trajectory of legal and policy development. Second, these contributions also challenge the assumption that refugee voices have largely been ignored in international law and policy making until very recently. This latter recognition creates the opportunity to reflect on these contributions and consider what lessons can be ascertained from these events for future initiatives seeking to more meaningfully include refugees in the design and implementation of international refugee law and policy.

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('Global Compact on Refugees') [7]. The outcomes of these initiatives merit further research given their relevance to contemporary approaches to refugee self-reliance. For more on the history of refugee self-reliance, see Evan Easton-Calabria and Naohiko Omata, 'Panacea for the refugee crisis? Rethinking the promotion of 'self-reliance' for refugees' (2018) 39(8) *Third World Quarterly*, 1458; also, Claudena Skran and Evan Easton-Calabria, 'Old Concepts Making New History: Refugee Self-reliance, Livelihoods and the 'Refugee Entrepreneur'' (2020) 33(1) Journal *of Refugee Studies* 1.

[82] Ben-Nun (n 69) 17.

From a normative perspective, several insights can be gained from reflecting on these contributions. First, the inclusion of refugees in the development of early international refugee law and policy enhanced the specificity and practical application of particular legal provisions and policy choices, drawing in part on the lived realities of refugee displacement and experience. This inclusion in turn led to better outcomes for both refugees and states, and is consistent with the recognition in the Global Compact on Refugees that 'responses are most effective when they actively and meaningfully engage those they are intended to protect and assist'.[83] Some notable examples of the instrumental value of participatory initiatives include Van Heuven Goedhart's intervention on the wording of Article 31 of the 1951 Refugee Convention on 'Refugees unlawfully in the country of refuge', as well as the evolution of the non-refoulement principle, from its legal origins in the 1920s and 1930s to its development in the 1951 Refugee Convention. The enduring relevance of these provisions is in part testament to the practical necessity of these protections for refugees, both then and now.

Second, formative ideas, such as the proposal to develop a binding international legal convention for refugees, emerged in an environment where refugee organisations and representatives had direct, sustained and systematic communication with states and international organisations over several years. Measures were in place in which these ideas could be recognised and debated, and then implemented. When Rubinstein first proposed the idea of a binding international convention relating to refugees in 1927, Nansen and the League of Nations were able to act on the suggestion within a matter of weeks, even though it took a further six years before states adopted the first binding treaty on refugees. The prompt consideration of Rubinstein's idea was in part due to the established communication channels that were already in place between the League of Nations and refugee organisations dating back to 1921, as well as the cultural and political acceptance at the time of the value and importance of these types of collaboration.

Third, the contributions of refugees to formal treaty-making negotiations, both during the 1933 Convention and the 1951 Convention, did not undermine state sovereignty or the legitimacy of these instruments. In 1936, the British government expressed some concern that non-state actor participation in the development of international refugee law should be minimised, suggesting that they 'should have been treated on the same

[83] Global Compact of Refugees [34].

footing as the press and other members of the public'.[84] However, overwhelmingly states tacitly supported the contributions of refugees to these legal and policy decision-making processes, with very little evidence in the historical record suggesting that states complained or were concerned about this type of involvement.

Refugees also contributed to this type of mutual collaboration, providing not only access to information that only they possessed, but also putting forward 'realistic' rights-based proposals that recognised the continuing importance of sovereignty for nation states. This approach is reflective of what Devika Hovell has labelled a 'public interest model of law'. As previously discussed in Chapter 3, this model of law is where 'increased opportunities for participation in decision making strengthen the bonds of rational consent between individuals and decisions', and 'respect for decision-making authority is negotiated, not won by subordination to formal rules'.[85]

Fourth, the active involvement of refugees in the development of early international refugee law is evidence that refugees identified the promising potential of international law, and the value of being recognised as specific subjects of international law with corresponding rights and responsibilities. For some, engagement in processes relating to the development of international law were no doubt in part to 'push the behaviour of states toward outcomes other than those predicted by power and the pursuit of national interest'.[86] Refugees and persons with lived refugee experience saw the potential of international law as being capable of setting benchmarks for states and other actors, establishing and reinforcing best practices and influencing the development and implementation of national law and policy.[87]

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[84] Quote of Roger Makins, cited in Beck (n 24) 617.

[85] Devika Hovell, 'Due Process in the United Nations' (2016) 110 (1) *The American Journal of International Law* 1, 7. Following the adoption of the 1951 Refugee Convention, Van Heuven Goedhart commented in a letter to the New York Times that 'In the present tense international situation, when Governments are concerned with questions of security, it would have been unrealistic to expect that the final text of the convention would be extremely liberal. However, any impartial person who studies the text must recognize that the convention marks a decisive step toward the establishment of reasonable average standards for the rights of refugees': Gerrit J Van Heuven Goedhart, 'Letters to the Times: Rights of Refugees', *New York Times* (New York, 15 September 1951) 14.

[86] Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 (2) *American Journal of International Law* 205, 206.

[87] See Robert Howse and Ruti Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1 *Global Policy* 2.

They also highlighted that refugee protection was an issue that demanded international cooperation.[88] Like many states, refugees participating in these processes stressed the humanitarian nature of refugee protection. However, they were also acutely aware of the political nature of international refugee protection, which led to some groups of refugees receiving protection but not others. As Rubinstein remarked in 1936, 'refugee work more than anything else should be free from political considerations. Unhappily, experience shows that humanitarian activities cannot escape from association'.[89]

Finally, to a small degree the participation of refugees in these diverse decision-making processes also contributed to the improved governance of the international refugee regime, by making decision-makers more accountable to those who had experienced the impacts of such policies. In the historical record, recognition that participation of refugees in the development of international refugee law could enhance the legitimacy of decisions is partly reflected in Robinson's remarks about the moral significance of a refugee taking the action of signing the Convention on behalf of a state. It is also tacitly acknowledged in some of the policy approaches undertaken by the League of Nations and UNHCR, such as the decision to establish field offices to more easily facilitate direct communication with refugees.

However, it is important to qualify that this governance benefit was not explicitly sought out at the time, and the refugees and persons with lived refugee experience who participated in these processes were not intended to be representative of the diverse communities of refugees in existence. While refugees from a variety of different countries of origin and countries of asylum participated in these processes, the individuals discussed in this chapter were able to participate due to some other type of recognised expertise (primarily legal expertise in these examples). Further, consistent with the geo-political origins of the modern international refugee regime, almost all were well-educated, European men.[90] If decision making processes in the future seek to be more accountable to refugees and improve governance and legitimacy in this regard, then it is important that future representation of refugees more appropriately reflects the diversity of

[88] Writing in 1939, Simpson argued that the political effect of the efforts of refugee leaders 'to obtain increasing definition of their status as refugees through a series of international instruments… has been to perpetuate their position as refugees, and to stabilize on an international basis a security as refugees which they had already won in practice in certain countries': Simpson (n 15) 107–108.
[89] Rubinstein (n 21) 733.
[90] One notable exception to this was the participation of Toni Sender, discussed above.

refugee communities affected by the decisions. This includes taking into consideration consultative obligations that already exist under international law in relation to women, children and persons with disabilities.[91]

In contemporary international refugee law and policy, some steps have already been undertaken to address these shortcomings. For example, during the drafting of the 2018 Global Compact on Refugees, UNHCR funded a team of academics and women from diverse refugee backgrounds to undertake a 'gender audit' of the Compact's legislative development. This audit aimed to ensure that issues related to gender equality, including sexual and gender-based violence and the meaningful participation of women and girls, were specifically addressed in the Compact.[92] Further, there have also been other initiatives to include a broader range of refugee voices from around the world in law and policy making at the international level. These include the 2016 Global Refugee Youth Consultations, and the establishment of a Global Youth Advisory Council in 2017, to incorporate refugee youth perspectives into UNHCR's work.[93] Nevertheless, despite initiatives such as these, more work is still needed.

## Conclusion

This chapter has examined the participation of refugees in law and policy making through the illustrative case study of the participation of refugees in the development of early international refugee law and policy between 1921 and 1955. In taking this approach, the chapter has shifted the longstanding focus within refugee law scholarship away from how international refugee law has engaged with the subject of refugees, and instead sought to consider

[91] See Chapter 2 for more on these obligations.

[92] There are sixteen different references to gender throughout the Global Compact on Refugees, including two paragraphs which specifically deal with the needs and issues facing refugee women and girls. These paragraphs include, among other things, a commitment 'to promote the meaningful participation and leadership of women and girls, and to support the institutional capacity and participation of national and community-based women's organizations, as well as all relevant government ministries': see Global Compact of Refugees, [74–75]. For more information on the gender audit, see Eileen Pittaway et al, 'Gender Audits and the Global Compact on Refugees"', *University of New South Wales* (Web page) <https://www.arts.unsw.edu.au/our-research/research-centres-institutes/research-networks/forced-migration-research-network/projects/gender-audits-and-global-compact-refugees#>.

[93] See UNHCR and WRC, *We Believe in Youth: Global Refugee Youth Consultations Final Report* (UNHCR, September 2016) <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2016/09/We-Believe-in-Youth-Global-Refugee-Youth-Consultations-Final-Report.pdf>; also, Caroline Lenette et al, '"We Were Not Merely Participating; We Were Leading the Discussions": Participation and Self-Representation of Refugee Young People in International Advocacy' (2020) 18(4) *Journal of Immigrant & Refugee Studies* 390.

the opposite, namely how refugees have engaged with the subject of international refugee law. This chapter has demonstrated that refugees and persons with lived refugee experience made a more significant contribution to the development of international refugee law and policy than has been recognised to date. These contributions included significant input into the drafting and deliberation of the 1933 Refugee Convention and the 1951 Refugee Convention, as well as substantial contributions to the policy development of international organisations, civil society organisations and refugee-led organisation during these years.

These contributions not only reveal a new way of understanding how international law pertaining to refugees has been developed and negotiated to date, but they also offer insights as to how refugees can more meaningfully participate in the formation of laws and policies that affect them going forward. While some caution is needed when considering how past practices can inform the development of laws and policies that affect refugees, the contributions of refugees to early international refugee law and policy demonstrate some of the benefits that arise from drawing on the considerable expertise of refugees over a sustained period, and by avoiding policy approaches that treat refugees as simply passive victims in need of rescue. This case study further demonstrates some of the different ways in which refugees can participate, either directly or through their representative organisations, in the development and reform of laws and policies that materially impact upon refugees' human rights. These lessons should be taken on board when considering future initiatives that include refugees in the development and reform of law and policy.

In the next chapter, this thesis transitions attention towards another important area of decision-making in the international refugee regime, namely the participation of refugees in decisions which involve the proposed movement of refugees across international borders from one sovereign jurisdiction to another.

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# REFUGEE PARTICIPATION IN RELOCATION DECISIONS

## Introduction

A second set of decisions that are central to the lives of refugees are decisions which involve the proposed movement of refugees across international borders from one sovereign jurisdiction to another. This thesis refers to these types of decisions as *relocation decisions*. In the international refugee regime, relocation decisions may seek to resolve the protection needs of refugees on a permanent basis and bring an end to the need for refugee status. Such examples include the so-called 'durable solutions' of voluntary repatriation to the refugee's country of origin and the resettlement of the refugee to a third country which has agreed to provide the refugee with permanent residence or citizenship.[1] Alternatively, relocation decisions are often pursued even without the guarantee of durable protection. These decisions may relate to labour and education migration pathways,[2] emergency transit mechanisms[3] or transfers proposed for the processing of asylum applications in third countries[4] or for the purposes of deterrence.[5]

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[1] For further analysis of the concept and application of 'durable solutions' in the international refugee regime, see Megan Bradley, 'Resolving Refugee Situations: Seeking Solutions Worthy of the Name' (World Refugee Council Research Paper No 9, March 2019) <https://www.cigionline.org/static/documents/documents/WRC%20Research%20Paper%20No.9web_1.pdf>; also, Elena Fiddian-Qasmiyeh, 'From Roots to Rhizomes: Mapping Rhizomatic Strategies in the Sahrawi and Palestinian Protracted Refugee Situations' in Megan Bradley, James Milner and Blair Peruniak (eds), *Refugees' Roles in Resolving Displacement and Building Peace* (Georgetown University Press, 2019) 247.

[2] See Claire Higgins and Marina Brizar, *Complementary Refugee Pathways: Labour Mobility Schemes* (Fact Sheet, Kaldor Centre for International Refugee Law at UNSW Sydney, August 2020) <https://www.kaldorcentre.unsw.edu.au/publication/complementary-refugee-pathways-labour-mobility-schemes>; also Tamara Wood and Rosie Evans, *Complementary Refugee Pathways: Education Pathways* (Fact Sheet, Kaldor Centre for International Refugee Law at UNSW Sydney, August 2020) <https://www.kaldorcentre.unsw.edu.au/publication/complementary-refugee-pathways-education-pathways>.

[3] See UNHCR, *Guidance Note on Emergency Transit Facilities* (UNHCR, 4 May 2011) <https://www.refworld.org/pdfid/4dddec3a2.pdf>.

[4] See, for example, in the context of the European Union, *Council and European Parliament Regulation (EU) No 604/2013 of 26 June 2013 Establishing the Criteria and*

As discussed in Chapter 3, refugees should be able to meaningfully participate in the determination of such relocation decisions because, at the very least, these decisions will almost certainly materially impact on the rights of refugees. This approach is consistent with a human rights-based approach to refugee participation in decision-making processes. It is also consistent with the commitments made by states in the 2016 *New York Declaration for Refugees and Migrants* ('New York Declaration')[6] and the 2018 *Global Compact on Refugees* ('Global Compact on Refugees') towards enabling refugees 'to assist in designing appropriate, accessible and inclusive responses'.[7] Further, such decisions are multi-jurisdictional and are not always effectively covered by refugees' ability to participate in law and policy reform at the international, regional, national and local levels.

Yet, despite compelling reasons to include refugees in decisions relating to their transfer or movement to other countries, this chapter argues that the international legal and policy framework has developed in such a way that it provides limited opportunities for refugees to participate in relocation decisions. At the individual level, refugees are limited in several ways in their capacity to identify and select relocation decisions most appropriate to their circumstances. Collectively, refugee-led organisations and representatives are also insufficiently included when decisions are made as to how relocation arrangements should be pursued in different contexts.

This chapter argues that this exclusion of refugee-led organisations and representatives in group-based relocation decisions is problematic because group-based participation of refugees is necessary to both improve outcomes and to address the systemic disadvantage refugees experience in these political processes.[8] Philosophically, these relocation decisions constitute the forming of new social contracts between refugees and nation states which should be expressly negotiated with refugee input. This concept of the social contract is premised on the idea that 'political legitimacy, political authority, and political obligation are derived from the

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*Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)* [2013] OJ L180/31 ('Dublin III Regulation') art 13.

[5] See Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (New South Publishing, 2016).

[6] *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (3 October 2016).

[7] *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2 August 2018) ('Global Compact on Refugees') [34]. These commitments are discussed in more detail in Chapter 2.

[8] See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press,1996) 144–145.

consent of the governed, and are the artificial product of the voluntary agreement of free and equal moral agents'.[9]

To elaborate on these arguments further, this chapter proceeds in three parts. First, the chapter considers one of the most significant and oftentimes contentious relocation decisions in the international refugee regime, namely the voluntary repatriation of refugees to their country of origin. Second, the chapter examines the participation of refugees in another major relocation decision that aims to resolve the need for refugee status, specifically the resettlement of refugees from countries of asylum to third countries. Finally, the chapter provides some commentary on why it is important to complement refugees' individual participation in relocation decisions with opportunities to collectively participate through their chosen representatives and how this can be achieved.

As this overview makes clear, this chapter does not seek to address the full gamut of relocation decisions that exist in the international refugee regime. The focus on repatriation and resettlement decisions in this chapter has been made because of their centrality to the international refugee regime and their importance to refugees, states, and other stakeholders.[10] This focus has also been chosen, within the modest scope of this thesis, to enable more detailed analysis than would have been possible had a broader lens been adopted. Nevertheless, it is believed that many of the issues and opportunities that arise in relation to repatriation and resettlement decisions also have relevance for other relocation decisions that involve refugees.

### 5.1 Voluntary Repatriation

One of the most significant and frequently controversial relocation decisions in the international refugee regime is the voluntary repatriation of a refugee to their country of origin. As discussed in Chapter 2, this is one of the only decision-making areas in the international refugee regime where the agency of a refugee to determine when to return is substantively developed in international refugee law.

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[9] Patrick Riley, 'Social contract theory and its critics' in Mark Goldie and Robert Wokler (eds), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge University Press, 2006) 347, 347.

[10] The third common 'durable solution' in the international refugee regime, 'local integration', is not discussed in this chapter because this solution does not involve the proposed relocation of a refugee from one jurisdiction to another. Additionally, the most common decision-making areas relating to the local integration of refugees in countries of asylum are those linked to law and policy-making and programme and service delivery. These decision-making areas are discussed in Chapter 4 and Chapter 6 respectively.

Article 1C(4) of the 1951 *Convention relating to the Status of Refugees* ('1951 Refugee Convention')[11] recognises that refugees can, consistent with the right of all persons under international law to enter their own country,[12] take steps to voluntarily return to their country of origin.[13] These steps can be taken regardless of the risks of persecution that may remain, so long as refugees are acting of their own volition and are truly exercising a free choice. Further, UNHCR is obliged to consult with refugees in relation to the specific issue of repatriation. This obligation exists because under its 1950 Statute UNHCR can only facilitate and promote the durable solution of repatriation in situations when such repatriation is considered 'voluntary'.[14]

This emphasis on the refugee's right to individually control the manner of their return is recognised as an important safeguard against refoulement. As discussed in Chapter 1, refugees are protected under Article 33 of the 1951 Refugee Convention and other international human rights law from being forcibly returned to any place where they may face persecution or other types of serious harm. This safeguard also gives worth to the refugee's individual agency. As Guy Goodwin-Gill and Jane McAdam have commented:

> voluntariness (the choice of the individual) is justified because in the absence of formal cessation, the refugee is the best judge of when and whether to go back; because it allows for the particular experiences of the individual, such as severe persecution and trauma,

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[11] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

[12] This right is expressly recognised in both Article 13(2) of the *Universal Declaration of the Human Rights* and Article 12 (4) of the *International Covenant of Civil and Political Rights*. Article 12(4) of the ICCPR provides that 'no one shall be arbitrarily deprived of the right to enter his own country'.

[13] The Global Compact on Refugees also records that that 'voluntary repatriation is not necessarily conditioned on the accomplishment of political solutions in the country of origin, in order not to impede the exercise of the right of refugees to return to their own country': see Global Compact on Refugees [87].

[14] *Statute of the Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/428(V) (14 December 1950), Chapter 1, [1], Chapter 2, [8(c)]. In addition, as discussed in Chapter 2, Article 12 of the Convention on the Rights of the Child requires that the views and wishes of unaccompanied and separated children, including child refugees, be considered when determining matters such as the identification of 'a durable solution that addresses all of their protection needs'. See *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); also Committee on the Rights of the Child, *General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2005/6 (1 September 2005) [25], [79].

> to receive due weight; and finally, because there is a value in individual choice.[15]

However, the concept of voluntariness embedded in this legal framework suffers from two major deficiencies when applied in practice. The first deficiency is that refugees often lack other acceptable options from which to choose when determining whether to return to their own country. As philosopher Serena Olsaretti argues, the making of a voluntary choice is contingent upon there being an acceptable alternative that provides the individual with an objective standard of wellbeing. Without an acceptable alternative from which the individual can choose, Olsaretti argues that a choice cannot be considered voluntary.[16] T M Scanlon likewise indicates that the value of having a choice 'is one factor among others that can render an outcome legitimate'.[17]

In the international refugee regime, acceptable alternatives to the decision to return are often unavailable. Despite repeated efforts to generate greater international cooperation and responsibility-sharing among states and other actors for providing protection to refugees,[18] most refugees experience protracted displacement with little access to solutions which bring an end to their need for international protection. At the end of 2019 for example, UNHCR estimated that there were 26 million refugees globally. However, states agreed to resettle only 107,800 refugees (0.4%), and only 55,000 refugees were naturalised in a country of asylum (0.2%).[19] These statistics are not dissimilar to previous years, and opportunities for solutions have only decreased further since the COVID-19 pandemic.[20]

In addition, refugees often find themselves in countries of asylum which are, as Kate Ogg states, 'sites of refuge only in a nominal sense'.[21] Refugees in both developing and developed countries often face insecurity and have

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[15] Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (Oxford University Press, 4th ed, 2021) 552.
[16] Serena Olsaretti, 'Debate: The Concept of Voluntariness – A Reply' (2008) 16(1) *Journal of Political Philosophy* 112, 112–113.
[17] T M Scanlon, 'Reply to Serena Olsaretti' (2013) 10 *Journal of Moral Philosophy* 484, 485. It is noted that Scanlon and Olsaretti have differing views on the value of choice.
[18] For more on these efforts, see Tristan Harley, 'Innovations in Responsibility Sharing for Refugees' (World Refugee Council Research Paper No 14, 28 May 2019) <https://www.cigionline.org/publications/innovations-responsibility-sharing-refugees/>.
[19] UNHCR, Global Trends: Forced Migration in 2019 (UNHCR, 2020) 2, 54.
[20] See UNHCR, *Global Trends: Forced Displacement in 2020* (UNHCR, 2021) <https://www.unhcr.org/en-au/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html>.
[21] Kate Elisabeth Ogg, *Protection from Refuge* (PhD Thesis, Australian National University, April 2019) 1.

limited access to education, healthcare, shelter, food and water. Further, they are often prevented from legally working in countries of asylum due to restrictive national laws.[22] These challenges to accessing protection are often more severe for women, children, the elderly, LGBTIQ+ communities, and refugees with disabilities. For example, data indicates that the vast majority of sexual and gender-based violence survivors are female.[23] Further, children represent 42 per cent of all forcibly displaced people, even though they only account for 30 per cent of the world's population.[24] These children face additional risks in countries of asylum, including child labour, child marriage, forced recruitment into armed groups, and separation from family members.[25]

The significant undersupply of solutions, coupled with inadequate protection in countries of asylum, has resulted in many refugees returning to their country of origin in circumstances that have not been truly voluntary. Scholars such as Long and Crisp record numerous occasions throughout history, and particularly from the 1980s onwards, where states have mounted extensive pressure on refugees to return. Without being exhaustive, these instances include the return of Rohingya refugees from Bangladesh to Myanmar in the late 1970s, the return of Cambodian refugees from Thailand and the return of Ethiopian refugees from Djibouti in the 1980s, as well as and the return of Rwandan refugees from Zaire and Tanzania in the mid-1990s.[26] In the international refugee regime, this practice often amounts to 'constructive refoulement'. This is where the conditions in the place of refuge are such that they forcibly compel refugees

[22] See Roger Zetter and Héloïse Ruaudel, 'Refugees' Right to Work and Access to Labor Markets – An Assessment' (Working Paper, KNOMAD, September 2016).
[23] UNHCR, *UNHCR Policy on Age, Gender and Diversity* (UNHCR, March 2018) ('UNHCR Policy on Age, Gender and Diversity') 5.
[24] UNHCR, *Global Trends: Forced Displacement in 2020* (UNHCR, 2021) 3.
[25] UNHCR Policy on Age, Gender and Diversity (n 23) 5.
[26] See Katy Long, *The Point of No Return: Refugees, Rights and Repatriation* (Oxford University Press, 2013) 90–97. In the case of the return of Rwandan refugees from Tanzania, Crisp and Long note that UNHCR's decision to issue a joint statement with the Tanzanian government indicating that 'all Rwandese refugees can now return to their country' 'amounted to *refoulement*, and thus fundamentally breached UNHCR's duty of refugee protection': see Jeff Crisp and Katy Long, 'Safe and Voluntary Refugee Repatriation: From Principle to Practice' (2016) 4 (3) *Journal of Migration and Human Security* 141, 145. As a more recent example, UNHCR has expressed its concern regarding the 'Assisted Voluntary Return' program implemented by the International Organization for Migration (IOM) for refugees placed in indefinite detention in Manus Island in Papua New Guinea, given the psychological impacts of protracted detention for the refugees involved and the prospect of lengthy delays in accessing a permanent solution. See UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea 11-13 June 2013* (UNHCR Australia, 12 July 2013) <https://www.refworld.org/pdfid/51f61ed54.pdf> [80].

to return to situations where they are at risk of persecution or other forms of serious harm.[27]

The second major deficiency associated with the concept of voluntariness embedded in the legal framework relating to repatriation is that it has largely been constrained to reflect liberal notions of individual consent and choice when applied in practice. As UNHCR noted in a submission to its Executive Committee in 2016, 'the decision to repatriate voluntarily is an individual one'.[28] Likewise, the ExCom Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees reaffirms 'the voluntary character of refugee repatriation, which involves the individual making a free and informed choice'.[29]

This focus on the individual in return decisions has impeded recognition of the complementary value of collective or group-based participation of refugees in return negotiations. This focus stems from the intellectual mooring of international human rights law in Western liberal political philosophy. As S James Anaya has indicated, the Western liberal perspective:

> acknowledges the rights of the individual on the one hand and the sovereignty of the total social collective on the other, but it is not alive to the rich variety of intermediate or alternative associational groups actually found in human cultures, nor is it prepared to ascribe to such groups any rights not reducible either to the liberties of the citizen or to the prerogatives of the state.[30]

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[27] For more on the ethical dimensions of this, see Mollie Gerver, *The Ethics and Practice of Refugee Repatriation* (Edinburgh University Press, 2018) 124–147.
[28] UNHCR, *Update on voluntary repatriation*, (UNHCR, EC/67/SC/CRP.13, 7 June 2016) [2].
[29] UNGA, *Report of the Fifty-Fifth Session of the Executive Committee of the High Commissioner's Programme, Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees*, UN Doc A/AC.96/1003 (12 October 2004) [23].
[30] S James Anaya, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, 1995) 321, 326. Will Kymlicka similarly suggests that that the focus on the development of individual human rights in the aftermath of World War II was in part aimed to resolve or subsume conflicts with previous approaches to minority rights. This approach was based on the idea that 'rather than protecting vulnerable groups directly, through special rights for the members of designated groups, cultural minorities would be protected indirectly, by guaranteeing basic civil and political rights to all individuals regardless of group membership': Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press,1996) 2–3.

Additionally, this focus on the individual in international refugee law is a product of its historical development in the context of the early Cold War. When the UNHCR Statute was developed in 1950, the requirement of voluntariness was introduced deliberately to prevent the repatriation of Soviet nationals following the end of World War II,[31] and was accordingly expressed in individualist terms in the following years.[32]

Since the development of this legal and policy framework, there have been very few examples of refugee communities being able to participate through their chosen representatives in group-based decisions relating to return. In 1989, the South West Africa People's Organisation ('SWAPO') was able to represent the interests of Namibian refugees in Angola during the development of a tripartite arrangement with the government of Angola and UNHCR.[33] However, this situation was unique in that it took place during the national liberation of Namibia from its colonial occupation by South Africa and SWAPO had already been recognised formally by the United Nations General Assembly as the 'authentic representative of the Namibian people'.[34]

Beyond this, there is only one other example known to the author where refugee representatives and refugee-led organisations have been formally included as a central stakeholder in the development and implementation of a legal instrument relating to refugee return. This example is that of Guatemalan refugees in Mexico between 1987 and 1994. After forming a representative body in exile in 1987 known as the *Comisiones Permanentes*

[31] See, for context, UNGA, *General Assembly, 5th Session: 325th Plenary Meeting, Thursday, 14 December 1950, Flushing Meadow*, UN Doc A/PV.325 (14 December 1950).
[32] For example, the first High Commissioner of UNHCR – Gerrit Van Heuven Goedhart – stated in 1955 (and in gendered terms) that 'freedom of decision is the inalienable right of the refugee himself. It is his wish that counts, and the United Nations, within the limits of the Statute, try to fulfil that wish, no matter what it is – repatriation, resettlement or integration': Gerrit J Van Heuven Goedhart, 'Refugee Problems and their Solutions' (Speech, UNHCR, Oslo, 12 December 1955) <https://www.unhcr.org/en-au/admin/hcspeeches/3ae68fb918/refugee-problems-solutions-address-dr-gerrit-jan-van-heuven-goedhart-united.html>.
[33] UNHCR, *Protocol between the Government of the People's Republic of Angola, South West Africa Peoples Organisation and the Office of the United Nations High Commissioner for Refugees Relating to the Repatriation of Namibian Refugees in Angola* (UNHCR, 14 March 1989) <https://www.refworld.org/docid/3ae6b3190.html>.
[34] *Resolution 3111(XXVIII). Question of Namibia*, GA Res, UN Doc A/RES/3111(XXVIII) (12 December 1973) [1]. In another context, Palestinians refugees have also participated in negotiations seeking to resolve the Israeli-Palestinian conflict, particularly through the umbrella of the Palestine Liberation Organization. For more, see Francesca P Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (Oxford University Press, 2nd ed, 2020) 54–63.

('CCPP'),[35] Guatemalan refugees were able to successfully negotiate through their chosen representatives a bilateral agreement directly with the government of Guatemala which documented the conditions under which they would be prepared to return to Guatemala.

This bilateral agreement, which was signed on 8 October 1992, produced numerous benefits for both parties. For the new civilian Guatemalan government, direct negotiations with the CCPP visibly demonstrated to the international community its improved approach to democracy and human rights, after decades of military dictatorship and several well-documented atrocities.[36] Stephanie Riess records that Guatemala was the last remaining country in the Central American region at the time to have a substantial refugee population abroad, and this had become a source of embarrassment that the government wished to resolve.[37]

For the refugees involved, the effective negotiation strategies of the CCPP secured major, context-specific protection guarantees that until that point had yet to be secured by other stakeholders, including UNHCR.[38] These guarantees included detailed provisions regulating the reclamation of land, including both access to unoccupied territories and procedures for situations where the land had subsequently been occupied by other inhabitants. One of the context-specific requests of the refugees in relation to this was the opportunity to embark on a communal return and develop cooperative villages in uninhabited parts of northern Guatemala.[39] This approach ensured greater visibility to the return process and facilitated increased international oversight.

The agreement also secured a guarantee for returnees that they would not be subject to compulsory military service for a period of three years from the date of return. This guarantee was sought by the refugees due to their

[35] In the Spanish language, letters of an abbreviation are customarily doubled to indicate that the abbreviation is a plural.
[36] Stephanie Riess, ''Return is struggle, not resignation:' lessons from the repatriation of Guatemalan refugees from Mexico' (New Issues in Refugee Research Working Paper 21, UNHCR, July 2000) 18.
[37] Ibid.
[38] For comparison, see UNHCR, *Carta de Entendimiento entre el Gobierno de Guatemala y la Oficina de la Alta Comisionada de las Naciones Unidas para los Refugiados Relaltivo a la Repatriacion Voluntaria de los Refugiados Guatemaltecos* (UNHCR, 13 November 1991) <https://www.refworld.org/pdfid/3dbe67d32.pdf>.
[39] *Acuerdo Suscrito Entre Las Comisiones Permanentes de Representantes de Los Refugiados Guatemaltecos en México y El Gobierno de Guatemala* (Guatemala, 8 October 1992) <https://www.refworld.org/docid/46d6e39a2.html> ('Acuerdo Suscrito') 6.D: Retornados cooperativistas.

ongoing distrust and apprehension towards the military.[40] However, it was agreed to by the Guatemalan government on the stated basis that the returnees had been in exile for many years and needed to focus on their resettlement, reconstruction, and reintegration in Guatemala.[41] Finally, the agreement also contained provisions which dealt with some of the specific needs of the refugee communities. For example, the agreement indicated that UNHCR would continue to assist in verifying the voluntary nature of return, but would need to take into account the customs of the Indigenous communities when undertaking this work.[42] This is one of the rare examples where rights-based claims to the preservation of Indigenous customs have been directly recognised in the formation of refugee policy.

As a single case study, the bilateral agreement between the government of Guatemala and the CCPP is often heralded as a successful and unique example of refugees effectively negotiating the terms of their return with the government of the country of origin.[43] Megan Bradley argues in her work on justice, responsibility and redress in refugee repatriation that the direct negotiations of the CCPP enabled the refugee communities 'to develop sharp political skills; enhance their visibility and, by extension, their physical safety; and secure a munificent "deal" in terms of access to land'. [44] She adds that while such an approach required repeated consultation and participation, it was ultimately perceived by refugees as morally and politically significant, and reflective of their desires.[45] This type of consultation is important because, as Jon Miller and Rahul Kumar reflect more broadly, 'in the real-world debates, the issue is often less about how to restore the *status quo ante* and more about how to repair broken relationships between people'.[46]

However, this case study remains an outlier within the international refugee regime. While refugees have regularly developed political communities in exile to advocate collectively for their needs and wishes, there has been rarely any formal inclusion of these communities in decisions relating to

[40] Riess (n 36) 15.
[41] Acuerdo Suscrito (n 39) 2.D.
[42] Ibid 1.A.
[43] See, for example, Karen Jacobsen, 'Durable Solutions and the Political Action of Refugees' in Megan Bradley, James Milner and Blair Peruniak (eds), *Refugees' Roles in Resolving Displacement and Building Peace* (Georgetown University Press, 2019) 23, 33; also, Riess (n 36).
[44] Megan Bradley, *Refugee Repatriation: Justice, Responsibility and Redress* (Cambridge University Press, 2013) 182.
[45] Ibid 182–183.
[46] Jon Miller and Rahul Kumar, 'Preface' in Jon Miller and Rahul Kumar (eds), *Reparations: Interdisciplinary Inquires* (Oxford University Press, 2007) v, vi.

return. This can be most clearly seen in the practice of what is known as tripartite agreements – which are made between UNHCR, the country of origin and the country of asylum – to outline the terms and conditions of a return arrangement for refugees. It can also be seen in decisions regarding the declaration of cessation of refugee status. Both of these practices are discussed in turn.

### *5.1.1 Tripartite agreements*

In contemporary international refugee law and policy, a common practice for situations where the return of refugee groups to their country of origin is being contemplated is the development of tripartite agreements – between the country of origin, the country of asylum and UNHCR – for the repatriation of refugees. Between 1996 – when UNHCR first published a sample tripartite agreement to assist with discussions with states around the world on this issue[47] – and 2021, 31 tripartite agreements for the repatriation of refugees have been concluded around the world *and* published on UNHCR's research tool *Refworld*.[48] An additional (unknown) number of tripartite agreements also have been concluded but remain unpublished and unavailable to refugees, advocates, researchers, and other stakeholders.[49] These confidential agreements are problematic because a failure to publicly release these agreements undermines refugees' capacity to make informed decisions relating to return.

Based on a review of the publicly released tripartite agreements, these agreements generally provide some important assurances for refugee rights. Notably, they usually highlight the importance of providing refugees with accurate and objective information on the situation in the country of origin. This is essential in order for refugees to make a free and informed choice as

[47] UNHCR suggests that this sample is 'intended to serve as a flexible reference point from which a number of acceptable alternatives can be drawn': UNHCR, *Handbook: Voluntary Repatriation: International Protection* (UNHCR, 1996) ('*Handbook: Voluntary Repatriation*') 78.

[48] References for each of these tripartite agreements are contained in the Annex to this thesis.

[49] See, for example, the press release regarding the signing of an unpublished Memorandum of Understanding between UNHCR, UNDP and Myanmar: see UNHCR and UNDP, 'UNHCR and UNDP sign a Memorandum of Understanding (MOU) with Myanmar to support the creation of conditions for the return of refugees from Bangladesh', *UNHCR*, (Press Release, 6 June 2018) <https://www.unhcr.org/en-au/news/press/2018/6/5b1787e64/unhcr-undp-sign-memorandum-understanding-mou-myanmar-support-creation-conditions.html>. For a more extensive list of unpublished return agreements, see Marjoleine Zieck, *UNHCR's Worldwide Presence in the Field: A Legal Analysis of UNHCR's Cooperation Agreements* (Wolf Legal Publishers, 2006) 365–366, Fn 2.

to whether to voluntarily repatriate. Commensurate with this expectation, the agreements usually also include provisions for 'go-and-see visits', whereby individual refugees and refugee representatives are supported to return to their country of origin to see with their own eyes whether the circumstances are suitable for return.[50] Additionally, these agreements normally affirm important protection standards, such as the voluntary character of return, and that return should only take place in conditions where the 'safety and dignity' of refugees can be guaranteed.[51]

Yet, these tripartite agreements also problematically cast aside the participation of refugee-led organisations and representatives. Out of the 31 published tripartite agreements on *Refworld*, not one agreement includes refugee representatives as members of the repatriation commission. Further, only two agreements make any specific mention of any form of consultation with refugee representatives, other than their involvement with go-and-see visits. The first of these agreements, the 2019 *Tripartite Agreement for the Voluntary Repatriation of Central African Refugees Living in Cameroon*, simply notes under article 40.4 that the Tripartite Commission 'shall where appropriate invite any person including refugee representatives to take part in its deliberations as an observer owing to his expertise'.[52] The second of these agreements, the 2003 tripartite agreement between Angola, South Africa and UNHCR, suggests that consultation should take the form of:

> meetings with the refugees for the purposes of explaining to them the concept of voluntary repatriation, and to provide them with all information relevant to their repatriation and reintegration in Angola.[53]

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[50] These visits enable refugees to return temporarily to their country of origin without the fear of losing refugee status while undertaking the visit.

[51] These standards have been endorsed in several ExCom Conclusions and (more recently) the Global Compact on Refugees. See, in particular, UNGA, *Report of the Fifty-Fifth Session of the Executive Committee of the High Commissioner's Programme, Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees*, UN Doc A/AC.96/1003 (12 October 2004) [23]; also, Global Compact on Refugees [87].

[52] *Tripartite Agreement for the Voluntary Repatriation of Central African Refugees Living in Cameroon between the Government of the Republic of Cameroon, the Governments of the Central African Republic and UNHCR* (UNHCR, 29 June 2019) <https://www.refworld.org/docid/5d2f244a4.html>.

[53] *Agreement for the Establishment of a Tripartite Commission for the Voluntary Repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees* (UNHCR, 14 December 2003) <https://www.refworld.org/docid/447e99f50.html>. This article mirrors a previous agreement from 1995 for the repatriation of Angolan refugees from Namibia: see *Tripartite Agreement on the Establishment of a Commission for the Promotion of Voluntary Repatriation of Angolan Refugees between the Government of the Republic of Angola, the*

These findings are not commensurate with contemporary commitments towards the inclusion of refugees in decision-making processes that affect them.[54]

These findings are also not unexpected. Dating back to the 1980s, there have been calls for tripartite agreements to include refugees through their representative organisations as an equal stakeholder, essentially making these arrangements quadripartite agreements.[55] However, states and UNHCR have been largely resistant to the idea. Marjoleine Zieck records that in 1993 UNHCR completed a draft of its *Handbook on Voluntary Repatriation* where it initially proposed substantial involvement of refugees in negotiating the content of return agreements. Notably, the draft indicated that 'where circumstances allow, it may be possible and even desirable to include the refugees and establish a quadripartite commission'.[56] Yet, the final version published three years later removed this reference. Instead, it suggested less ambitiously that 'the refugee community should be kept informed of the progress of repatriation negotiations' and 'formal representation of the refugee community can be considered'.[57] While UNHCR and states may solicit some informal input from refugee communities in practice prior to engaging in formal tripartite agreements, this is not the same as having refugees directly participate in these decision-making processes as equal stakeholders with the capacity to influence the terms of the agreement and have any proposals or objections formally recorded.

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*Government of the Republic of Namibia and the United Nations High Commissioner for Refugees* (UNHCR, 7 November 1995) <https://www.refworld.org/docid/447d5d2d4.html>.

[54] In addition to the commitments made in the Global Compact on Refugees, see Committee on the Elimination of Discrimination against Women, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc CEDAW/C/GC/30 (1 November 2013) [57]. This is discussed in greater detail in Chapter 2.5.

[55] For example, in a paper commissioned by UNHCR in 1987, Guy S Goodwin-Gill records that the International Council of Voluntary Agencies advocated at the time that it was 'essential to involve refugee representatives in any discussions or tripartite commission meetings': Guy S Goodwin-Gill, 'Voluntary Repatriation: Legal and Policy Issues' (Research Paper, UNHCR, August 1987) 23 (on file with author). See also, 'The UNHCR Note on International Protection You Won't See' (1997) 9(2) *International Journal of Refugee Law* 267, 268–269; also Jeff Crisp, 'Repatriation principles under pressure' (2019) 62 *Forced Migration Review* 19, 22.

[56] Marjoleine Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff, 1997) 120.

[57] *Handbook: Voluntary Repatriation* (n 47) 26.

### *5.1.2 Cessation of refugee status*

In addition to the exclusion of refugees from tripartite agreements, refugee representatives and refugee-led organisations also often find themselves side-lined from decisions relating to the cessation of refugee status for particular refugee groups. Under the 1951 Refugee Convention, Article 1C (5-6) provides for the cessation of refugee status and the subsequent legally permissible return of refugees in situations where there has been a fundamental change of circumstances in the country of origin.[58] If and when this legal threshold for cessation is reached, the consent of refugees (or now former refugees) is not required before a return take place.[59] From an ethical position, the non-consensual return of former refugees in these circumstances is justified (appropriately or not) on the basis that, as surrogate international protection is no longer needed, states regain the sovereign discretion to deport former refugees under the same legal frameworks of other non-citizens.

Although international law outlines that states parties to the 1951 Refugee Convention are primarily responsible for the application of the cessation clause(s) in the convention,[60] UNHCR has at times sought to assist by issuing what it calls 'formal declarations of general cessation of refugee status' for particular refugee groups.[61] These declarations indicate to governments that UNHCR believes that it is safe for the refugee group to

[58] According to UNHCR's Guidelines on the Cessation of Refugee Status, this provision requires states to demonstrate that the cessation of refugee status is possible because the change in circumstances is fundamental, enduring and will lead to the restoration of protection for the individual involved. See UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)* (UNHCR, HCR/GIP/03/03, 10 February 2003) <https://www.unhcr.org/en-au/publications/legal/3e637a202/guidelines-international-protection-3-cessation-refugee-status-under-article.html> ('*Cessation of Refugee Status Guidelines*').

[59] Ibid, noting 'Cessation under Article 1C(5) and (6) does not require the consent of or a voluntary act by the refugee' at [7].

[60] For an analysis of their legality, see James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2nd ed, 2021) 1156–1160. See also UNGA, *Addendum to the Report of the United Nations High Commissioner for Refugees, Conclusion of Status*, UN Doc A/47/12/Add.1 (30 March 1993) [22], noting that 'the application of the cessation clause(s) in the 1951 Convention rests exclusively with the Contracting States, but that the High Commissioner should be appropriately involved…'.

[61] *Cessation of Refugee Status Guidelines* (n 58). UNHCR has indicated that between 1973 and 2020, UNHCR 'has found it appropriate to invoke the "ceased circumstances" clause on 25 occasions': see UNHCR, 'Amicus curiae of the United Nations High Commissioner for Refugees on the interpretation of the 1951 Convention relating to the Status of Refugees', Submission in *Case Number 19-028135ASD-BORG/01 regarding ------ (represented by lawyer Arild Humlen) against the State/the Norwegian Appeals Board before the Borgarting Court of Appeal (Borgarting Lagmannsrett)*, 10 April 2020 <https://www.refworld.org/docid/5f808ec04.html> Fn 62.

return home. These formal declarations are politically persuasive in that they often give rise to states taking concrete steps to return (former) refugees to their country of origin, both with and without their consent. These declarations are also often concurrently made with a decision by UNHCR to withdraw protection assistance to these refugee groups.

Since the emergence of this practice, 'declarations' of cessation have been a source of significant controversy. This controversy has arisen in part because refugees have frequently fundamentally disagreed with the assessment of states and UNHCR that there has been a fundamental and enduring change in circumstances in the country of origin and that they are no longer in need of international protection.[62] It has also arisen because the processes through which states and UNHCR make these determinations are often opaque and do not enable appropriate consultation with refugee-led organisations or representatives prior to the decision being made. This failure to consult is problematic because refugees often have unique access to relevant information regarding the conditions in the country of origin. It is also problematic because such declarations may ultimately result in refugees losing access to any right to consultation and being returned to their country of origin against their will.

UNHCR's guidelines for states on the cessation of refugee status indicate that 'it is important that both the declaration process and implementation plans be consultative and transparent, involving in particular UNHCR, given its supervisory role'.[63] The Guidelines further suggest, without giving any further guidance on procedure, that 'NGOs and refugees should also be included in this consultative process'.[64] However, in practice refugee communities often believe this commitment to consultation is not respected.

For example, on 13 June 2018 UNHCR announced that it was enacting its cessation procedures for ethnic Chin refugees in Malaysia following 'an analysis of the political, social and security development in Chin state (in

[62] See, for example, the response of Rwandan refugees to the joint statement made by UNHCR and the government of Tanzania on 5 December 1996 that 'all Rwandese refugees in Tanzania are expected to return home by 31 December 1996', documented in Beth Elise Whitaker, 'Changing priorities in refugee protection: the Rwandan repatriation from Tanzania' (New Issues in Refugee Research Working Paper No 53, UNHCR, February 2002); also, in relation to East Timor, see Georgia Cole, 'Cessation' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 1029, 1035–1036.
[63] *Cessation of Refugee Status Guidelines* (n 58) 7
[64] Ibid.

Myanmar) over the course of several years'.[65] In its community messaging, UNHCR did not provide detailed reasons for its decision, but simply advised that 'the situation in Chin State (in Myanmar) is now stable and secure from a refugee protection perspective' and that 'ethnic Chin refugees are safely able to avail themselves to the protection of the Myanmar Government and hence are no longer in need of international protection from UNHCR'.[66] UNHCR gave no indication in its messaging that any consultation process occurred with Chin refugee organisations and representatives prior to making this statement. It also gave no indication that it assessed the conditions in the remainder of the country when making this decision.[67]

In response to UNHCR's announcement, hundreds of Chin refugees, coordinated by the Alliance of Chin Refugees, protested outside UNHCR's office in Kuala Lumpur to challenge the decision and bring it to the attention of the international community.[68] They argued that not only was it unsafe for Chin refugees to return to Myanmar at the time, but that UNHCR was not applying its own guidelines on cessation appropriately.[69] Following substantial campaigning in the media by the refugee community,[70] and the emergence of new country of origin information,[71] UNHCR indicated on 14

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[65] UNHCR, 'Community Messaging on Chin Cessation Process' (Web page, Star Media Group, 13 June 2018) <https://www.rage.com.my/refugeesnomore-chin/>.

[66] Ibid. Hamsa Vijayaraghavan and Pallavi Saxena have subsequently assessed that 'UNHCR made no move to share information on how this conclusion had been reached. The little material that was eventually provided was on general access to health, education and documentation, without mention of other relevant elements such as safety, security, infrastructure and extent of military/paramilitary activity in returnee areas': see Hamsa Vijayaraghavan and Pallavi Saxena, 'A premature attempt at cessation' (2019) 62 *Forced Migration Review* 41, 42.

[67] This is also contrary to UNHCR's own guidelines. See UNHCR, 'Amicus curiae of the United Nations High Commissioner for Refugees on the interpretation of the 1951 Convention relating to the Status of Refugees', Submission in *Case Number 19-028135ASD-BORG/01 regarding ------ (represented by lawyer Arild Humlen) against the State/the Norwegian Appeals Board before the Borgarting Court of Appeal (Borgarting Lagmannsrett)*, 10 April 2020 <https://www.refworld.org/docid/5f808ec04.html> [23].

[68] Rashvinjeet S Bedi, Samantha Chow and Justine Yeap, 'Chin refugees protest at UNHCR offices over UN decision on refugee status', *The Star* (Kuala Lumpur, 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/#5BuVJvOtqeI2jVMX.99>.

[69] Ibid. See also R.AGE, *Refugees No More* (Web page, Star Media Group, 2019) <https://rage.com.my/refugeesnomore/>.

[70] See, of note, 'The Chin Up Project' (Web page, Star Media Group, 2019) <https://chinup.my/>.

[71] See, for example, Yanghee Lee, Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 73rd session of the General Assembly (Speech, UNOHCHR, 23 October 2018) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23779&LangID=E>; also Andrej Mahecic, 'UNHCR concerned about the humanitarian impact of continuing violence in southern Chin State and Rakhine State in Myanmar, and stands

March 2019 that it was reversing its initial decision and announced that 'Chin refugees may still require international protection due to the worsening security situation in southern Chin State in Myanmar'.[72] Rather than accept that an error had been made in the first instance, UNHCR indicated that:

> The decision to reassess our overall approach is in line with our stated commitment at the very start of the review process – that UNHCR would continue to monitor developments and revisit our position if warranted.[73]

However, it is difficult to reconcile this position given that less than a year had passed since the initial decision, and the initial decision required an assessment of enduring and stable change in the country of origin.

In its guidelines on cessation, UNHCR indicates that, given the potential impact of a general cessation declaration, refugees and their families 'should be given an opportunity, upon request, to have their case reconsidered on grounds relevant to their individual case'.[74] This avenue to individually rebut an assessment of cessation is important to ensure safeguarding from refoulement. However, this approach is also problematic procedurally. As James Hathaway has stated, this approach not only reverses the onus of proof (which lies on the state in the context of cessation), but 'it expressly acknowledges that "cessation declarations" are likely to capture at least some people still at risk of being persecuted'.[75] Additionally, this approach curtails the involvement of refugee representatives and refugee-led organisations in such decision-making areas, limiting opportunities for rebuttal to individual refugees.

### *5.1.3 Explaining exclusion*

What explains this widespread exclusion of refugee representatives from decisions relating to return almost uniformly around the world? Katy Long suggests, in her seminal text *The Point of No Return: Refugees, Rights and*

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ready to offer support' (Press Briefing, UNHCR, 8 February 2019) <https://www.unhcr.org/news/briefing/2019/2/5c5d4e754/unhcr-concerned-humanitarian-impact-continuing-violence-southern-chin-state.html>.

[72] UNHCR, 'UNHCR says ethnic Chin refugees may require continued international protection as security situation worsens in Myanmar' (Press Release, UNHCR, 14 March 2019) <https://www.unhcr.org/en-au/news/press/2019/3/5c8a31984/unhcr-says-ethnic-chin-refugees-require-continued-international-protection.html>.

[73] Ibid.

[74] *Cessation of Refugee Status Guidelines* (n 58) [25] (vii).

[75] Hathaway (n 60) 1157–1158, Fn 135.

*Repatriation*, that 'a cynical interpretation—but one that undoubtedly holds some truth— is that refugees have often been excluded … because such exercises often tend to involve populations who are reluctant to return'. She adds that 'it is certainly clear from UNHCR archives that refugee participation in the politics of return has tended to be viewed as an obstacle to securing the sustainable political resolution of a refugee crisis'.[76] This is particularly the case given that refugees who are willing to return often have already done so outside of these formal, intergovernmental processes.[77]

Focusing on this political context, it is clear that states preference the solution of repatriation over others. This preferencing is so transparent it is embedded into the international legal instruments governing repatriation. For example, several ExCom Conclusions and the Global Compact on Refugees state plainly and repeatedly that the 'voluntary repatriation in conditions of safety and dignity remains the preferred solution in the majority of refugee situations'.[78] States embrace this preferencing in part because it reiterates that providing protection is first and foremost the responsibility of the country of origin towards its own citizens. Additionally, it is also supported by states because it downplays the need for responsibility-sharing,[79] and it minimises claims for international accountability for wrongdoing.[80]

When refugee representatives and refugee-led organisations object to this prioritisation of return in practice, Long is correct in suggesting that such individuals and groups are often side-lined from participating in formal negotiations because they are seen as disagreeable to states' interests and

[76] Long (n 26) 190.
[77] UNHCR and other stakeholders have often labelled these types of refugee returns as 'spontaneous returns'. However, the use of the term 'spontaneous' is problematic in this context given the way in which it denies recognition of the ways refugees may carefully plan their return, taking into account the individual and collective resources and options that may be available to them. Instead, it is more appropriate to consider such returns as either refugee-led returns or returns that are unassisted by states or other stakeholders.
[78] Global Compact on Refugees [87]. See also, UNGA, *Report of the Fifty-Second Session of the Executive Committee of the High Commissioner's Programme, Conclusion on International Protection*, UN Doc A/AC.96/959 (5 October 2001) [22](j); UNGA, *Report of the Fifty-Fifth Session of the Executive Committee of the High Commissioner's Programme, Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees*, UN Doc A/AC.96/1003 (12 October 2004) [23]; *Resolution adopted by General Assembly on 19 December 2017*, GA Res, UN Doc A/RES/72/150 (17 January 2018) [39].
[79] Long adds that 'repatriation is particularly attractive to states because – at least superficially – repatriation reinforces the capacity of the national-state system of international political organization, while simultaneously appearing to offer refugees renewed access to the liberal freedoms of citizenship': Long (n 26) 27.
[80] For more on international accountability for wrongdoing in the international refugee regime, see Tally Kritzman-Amir, 'Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law' (2009) 34(2) *Brooklyn Journal of International Law* 355.

what states perceive to be the best solution to a displacement situation. This side-lining is possible due to the significant power asymmetries that exist between states and refugee representatives, as well as the lack of any clear legal obligations to engage with refugee-led organisations and refugee representatives under international law.

However, while this reasoning is informative, it does not fully explain why refugee representatives are also routinely excluded from repatriation negotiations in contexts where they are generally supportive of return as a preferred solution to their displacement. It also does not fully detail UNHCR's reasons for failing to ensure the inclusion of refugee representatives in tripartite agreements and decisions relating to cessation, although undoubtedly pressure from states is a major factor given that UNHCR operates within a state-based system and is dependent on states for funding and the continuation of its protection mandate.

Looking at state and UNHCR practice in this area more closely, two other reasons also emerge for not engaging with refugee representatives and refugee-led organisations in these decision-making areas. The first of these reasons relates to a clear and often legitimate concern that refugee representatives may be engaging in illiberal practices that undermine the rights of the individual refugees whom they claim to represent. While it is important not to make cultural assumptions in relation to this,[81] this concern may arise due to evidence of militarization within refugee communities,[82] the favouring of certain ethnic groups, or suspicions of corruption.[83] Alternatively, it may arise on gendered grounds. A common example of this is when states and UNHCR perceive that the rights and wishes of refugee

[81] Elisabeth Olivius notes that 'in humanitarian policy and practice, refugee communities are regularly assumed to be traditional societies where norms and ideas such as democracy and human rights are unfamiliar. By contrast, humanitarian organizations are assumed to be bringing modernity and progress into new territory'. She adds that 'the assumption that international humanitarian organisations are culturally more advanced and normatively superior denies refugees a role as political actors in the transformation of their own communities'. See Elisabeth Olivius, 'Political space in refugee camps: Enabling and constraining conditions for refugee agency' in Hansson Eva and Meredith L Weiss (eds), *Political Participation in Asia: Defining and Deploying Political Space* (Routledge, 2017) 169, 177–178.

[82] See, for example, the analysis of 'refugee-warrior communities' in Aristide Zolberg, Astri Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (Oxford University Press, 1989) 275–258; also, Kirsten McConnachie, 'Rethinking the 'Refugee Warrior': The Karen National Union and Refugee Protection on the Thai–Burma Border' (2012) 4(1) *Journal of Human Rights Practice* 30.

[83] See Jeff Crisp, 'Why do we know so little about refugees? How can we learn more?' (2003) 18 *Forced Migration Review* 55.

women and girls are not being respected by either male refugee representatives or refugee-led organisations run predominantly by men.

States and UNHCR do not always discuss these concerns publicly.[84] Nevertheless, an illustrative example can be seen in the 2019 tripartite agreement between Angola, the Democratic Republic of Congo and UNHCR. This agreement not only excludes refugee representatives from the agreement in its entirety, but goes further to state that:

> No community leader, tribal leader, customary, community, or traditional authority can make a collective decision to return or put pressure on anyone to make a decision contrary to their will.[85]

This provision explicitly highlights the concern of the parties to the agreement that refugee representatives may adversely interfere with the individual right of refugees to choose when to voluntarily return to their own country.

The other major reason for failing to engage with refugee representatives and refugee-led organisations during return negotiations is the lack of understanding as to how representative bodies emerge in displacement contexts and a failure to provide the support they need to effectively participate. This can be seen in the case of the negotiations of Guatemalan refugees in Mexico discussed above, where few stakeholders anticipated that the CCPP would play such a substantive role in negotiating the conditions of their return.[86]

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[84] Several cables released by Wikileaks detail some of these concerns among states and UNHCR. See, for example, 'Refugee Update: Mtabila Burundi Resist Return; UNHCR on Tanzania's Return of Congolese' (Wikileaks Cable, 09DARESSALAAM882_a, 21 December 2009) <https://wikileaks.org/plusd/cables/09DARESSALAAM882_a.html>, noting that 'UNHCR suspects camp leaders are conducting intimidation campaigns to limit repatriation'.

[85] *Accord tripartite entre le Gouvernement de la République d'Angola, le Gouvernement de la République Démocratique du Congo (RDC) et le Haut Commissariat des Nations Unies pour les Réfugiés (HCR) relatif au rapatriement volontaire des réfugiés congolais vivant en Angola dans la Province de Lunda Norte* (UNHCR, 23 August 2019) <https://www.refworld.org/docid/5d64df424.html> Art 4.4 (translated from French).

[86] In 1989, Central American governments held a major international conference in Guatemala City to address the flows of refugees in the region and to develop a plan of action to facilitate durable solutions for more than two million Central American refugees and other displaced persons. During this conference, governments, including Mexico and Guatemala, stressed the 'crucial role played by the tripartite commissions, made up of representatives of the country of asylum, the country of origin and the United Nations High Commissioner for Refugees, in facilitating and promoting the voluntary repatriation of refugees'. They also committed to respect 'the voluntary and *individually-manifested* character of repatriation' (own emphasis). At no point in 1989 did UNHCR or states

When the CCPP emerged as a legitimate and powerful stakeholder in return negotiations in 1991 and 1992, it was largely due to their own initiatives and their ability to work together as a community across cultural, linguistic, and religious differences. As one of the members of the CCPP – Ricardo Epifanio Pérez Hernández – has documented in his thesis on the subject, the CCPP targeted transnational networks to secure international funding to establish its field offices and to cover the costs of its visits to Guatemala for meetings with the government.[87] The CCPP also arranged for participant assemblies to elect its representatives, and established a formal governance structure to develop its political strategies, manage funding arrangements and build international partnerships.[88]

The Mexican Commission for Aid to Refugees ('COMAR') and UNHCR had previously supported these refugee groups to pursue economic self-sufficiency initiatives in Mexico. However, COMAR and UNHCR never expected nor intended for these refugee communities to subsequently mobilise politically to negotiate the conditions of their return. Thus, as successful as the CCPP were in securing a seat at the decision-making table, this case study reveals the amount of effort required by refugee communities to force themselves into the decision-making process, and the time and resources required. Financial and material support for this type of political participation is rarely provided to refugee communities, and remains a major barrier to the group-based participation of refugees in return decisions around the world.

### 5.2 Resettlement

In addition to the exclusion of refugees from decisions relating to return, the international refugee regime has also limited the participation of refugees, both individually and collectively through their chosen representatives, in

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envisage refugees' representative organisations contributing as a leading, or even active, stakeholder in future return negotiations. See UNGA, *Office of the United Nations High Commissioner for Refugees, International Conference on Central American Refugees: Report of the Secretary General*, UN Doc A/44/527 (3 October 1989) Annex: Declaration and Concerted Plan of Action in Favour of Central American Refugees, Returnees and Displaced Persons. For more on this conference and the context surrounding it, see Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar, 2016) 175–188.

[87] Ricardo Epifanio Pérez Hernández, *El Retorno de los Refugiados del Conflicto Armado del Año 85 al 1999* (Master's Thesis, Universidad de San Carlos de Guatemala, July 2005) 25.

[88] Ibid. A key element of this strategy was the push by CCPP in 1990 for UNHCR and COMAR to formalise its legal standing.

decisions relating to resettlement. This can be seen in three central decision-making areas. First, it can be seen in the restrictions imposed upon individual refugees who wish to seek resettlement as a particular solution to their displacement. Second, for refugees who are identified as needing resettlement, it can be seen in the restricted capacity of refugees to have a say in choosing where they are resettled. Third, it can be identified in the large-scale exclusion of refugee representatives and refugee-led organisations from the design and implementation of resettlement policy. Each of these decision-making areas are discussed below.

### *5.2.1 Seeking resettlement*

Unlike the right to seek asylum and the right to return to one's own country, refugees have no clear right to either seek or receive resettlement under international law. The Preamble to the 1951 Refugee Convention recognises broadly that 'the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution … cannot therefore be achieved without international co-operation'. However, beyond this, the Convention says very little that directly deals with the provision of resettlement, other than permitting refugees to transfer their own assets to another country for the purposes of resettlement.[89]

The absence of any right of refugees to seek or receive resettlement, as well as any corresponding obligation on states to provide resettlement to refugees, has led to resettlement as a durable solution operating in what Tom De Boer and Marjoleine Zieck have referred to as a 'legal abyss'.[90] This legal abyss allows states to pick and choose how many refugees they wish to resettle each year, if any at all. It also enables states to establish criteria as to whom should be resettled, with little oversight or accountability from other states, UNHCR or other stakeholders.

At times, this approach to resettlement has led to successful, large-scale resettlement programmes being implemented by states. The most notable example of this is the Comprehensive Plan of Action for Indochinese Refugees, where the right political conditions led to over one million resettlement places being provided to Vietnamese and Laotian refugees between 1979 and 1996.[91] Yet, far more commonly, resettlement as a

[89] See 1951 Refugee Convention art 30.
[90] Tom De Boer and Marjoleine Zieck, 'The Legal Abyss of Discretion in the Resettlement of Refugees: Cherry-Picking and the Lack of Due Process in the EU' (2020) 32(1) *International Journal of Refugee Law* 54.
[91] See Mathew and Harley (n 86) 151.

durable solution to refugees is critically underprovided. UNHCR's Global Trends data reveals that consistently less than one per cent of persons identified as in need of resettlement each year are provided with a resettlement offer.

This critical shortage of resettlement places has closed opportunities for refugees to meaningfully seek resettlement as a solution to their displacement. Apart from a few notable but relatively small alternative pathways which have opened up additional choices for some refugees,[92] refugees are generally prevented from applying directly to states to be resettled. Instead, they are directed to seek resettlement opportunities through UNHCR, who, in its own words, 'partners with resettlement States to coordinate and deliver resettlement programmes that offer protection and solutions to refugees facing heightened protection risks'.[93]

Through the delivery of these resettlement programmes, UNHCR has come to exercise considerable influence and control in determining when resettlement should be offered to refugees and to whom. While resettlement states retain final authority for making a resettlement offer, UNHCR is frequently responsible for preselecting refugees, taking into account its resettlement guidelines and the criteria individual states impose. This preselection process has almost no external oversight. Resettlement states generally do not interview refugees who have not been preselected by UNHCR in the first instance.[94] There is also no legal avenue for refugees or other stakeholders to appeal a decision made by UNHCR that a refugee is ineligible or unsuitable for resettlement.

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[92] While the majority of resettlement offers globally proceed from UNHCR referrals in the first instance, other referral processes to resettlement countries also exist. See, for example, Government of Canada, 'Guide to the Private Sponsorship of Refugees Program', *Immigration, Refugees and Citizenship Canada* (Web page, 14 January 2019) <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/guide-private-sponsorship-refugees-program/> 2 ; also, in relation to state-led resettlement programmes for Afghan nationals who assisted armed forces, see UNHCR, 'Help Afghanistan - Relocation Programmes, *UNHCR* (Web page, 2021) <https://help.unhcr.org/afghanistan/relocation/>.

[93] UNHCR, *What is Resettlement?* (UNHCR, October 2020) <https://www.unhcr.org/5fe06e8b4> 2.

[94] For example, a report produced by the European Migration Network on the use of resettlement and humanitarian admission programmes in Europe found that sixteen European states implemented programs that proceeded from UNHCR referrals. Among these states, ten countries reassessed candidates identified by UNHCR. See European Migration Network, *Resettlement and Humanitarian Admission Programmes in Europe – what works?* (European Commission, 9 November 2016) 23.

Whether it is due to the severe shortage of resettlement places, a desire to manage expectations, budget limitations or a lack of trust of refugees, UNHCR has also actively sought to discourage refugees from directly applying for resettlement through the organisation. For example, in a poster marketed to Syrian refugees in Turkey, Lebanon, Jordan and Egypt in 2014, UNHCR informed refugees that:

> Resettlement is not an entitlement and you cannot apply for resettlement yourself. If you fit the criteria you will be contacted by UNHCR.[95]

Similarly, in a leaflet published for refugees in Indonesia in 2017, UNHCR advised refugees:

> Please do not write to UNHCR repeatedly asking for resettlement (underline in original). Identification is based on an assessment of each case based on UNHCR records, not on requests received from refugees. Such letters take a considerable amount of UNHCR staff time and only delay resettlement processing.[96]

This latter communication is particularly problematic given that it seeks to deter refugees from communicating directly with UNHCR, suggesting that such communication makes the possibility of receiving a resettlement offer even more distant.

In its *Resettlement Handbook* – which provides management and policy guidance to staff, and is a key reference tool for resettlement countries – UNHCR suggests that while 'unsolicited requests' to UNHCR for resettlement occur, it is problematic for the organisation to place extensive reliance on these 'self-referrals'.[97] UNHCR argues that deemphasising self-referrals is important to avoid 'potential bias against refugees who cannot express their protection needs in writing, or who otherwise have difficulty accessing UNHCR'. It further suggests that such referrals may be less

[95] See UNHCR Egypt, *Leaflet on Resettlement* (UNHCR, 2014) <https://data2.unhcr.org/en/documents/download/42230>; also De Boer and Zieck (n 90) 61, Fn 42.
[96] UNHCR Indonesia, *Information for Refugees on Resettlement* (UNHCR, February 2017) <https://www.unhcr.org/id/wp-content/uploads/sites/42/2017/05/Resettlement-Information-Leaflet-English-Feb-2017.pdf> ('*Information for Refugees on Resettlement – Indonesia*')1.
[97] UNHCR, *UNHCR Resettlement Handbook* (UNHCR, 2011) ('*UNHCR Resettlement Handbook*') 232.

credible and have higher possibility of fraud, citing the example of 'brokers charging fees to present written claims to UNHCR'.[98]

However, this approach is concerning given that it actively restricts the agency of refugees to pursue a solution that they may see as best suited to their displacement. Although the likelihood of receiving a resettlement offer may be remote given the lack of resettlement places offered by states, this approach places no value in the claim-making process itself, either as an expression of autonomy or as a rights-based petition for international protection. The lack of a fully transparent resettlement procedure also creates uncertainty among refugees, as many are not aware if UNHCR will consider their individual situation as being suitable for resettlement and when this consideration will take place.

For refugees, this uncertainty leads to many waiting indefinitely, holding onto hope of a resettlement solution that may not be forthcoming. This waiting in and of itself, Molly Fee argues, burdens refugees with additional material, emotional and physical costs.[99] It also leads to the proliferation of rumours among refugee communities and a distrust of UNHCR.[100] For UNHCR, the absence of a clear procedure from which all refugees can apply for resettlement may save some administration costs. However, it creates additional tensions with refugee communities, who often see the organisation, as opposed to states, as the major gatekeeper to resettlement. From a policy perspective, it also means that UNHCR does not truly know how many refugees seek resettlement as a solution to their displacement around the world each year.[101]

### *5.2.2 Preferences and matching*

For refugees who are identified as being in need of resettlement, UNHCR additionally limits refugees' involvement in articulating their preferences as to where they would like to be resettled. In its communications, UNHCR has advised refugees that it is the organisation's role to:

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[98] Ibid.
[99] Molly Fee, 'Lives stalled: the costs of waiting for refugee resettlement' (2021) *Journal of Ethnic and Migration Studies* (forthcoming).
[100] Derya Ozkul and Rita Jarrous, 'How do refugees navigate the UNHCR's bureaucracy? The role of rumours in accessing humanitarian aid and resettlement' (2021) 42 (10) *Third World Quarterly* 2247, 2259–2260.
[101] UNHCR's methodology for estimating the number of refugees in need of resettlement can be found in UNHCR, *UNHCR Projected Global Resettlement Needs 2022* (UNHCR, 23 June 2021) 98–99.

> identify the most appropriate country (for resettlement) taking into account the presence of immediate family members in resettlement countries and the criteria applied by each respective country.[102]

It has also told refugees directly that they cannot choose the country to which they are referred to for resettlement.[103]

Under UNHCR's resettlement procedures, refugees have the right to individually refuse a resettlement offer. As Annelisa Lindsay notes, 'the only agency that refugees possess in the resettlement regime is the choice not to resettle if they have been offered resettlement'.[104] However, even this decision is usually presented on a 'take it or leave it' basis. UNHCR may work behind closed doors with individual refugees who reject a resettlement offer to see if they can find another country willing to resettle them. However, publicly UNHCR has advised refugees in some country contexts that if they reject a resettlement offer, the organisation 'will normally not resubmit your case to another country'.[105]

Given the shared desire among resettlement countries, UNHCR and refugees alike for resettlement to lead to successful integration outcomes, the absence of any formal procedure to record and identify refugees' preferences for where they would like to be resettled, and their reasons for these preferences, appears to be a missed opportunity. Recent research in this area has highlighted the possibility of utilising two-sided matching theory in the allocation of resettlement places to give refugees some meaningful say in where they would like to be resettled. [106] This approach enables refugees to register their preferences as to where they would like to be resettled and for states similarly to indicate the types of refugees they would like to receive. An independent system then matches these preferences by using a mathematical algorithm to produce the most efficient results. This algorithm is commonly deployed in other matching scenarios, such as the matching of tertiary-level students to university courses and programmes.

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[102] *Information for Refugees on Resettlement – Indonesia* (n 96) 1, 2.
[103] Ibid 1; also, *UNHCR Resettlement Handbook* (n 97) 375.
[104] Annelisa Lindsay, 'Surge and selection: power in the refugee resettlement regime' (2017) 54 *Forced Migration Review* 11, 12.
[105] *Information for Refugees on Resettlement – Indonesia* (n 96) 2.
[106] See Jesus Fernandez-Huertas Moraga and Hillel Rapoport, 'Tradable Refugee-admission Quotas and EU Asylum Policy' (2015) 61(3) *CESifo Economic Studies* 638. See also Will Jones and Alexander Teytelboym, 'Matching Systems for Refugees' (2017) 5(3) *Journal on Migration and Human Security* 666.

So far, preference matching of this kind has been piloted in local areas in the United Kingdom with the resettlement of Syrian refugees.[107] However, it is possible that such an approach could be broadened in resettlement policy more widely, so long as it is designed in consultation with refugees and is implemented in a way that is compliant with international human rights law, particularly with regards to non-discrimination. In advocating for this approach, Will Jones and Alexander Teytelboym have suggested that the incorporation of refugee choice in this context not only facilitates more successful integration in the country ultimately matched, but it also gives weight to refugees and states' particular priorities.[108] Additionally, this approach is likely to improve transparency in the resettlement selection process, as it makes visible how refugees are referred to resettlement states and how resettlement offers are made.

For refugees, there may be genuine questions as to whether such a reform is reflective of their desires and aspirations. However, at a minimum this approach is likely to give refugees a greater say in fashioning their own destiny than currently exists. Among the refugees interviewed for this research who received a resettlement offer through a UNHCR referral process, many noted the lack of any say in where they were resettled, as well as lack of autonomy they experienced when going through the process. For example, Muzafar Ali, a former Hazara refugee from Afghanistan, stated that during the resettlement process:

> refugees have no choice. It is whatever UNHCR decides. They don't ask refugees what you want and what is needed. They are not obliged to answer any questions either.[109]

Apajok Biar, a former refugee from South Sudan, discussed in a similar manner her family's experience of being resettled from Kakuma refugee camp in Kenya to Australia:

> We were just told that you are going to this country. You just say yes because you are starting a new life. You have no idea. You don't

[107] For an evaluation of this pilot, see UNHCR, IOM and City University London, *Towards Integration: The Syrian Vulnerable Persons Resettlement Scheme in the United Kingdom* (UNHCR, November 2017) <https://www.unhcr.org/en-au/protection/basic/5a0ae9e84/towards-integration-the-syrian-vulnerable-persons-resettlement-scheme-in.html>.
[108] Jones and Teytelboym (n 106).
[109] Interview with Muzafar Ali, Co-founder of Cisarua Refugee Learning Centre in Indonesia (29 November 2019).

> know anyone there. You don't know anything about the country. You just figure it out and you move on.[110]

In her book, *Body Counts: The Vietnam War and Militarized Refugees,* Yến Lê Espiritu has similarly highlighted the ambivalent experiences of Vietnamese refugees who were resettled to the United States of America after the war in Vietnam. She notes that:

> not all Vietnamese came running through the door that the United States allegedly opened. Rather, many moved very slowly, with much confusion, ambivalence, and even misgivings, uncertain about what they were walking toward or what they were walking from. And a few, in fact, travelled in the opposite direction, away from the United States.[111]

In her view, the experiences of these resettled Vietnamese refugees was in part due to the stark absence of choice in the flight-to-resettlement process.

### *5.2.3 The development of resettlement policy*

In addition to the limitations placed on refugees from participating in decisions relating to their individual resettlement claims, refugees' chosen representatives have often been left out from the design and implementation of resettlement policy. At the international level, two primary governance mechanisms exist for the development and coordination of resettlement policy. These are the Annual Tripartite Consultations on Resettlement ('ATCR') and UNHCR's Working Group on Resettlement. UNHCR established both mechanisms in 1995 in response to a perceived shift in states' interest in resettlement in the aftermath of the Cold War, as well as a belief that UNHCR itself was failing to properly articulate and apply appropriate criteria and policies for the assessment and use of resettlement.[112]

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[110] Interview with Apajok Biar, Co-founder of South Sudan Voices of Salvation Inc (3 December 2019).

[111] Yến Lê Espiritu, *Body Counts: The Vietnam War and Militarized Refugees* (University of California Press, 2014) 2.

[112] In December 1994, an internal review of UNHCR's policies and practice recommended that UNHCR needed to 'modify its current approach' in order 'to ensure that resettlement can continue to function effectively as a tool of protection'. The review proposed that this should include 'focussing more on policy development and dissemination', and that 'a forum should be established for regular and on-going multilateral dialogue with resettlement country governments and nongovernmental organizations on resettlement needs, strategies and practices': see John Fredriksson and Christine Mougne, *Resettlement*

Since their formation, both mechanisms have influenced the ways in which states and UNHCR implement resettlement procedures in several significant ways. Without being exhaustive, these mechanisms have produced UNHCR's *Resettlement Handbook*, which details whom UNHCR views as most in need of refugee resettlement and establishes a definition of resettlement.[113] Relevantly, UNHCR defines resettlement as 'the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status'.[114] This understanding of resettlement ensures protection from *refoulement* and provides refugees with 'access to rights similar to those enjoyed by nationals'. However, this definition does not require resettlement states to provide refugees with voting rights in the resettlement country, as these rights are normally reserved for citizens.[115]

These mechanisms have also been responsible for developing UNHCR's policy for the 'strategic use of resettlement'. This approach is understood as:

> the planned use of resettlement in a manner that maximizes the benefits, directly or indirectly, other than those received by the refugee being resettled. Those benefits may accrue to other refugees, the hosting state, other states or the international protection regime in general.[116]

Additionally, these mechanisms have developed UNHCR's Heightened Risk Identification Tool and the NGO Toolkit, the latter of which informs

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*in the 1990s: A Review of Policy and Practice* (UNHCR, EVAL/RES/14, December 1994) <https://www.unhcr.org/3ae6bcfd4.pdf> 4.

[113] UNHCR identifies seven categories for prioritisation. These are 'legal and/or physical protection needs'; 'survivors of torture and/or violence'; 'medical needs'; 'women and girls at risk'; 'family reunification'; 'children and adolescents at risk'; and 'lack of foreseeable alternative durable solutions'. See *UNHCR Resettlement Handbook* (n 97) 245–296.

[114] Ibid 3.

[115] Ibid. The definition notes that resettlement 'carries with it the opportunity to eventually become a naturalized citizen of the resettlement country', but it does not guarantee this.

[116] Executive Committee of the High Commissioner's Programme, *The Strategic Use of Resettlement (A Discussion Paper Prepared by the Working Group on Resettlement)* (UNHCR, EC/53/SC/CRP.10/Add. 1, 3 June 2003) [6]. For a list of the tangible ways in which resettlement can be employed strategically, see Margaret Piper, Paul Power and Graham Thom, 'Refugee resettlement: 2012 and beyond' (New Issues in Refugee Research, Research Paper No 253, UNHCR, February 2003) 3. For a review of UNHCR's strategic use of resettlement, see Joanne van Selm, *Great expectations: A review of the strategic use of resettlement* (UNHCR Policy Development and Evaluation Service, PDES/2013/13, August 2013) <https://www.refworld.org/docid/520a407d4.html>.

partnerships between UNHCR and NGOs on resettlement.[117] The ATCR has also become the forum where UNHCR presents its annual Projected Resettlement Needs document to resettlement countries and other stakeholders. This document is a key resource for the forward yearly planning and allocation of resettlement needs and priorities around the world.

These policy outputs have greatly impacted the ways refugees access resettlement. However, despite this impact, refugee-led organisations and representatives have been largely kept out of the development of these policy-making processes. The ATCR has historically restricted participation to 'representatives of resettlement States, NGOs, International Organizations, UNHCR, and invited observers from prospective resettlement countries'.[118] Similarly, the Working Group on Resettlement has generally been even more restrictive in its stakeholder engagement, with only limited NGO participation permitted alongside international organisations (particularly UNHCR and IOM) and resettlement states.

Since June 2019, there has been some formal acknowledgement that refugee advocates should be supported to participate in national and global resettlement fora, including the ATCR. Notably, UNHCR's *Three-Year Strategy on Resettlement and Complementary Pathways* committed to enhancing meaningful refugee participation in resettlement as a means 'to improve quality'.[119] It proposed that this could be undertaken through 'evaluation and feedback tools co-designed and implemented with refugees'; 'support for refugee advocates, including through increased participation of refugees in national and global resettlement fora such as the ATCR'; and 'refugee involvement in matching related to placement within the resettlement country'.[120]

This commitment to strengthening refugee participation in resettlement policy has already led to the formation of a Refugee Steering Group as part of the ATCR in 2020. It has also prompted the Working Group on Resettlement to start including refugee representatives as part of its deliberations. However, these are incremental steps and refugee representatives remain underrepresented and underfunded in comparison to

[117] For more on the history of these mechanisms, see UNHCR, *The History of Resettlement: Celebrating 25 Years of the ATCR* (UNHCR, 2019) <https://www.unhcr.org/5d1633657.pdf>.
[118] *UNHCR Resettlement Handbook* (n 97) 119.
[119] UNHCR, *The Three-Year Strategy (2019-2021) on Resettlement and Complementary Pathways* (UNHCR, June 2019) <https://www.unhcr.org/5d15db254.pdf> 20.
[120] Ibid.

other stakeholders in this forum.[121] To further embed refugee participation within the ATCR, refugee representatives – many of whom are members of the Refugee Steering Group – have called for 'the formal and transparent establishment of a 'Refugee co-chair' role'' that is 'selected by refugees' and 'reflects a shift from a tripartite to a multipartite dialogue model'. They have also advocated for 20 per cent of ATCR participants to be able to contribute from a perspective of lived refugee/resettlement experience.[122] Both of these suggestions would contribute further to the transformative engagement of refugees in resettlement policy.

### 5.3 Commentary

The above analysis reveals that the international refugee regime has developed in such a way that it provides limited opportunities for refugees to meaningfully select or participate in decisions relating to repatriation or resettlement. Refugees are restricted in several ways at the individual level in their capacity to make relocation decisions most appropriate to their circumstances. Collectively, there are also very few opportunities in place for refugee-led organisations and representatives to meaningfully engage in determining how relocation arrangements should be pursued in different contexts. This is true for decisions relating to the voluntary repatriation of refugees to their country of origin, as evidenced by the common practice of tripartite agreements and declarations of cessation of refugee status. It is also the case with decisions related to the design and implementation of resettlement policy.

The exclusion of refugees from meaningfully participating in relocation decisions, both individually and through their chosen representatives, is problematic for a variety of reasons. At the individual level, this exclusion undermines the autonomy of refugees to have a meaningful say in their own lives. This autonomy may be understood, as Gerald Dworkin contends, as a capacity to reflect critically upon one's own preferences and to accept or change these preferences with procedural independence.[123] Alternatively, it may be seen, as Joseph Raz argues, as the ideal of 'controlling, to some

[121] For an overview of some of these developments, see *Concept Note on Meaningful Refugee Participation at the Annual Tripartite Consultations on Resettlement (ATCR)* (2020) (on file with author).
[122] See Anila Noor et al, *Annual Tripartite Consultations on Resettlement (ATCR): Refugee Statement* (Forum for Refugees Japan, June 2020) <http://frj.or.jp/news/wp-content/uploads/sites/2/2020/07/atcr-2020-refugee-statement.pdf>.
[123] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988) 20.

degree, their own destiny, fashioning it through successive decisions throughout their lives'.[124]

Collectively, the exclusion of refugees' chosen representatives from the design and implementation of repatriation and resettlement policy amplifies this disempowerment. It diminishes the political agency of refugees and contributes to the systemic disadvantage refugees experience in these political processes. As discussed in Chapter 3, this political exclusion causes additional harm to refugees. In the words of Jill Stauffer, it contributes to an 'ethical loneliness', where the experience of being persecuted or unjustly treated is compounded by the experience of not being heard.[125]

In reviewing state and UNHCR practice in repatriation and resettlement, this chapter has suggested that refugees should be able to participate in relocation decisions not only *individually*, but also *collectively* through their chosen representatives. Taking this approach not only avoids the adverse consequences of exclusion discussed above, but it also helps to improve protection outcomes and enable refugees to realise their rights more effectively. In the case of repatriation decisions, the inclusion of refugees' chosen representatives has been shown to lead to more contextually specific agreements being made, as can be seen by the bilateral agreement reached between the CCPP and the government of Guatemala in 1992. It can also restore broken relationships between refugees and the country of origin through the negotiation of a new social contract between both parties. In the development of resettlement policy, increased participation of refugee representatives can similarly assist in identifying priorities and ensuring that measures are appropriate.

Currently, the extant international legal instruments that address the participation of refugees in decision-making do not directly distinguish between the individual and group-based demands of refugees in relocation decisions. The 2018 Global Compact on Refugees indicates broadly in paragraph 34 that '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'. However, the Compact does not provide any further conceptual or procedural guidance as to how this should be achieved.

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[124] Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1988) 369. See also Ben Colburn, 'Autonomy, voluntariness and assisted dying' (2020) 46 *Journal of Medical Ethics* 316, 317.

[125] Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015) 1–2.

In relation to repatriation decisions, states and UNHCR have stressed the individualised nature of voluntariness and the importance of an independent choice. However, they have also committed to the voluntary repatriation of refugees in 'safety and dignity'. This commitment raises an important question. What does a dignified return require exactly? UNHCR's 1996 *Handbook on Voluntary Repatriation* utilises what it admits is a 'dictionary definition' of dignity, which suggests the principle contains meanings such as 'serious, composed, worthy of honour and respect'. UNHCR then suggests that in practice elements of dignity:

> must include that refugees are not manhandled; that they can return unconditionally and that if they are returning spontaneously they can do so at their own pace; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.[126]

While there are merits in including each of these elements, a more expansive understanding of the term – one that takes into consideration understandings of dignity drawn from moral and political philosophy[127] – could place greater emphasis on the importance of including refugees' chosen representatives in repatriation decisions as well.

In highlighting the importance and benefits of collective or group-based participation of refugees in relocation decisions, it is important to address some of the challenges that arise from this approach. As discussed above, states and UNHCR often have legitimate reservations about engaging with refugee representatives in situations where there is evidence that these representatives may be engaging in illiberal practices that undermine the rights of the individual refugees whom they claim to represent. What should be done in these scenarios? How should states, UNHCR and others respond when these concerns arise?

One approach, advocated by political theorists such as Will Kymlicka, is that in the case of concerns of illiberal practices or disagreement between representatives of the community and its individual members, the wishes and demands of the individual shall prevail.[128] This approach is taken to give primacy to ideas of liberal autonomy and agency of individuals. It is

[126] *Handbook: Voluntary Repatriation* (n 47) 2.4.
[127] See Chapter 3.4.2.
[128] See Kymlicka (n 30) 7, 34–48.

also an approach that fosters diversity and is most compatible in advancing international human rights law. As Helen O'Nions has argued in relation to the protection of the Roma in Europe, 'group rights should not be regarded as an alternative but as a supplement to individual rights where it is clear that the latter cannot be adequately protected without some collective protection'.[129]

Many relocations decisions in the international refugee regime require group-based participation of refugees because they apply to defined refugee communities rather than just individuals. For example, UNHCR's declarations of cessation of refugee status apply to specific refugee groups which are often defined in relation to national, ethnic, or religious characteristics. Similarly, tripartite agreements for the repatriation of refugees generally apply to all refugees within the country of asylum at the time. For refugees to be meaningfully heard in decision-making scenarios that impact on refugees collectively, participation in the form of individualised consent after a decision or policy has been made is not sufficient. Instead, meaningful refugee participation requires genuine consultation with refugees' chosen representatives at the time of development of the decision or policy as well.

## Conclusion

This chapter has examined to what extent and in what ways refugees have been able to participate in decisions relating to the relocation of refugees from one sovereign jurisdiction to another. Focusing on two relocation decisions in particular – voluntary repatriation and resettlement – the chapter has revealed that the international legal and policy framework governing these decision-making areas has developed in such a way that it provides limited opportunities for refugees to participate in these decision-making processes. Individually, refugees are limited in several ways in their capacity to make decisions most appropriate to their circumstances. Collectively, refugee-led organisations and representatives are also insufficiently included in decision-making processes related to how relocation arrangements should be pursued.

This chapter has argued that the exclusion of refugees from meaningfully participating in relocation decisions, both individually and through their chosen representatives, is a cause for concern. At the individual level, this

[129] Helen O'Nions, *Minority Rights Protection in International Law: The Roma in Europe* (Ashgate, 2007) 65.

exclusion undermines the autonomy and dignity of refugees to have a meaningful say in their own lives. At the collective level, the exclusion of refugee-led organisations and representatives in group-based relocation decisions is problematic because group-based participation of refugees is necessary to both improve outcomes and to address the systemic disadvantage refugees experience in these political processes. Given concerns about the inclusion of refugee representatives and refugee-led organisations in these decisions in practice, the final section of this chapter has analysed why it is important to supplement refugees' individual participation in relocation decisions with opportunities to collectively participate through their chosen representatives. The chapter has also provided some suggestions as to how to pursue this supplementary form of participation.

In the next chapter, this thesis shifts attention to another key area of decision-making in the international refugee regime that warrants the participation of refugees. This area is the participation of refugees in the delivery of programmes and services.

# || 6 ||

# REFUGEE PARTICIPATION IN PROGRAMME AND SERVICE DELIVERY

## Introduction

For many refugees, some of the most central decisions to their lives each day are decisions related to the delivery of rights-based protection programmes and services. Generally, these decisions may be linked to the provision of food, shelter, and health services. Alternatively, they may relate to education and employment initiatives, or the allocation of financial support, for example. Yet, to what extent have refugees been included in the design and implementation of programmes and services that materially impact their human rights? Further, how does the international legal and policy framework governing refugees guide participation in this area?

In the previous two chapters, this thesis considered to what extent and in what ways refugees have been able to participate in two decision-making areas central to their lives. These decision-making areas were firstly the development of laws and policies that materially impact their human rights, and secondly decisions relating to the movement of refugees from one jurisdiction to another, described as *relocation decisions*. These two chapters found that despite the emergence of some promising developments in different parts of the world, the international legal and policy framework governing these decision-making areas has significantly curtailed the participation of refugees in these decision-making processes, both individually and through their chosen representatives. This chapter builds on the analysis undertaken in the previous two chapters by considering to what extent and in what ways refugees have been able to participate in a third decision-making area, namely the delivery of rights-based protection programmes and services to refugees.

Unlike the other decision-making areas discussed in this thesis, the inclusion and participation of refugees in the delivery of programmes and services on the ground has been the subject of substantial scholarly attention over several decades. In her seminal book *Imposing Aid: Emergency Assistance to Refugees*, Barbara Harrell-Bond critiqued the dominant humanitarian model of assistance to refugees, which portrayed refugees as

helpless beneficiaries and failed to include refugees in the design and implementation of protection services.[1] Writing in 1986, she observed that 'the questions asked by (humanitarian) agencies are how much, what kind of aid, where, who, and when. What is never questioned is *who* should make these decisions'.[2] She argued that the failure to ask this question, along with the top-down provision of aid to refugees, undermined refugee agency and led to the misallocation of scarce resources. To address this shortcoming, she advocated for a critical reassessment of the assumptions underpinning humanitarian assistance, as well as the pursuit of research with refugees that is 'participatory, action-oriented, and consultative'.[3]

Since this pioneering research, several other research studies have explored further the agency of refugees and their involvement in the delivery of protection programmes and services. Some of this research has focused on the economic lives of refugees, highlighting the ways in which refugees pursue livelihoods and economic activities outside of formal assistance programmes.[4] Other research has focused on refugees' involvement in political self-governance, particularly in camp settings,[5] and the de facto provision of protection and assistance by refugees.[6]

In recent years, particularly in the context of the Black Lives Matter movement, scholarship has also begun to consider the racialized and neo-colonial dimensions of refugee programme and service delivery. This scholarship has sought to highlight, among other things, how the laws and policies instituted in humanitarian organisations reinforce the 'othering' and systematic oppression of people from the Global South by people and institutions from the Global North.[7] They also showcase how structural

[1] Barbara Harrell-Bond, *Imposing Aid: Emergency Assistance to Refugees* (Oxford University Press, 1986).
[2] Ibid 19.
[3] Ibid 21.
[4] See Karen Jacobsen, *The Economic Life of Refugees* (Kumarian Press, 2005); also, Alexander Betts, *The Wealth of Refugees: How Displaced People Can Build Economies* (Oxford University Press, 2021).
[5] See Kirsten McConnachie, *Governing Refugees: Justice, Order and Legal Pluralism* (Routledge, 2014); also, Elisabeth Olivius, 'Political space in refugee camps: Enabling and constraining conditions for refugee agency' in Hansson Eva and Meredith L Weiss (eds), *Political Participation in Asia: Defining and Deploying Political Space* (Routledge, 2017) 169.
[6] See Kate Pincock, Alexander Betts and Evan Easton-Calabria, *The Global Governed? Refugees as Providers of Protection and Assistance* (Cambridge University Press, 2020).
[7] See, for example, Saman Rejali, 'Race, equity, and neo-colonial legacies: identifying paths forward for principled humanitarian action', *ICRC Humanitarian Law and Policy Blog* (Blog post, 16 July 2020) <https://blogs.icrc.org/law-and-policy/2020/07/16/race-equity-neo-colonial-legacies-humanitarian/>. Seema Khan et al define 'othering' as 'the process through which a dominant group defines into existence a subordinate group. This is

racism has been embedded into the everyday practice of service delivery on the ground.[8]

This chapter contributes to this academic literature by providing a socio-legal analysis of the legal and policy framework governing the participation of refugees in the delivery of rights-based programmes and services. While noting that refugee participation in programme and service delivery is in a state of transition, the chapter firstly examines UNHCR's various approaches to including refugees in the delivery of services at the local level, as well as the current limitations of this. The chapter then addresses emergent trends in relation to the recognition and funding of refugee-led organisations, and the transition among some NGOs towards greater inclusion of refugees within their organisational leadership. Lastly, the chapter considers the legal dimensions of the participation of refugees in programme and service delivery.

This chapter argues that while there has been growing recognition and support for the increased participation of refugees in the provision of protection services in local settings in recent years, the international legal and policy framework remains insufficiently developed to ensure the meaningful and sustained inclusion of refugees in the design and implementation of rights-based protection programmes and services to refugees. This is problematic for the international refugee regime because while positive practices have emerged among some institutions and decision-making processes, implementation remains inconsistent and patchy. Further, numerous barriers still prevent or limit the meaningful and sustained participation of refugees in programme and service delivery in several areas.

## 6.1 UNHCR's engagement with refugees in programme and service delivery

As a subsidiary organ of the United Nations General Assembly, UNHCR exercises considerable influence and power in the design and implementation of rights-based programmes and services for refugees around the world. On an annual basis, it oversees a multi-billion-dollar

done through the invention of categories and labels, and ideas about what characterises people belonging to these categories': see Seema Khan, Emilie Combaz and Erika McAslan Fraser, *Social exclusion: topic guide* (University of Birmingham, 2015) 29.

[8] See, for example, Peace Direct, *Time to Decolonise Aid: Insights and lessons from a global consultation* (Peace Direct, 12 May 2021) <https://www.peacedirect.org/wp-content/uploads/2021/05/PD-Decolonising-Aid-Report-2.pdf>.

budget to provide international protection to refugees and other displaced persons.[9] This budget is almost entirely funded by voluntary contributions.[10] As of 31 December 2020, the organisation also employs more than 17,878 staff across 520 offices. These staff are located in 132 countries around the world.[11]

In accordance with its broad protection mandate, UNHCR works in a myriad of ways to support the diverse needs of refugee communities, both in the short and long term. Some of UNHCR's functions focus on assisting host countries with immediate reception arrangements, including registration, documentation, security screening and health assessments for new arrivals. Other programmes are devoted to meeting the needs of refugees over a more prolonged period. This may include contributing resources and expertise to facilitate education and work opportunities for refugees. Alternatively, and without being exhaustive, it may be directed towards improving food security and accommodation for refugees.[12]

In the design and implementation of its programmes and services, UNHCR has a mixed record when it comes to consulting with and including refugees. Some of its policies and practices have contributed to increased recognition and understanding of the importance of including refugees in the delivery of programme services on the ground. This has in turn influenced the international refugee regime more broadly to undertake similar participatory approaches to refugee protection. Yet, other policies and practices, including some that still operate today, have largely excluded refugees, or have limited their participation to simply that of data collectors

[9] For the year ended 31 December 2020, UNHCR expended $4.43 billion (United States dollars). See UNGA, *Voluntary funds administered by the United Nations High Commissioner for Refugees Financial report and audited financial statements for the year ended 31 December 2020 and Report of the Board of Auditors*, UN Doc A/76/5/Add.6. (22 July 2021) 17 ('UNHCR 2020 Financial Report').

[10] Voluntary contributions represented 98.7 per cent of UNHCR's total revenue in 2020. See ibid 11. UNHCR's reliance on voluntary contributions arises because paragraph 20 of UNHCR's Statute provides that 'no expenditure other than administrative expenditures relating to the functioning of the Office of the High Commissioner shall be borne on the budget of the United Nations and all other expenditures relating to the activities of the High Commissioner shall be financed by voluntary contributions'. See *Statute of the Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/428(V) (14 December 1950) ('UNHCR Statute').

[11] See UNHCR 2020 Financial Report (n 9) 17.

[12] For further analysis of the scope of UNHCR's mandate, see UNHCR, *Note on the Mandate of the High Commissioner for Refugees and His Office* (UNHCR, October 2013) <https://www.refworld.org/pdfid/5268c9474.pdf> for UNHCR's perspective; also, Guy S Goodwin-Gill, 'The Office of The United Nations High Commissioner for Refugees and the Sources of International Refugee Law' (2020) 69(1) *International and Comparative Law Quarterly* 1.

or translators who identify needs. This section examines this mixed record in more detail, examining both UNHCR's internal and external engagement with refugees through the work of its offices. It commences by exploring UNHCR's record and approach to hiring refugees within the organisation. It then considers UNHCR's external engagement with refugees, both as so-called 'beneficiaries' of UNHCR's protection work and as possible 'implementing partners'.

### *6.1.1 Employment of refugees within UNHCR*

In its early years of operations, persons with lived experience of displacement played a fundamental role in shaping UNHCR's work. Among its 99 staff in the 1950s,[13] UNHCR's first High Commissioner had personal experience of forced displacement, as did several other members of UNHCR's staff at the time. As discussed in Chapter 4, these staff members exercised considerable influence in shaping UNHCR's priorities towards serving its mandate in the 1950s. This influence included the push to establish and finance field offices so that refugees could directly communicate with UNHCR on the ground. It also included the development of innovative self-reliance initiatives, such as small business loans for refugees and vocational training ranging from apprenticeships to university scholarships.[14]

However, with the push towards humanitarian professionalisation in a manner that gives preference to technical expertise over direct experience, and with the emergence of new refugee-producing conflicts outside of Europe, this leadership of persons with lived experience of displacement within UNHCR's staffing decreased. Since the appointment of Gerrit Van Heuven Goedhart as the first High Commissioner of UNHCR in 1950, no other high commissioner has been appointed with lived experience of displacement. Further, it has become increasingly rare to see refugees or persons with lived experience of displacement in senior leadership roles within the organisation.

UNHCR's staffing and human resources policies reveal that despite being 'committed to attracting, retaining and developing a workforce that is diverse in the broadest sense',[15] UNHCR has never implemented an

[13] Susan F Martin, 'Forced Migration and Professionalism' (2001) 35(1) *International Migration Review* 226, 227.
[14] See Chapter 4.3.
[15] UNHCR, *UNHCR's People Strategy 2016-2021: In Support of Those We Serve* (UNHCR, December 2015) <https://www.unhcr.org/55f97a9f9.pdf> 12.

affirmative action recruitment policy for refugees and other persons with lived experience of displacement.[16] As discussed in Chapter 4, the fact that Van Heuven Goedhart had personal experience of displacement prior to being appointed to the post of High Commissioner was significant at the time. However, it was not an essential criterion for the role. More recently, in 2019 the UN Volunteers programme commenced a targeted pilot project to recruit refugees and stateless persons to support UNHCR operations as 'Refugee UN Volunteers'.[17] This project may ultimately lead to increased employment of refugees within UNHCR. However, it provides no guarantee of such employment and its focus on volunteerism (albeit with a volunteer living allowance) is ethically contentious.[18]

Other than this development, several barriers curtail the employment of refugees within UNHCR, particularly with regards to locally engaged staff. These barriers arise in part due to the states' views regarding the operations of UNHCR, which itself is present in any country by the consent of the state. They also arise due to the rules and regulations of the United Nations. For example, the *Staff Regulations and Rules of the United Nations* place obligations on UN staff that have limited the ability or willingness of UNHCR to employ refugees. Rule 1.2(b) provides that all staff 'must comply with local laws'.[19] This provision, which is expressed in broad and general terms, has led to UNHCR placing limits on its employment of

[16] In 1996, UNHCR did recommend to implementing partners that they should consider the hiring of refugee staff a key area of refugee participation. However, UNHCR did not seek to apply this recommendation internally. See UNHCR, *Partnership: A Programme Management Handbook for UNHCR's Partners* (UNHCR, March 1996) ('*Programme Management Handbook for UNHCR's Partners*') 3.9.

[17] See UN Volunteers, *Conditions of Service for Refugee UN Volunteer assignments* (UN Volunteers, 2019) <https://www.unv.org/sites/default/files/Condition%20of%20Service_UN%20Refugee.pdf>.

[18] In its guidelines on meaningful refugee participation, the Global Refugee-led Network has advocated that a high priority transformative action is ensuring that 'refugees receive equal pay for equal work' within UNHCR's offices: see Global Refugee-led Network, *Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action* (Asylum Access, December 2019) 15. UNHCR has also considered this issue. In a report published by UNHCR's Evaluation and Policy Analysis Unit in 2005, Barb Wigley revealed that UNVs are often used 'above and beyond what they contracted to do', and 'in the context of tenuous long-term employment possibilities' it 'becomes a form of exploitation'. Wigley noted that UNVs often experience considerable resentment due to their lower status, lower pay and the amount that is expected of them: see Barb Wigley, *The state of UNHCR's organization culture* (UNHCR, EPAU/2005/08, May 2005) <https://www.unhcr.org/428db1d62.pdf> [150]–[153].

[19] Staff Regulations and Rules of the United Nations: Secretary-General's bulletin, UN Doc ST/SGB/2018/1/Rev.1 (1 January 2021).

refugees who have been denied the legal right to work in the country of asylum.[20]

Further, Regulation 1.2(m) requires UN organisations to mitigate any actual or possible conflicts of interest among staff, which are defined as occurring when:

> a staff member's personal interests interfere with the performance of his or her official duties and responsibilities or with the integrity, independence and impartiality required by the staff member's status as an international civil servant.[21]

With regards to hiring refugees, this regulation may be seen as a barrier or challenge for UNHCR given that refugees often have personal relationships with community members in the areas where they are seeking to work. Additionally, refugees and asylum seekers are often seeking to obtain support or a declaration of refugee status from UNHCR.[22] Nevertheless, these provisions do not fully explain why UNHCR does not recruit more refugees as international staff.

Beyond this, other barriers to hiring refugees are more insidious. For example, in UNHCR's Staff Code of Conduct, the only specific reference to the employment of refugees in the entirety of the code is in relation to the

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[20] For example, UNHCR's Procedural Standards for Refugee Status Determination Under UNHCR's Mandate provide that, in the context of employing interpreters, UNHCR can only employ refugees as interpreters where 'a UNHCR Office does not have an adequate number of interpreters who speak the languages required'. The policy states that in such situations, 'UNHCR Offices should make every effort to employ refugees who have a legal status in the host country/country of asylum allowing them to work, or refugees who have been accepted for resettlement to a third country and are awaiting travel. If UNHCR has no other viable option than to select as an interpreter an individual who has no right to work in the host country, all possible efforts should be made by the Office to negotiate the issuance of a work permit to the person concerned on exceptional grounds on the basis of existing national law provisions. Interpretation by refugees who do not have a right to work in the host country/country of asylum may be used only as an exceptional and temporary arrangement until UNHCR interpreter staff shortages can be addressed': see UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate* (UNHCR, 26 August 2020) <https://www.refworld.org/docid/5e870b254.html> 47.

[21] *Staff Regulations and Rules of the United Nations: Secretary-General's bulletin*, UN Doc ST/SGB/2018/1 (1 January 2018).

[22] This difficulty is implicitly acknowledged in UNHCR's Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, which states that 'as a general rule, refugees, asylum-seekers and asylum-seekers (sic) whose claims have been rejected should not be hired to provide interpretation services in UNHCR RSD procedures' and that only recognised refugees should be recruited in these situations. See UNHCR, *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate* (UNHCR, 26 August 2020) <https://www.refworld.org/docid/5e870b254.html> 47.

hiring of 'beneficiaries' for private housekeeping services. Principle 7.3 of the Code provides that:

> Staff who hire beneficiaries for private services, such as housekeeping, must be aware that they may be seen as abusing their economic power or favouring certain individuals. In some places where we work, the economic gap between us and the people we serve is so huge that any association with us could be seen as a privilege and a position of advantage.[23]

This provision, while not prohibiting the employment of refugees outright, inappropriately downplays the diverse skills that refugees possess by focusing on the single skill of housekeeping. It also reveals UNHCR's concerns about hiring refugees due to embedded power and socio-economic imbalances between the organisation and refugees. Problematically, this provision does not propose any specific measure to address these imbalances in practice.[24]

#### *6.1.2 UNHCR's external engagement with refugees*

Without significant numbers of refugees or persons with lived experience of displacement working within UNHCR, there has often been a disconnect between the organisation and those it is mandated to protect. In 2005, UNHCR's Evaluation and Policy Analysis Unit published a report by consultant Barb Wigley on the state of UNHCR's organisation culture. This report incorporated input from over 100 UNHCR staff at the time and was based on fieldwork conducted in UNHCR's headquarters in Geneva and twelve other country operations across Africa, the Balkans and Southeast Asia.[25] This report found that while on many occasions staff often have positive and productive relationships with refugees that are characterised by collaboration and respect, UNHCR staff also tend to detach from direct engagement due to the time it takes to speak with refugees and their frustration and despair arising from the acute scarcity of resources and an

[23] UNHCR, *Code of Conduct & Explanatory Notes* (UNHCR, June 2004) <https://www.unhcr.org/en-au/admin/policies/422dbc89a/unhcr-code-conduct-explanatory-notes.html>.
[24] This Code of Conduct was developed in the context of seeking to combat sexual abuse and exploitation during humanitarian crises, including sexual abuse and exploitation involving 'humanitarian workers, officials and other persons working closely with refugee populations'. See further UNGA, *Report of the Fifty-Fourth Session of the Executive Committee of the High Commissioner's Programme, Conclusion on Protection from Sexual Abuse and Exploitation*, UN Doc A/AC.96/987 (10 October 2003) [24].
[25] Wigley (n 18).

inability to be able to provide protection and solutions. As one staff member reported anonymously:

> It's difficult for UNHCR to admit that they don't like dealing with refugees. It's draining that you can't solve their problems and that they take a long time to tell their stories. We're not sufficiently in tune with them; we assume they're always the same.[26]

Similarly, another staff member added:

> There is so much interest for UNHCR staff to reach out to refugees on a daily basis. We were excited to talk to refugees, but now we try to avoid meeting them because if our answer to every question is sorry, I can't, don't want to add to the frustration. It's very difficult. We lie to ourselves very often, I find it very disturbing.[27]

These sentiments are similar to those experienced by other humanitarian workers in the field. For example, in a study on the everyday emotional lives of aid workers, Amoz Hor records how aid workers commonly experience emotional anxiety regarding their powerlessness to change the fate or circumstances of those they are seeking to assist.[28] This anxiety is often coupled with a persistent questioning of their complicity in the suffering of others. Hor suggests that these anxieties have adverse consequences for meaningful participation with beneficiaries because aid workers tend to reproduce and adopt reductive narratives of aid beneficiaries as a coping mechanism for their anxieties.[29]

Although UNHCR has made some effort to engage refugees in the design and implementation of its programmes and services throughout its organisational history (as evidenced by the early work of its field offices), a more concerted policy shift to include refugees in these decision-making processes is noticeable from the 1990s onwards.[30] Between 1990 and 2010, this shift can be seen in several different policy documents, including UNHCR's *Framework for People-Oriented Planning in Refugee Situations*

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[26] Ibid [60].
[27] Ibid [61]. Similar findings are also discussed in Jeff Crisp, 'Why do we know so little about refugees? How can we learn more?' (2003) 18 *Forced Migration Review* 55.
[28] Amoz J Y Hor, 'The Everyday Emotional Lives of Aid Workers: How Humanitarian Anxiety gets in the way of Meaningful Local Participation' (2021) *International Theory* (forthcoming).
[29] Ibid 3.
[30] For the context surrounding this development, see Chapter 3.

(1992),[31] UNHCR's *Operations Management Handbook for UNHCR's Partners* (1996),[32] UNHCR's *Handbook for Emergencies* (1998),[33] UNHCR's *Field Guide for NGOs* (1999),[34] the UNHCR *Tool for Participatory Assessment in Operations* (2006),[35] UNHCR's *Handbook for Self-reliance* (2006),[36] UNHCR's *Handbook for the Protection of Women and Girls* (2008),[37] and the development of *A Community-based Approach in UNHCR Operations* (2008).[38] Each of these policy documents makes at least some reference to the importance of consulting with refugees in the development of UNHCR's protection operations on the ground. Several of these documents also provide suggestions and training as to how this can be pursued in practice.

Among these documents, UNHCR's *Tool for Participatory Assessment in Operations* is arguably the most influential with regards to UNHCR's approach to refugee participation in operations. This tool highlights that 'refugees, internally displaced persons and returnees must be at the centre of decision making concerning their protection and well-being'.[39] 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'.[40] 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.

For example, the tool highlights the importance, from a protection perspective, of utilising a mixed-methods approach that consists of a combination of focus group discussions, semi-structured (or household)

[31] UNHCR, *A Framework for People-Oriented Planning in Refugee Situations, Taking Account of Women, Men and Children* (UNHCR, December 1992) <https://www.refworld.org/docid/4c8f67d52.html>.
[32] *Programme Management Handbook for UNHCR's Partners* (n 16).
[33] UNHCR, *Handbook for Emergencies* (UNHCR, 2nd edition, 1998).
[34] UNHCR and NGO partners, *Protecting Refugees: A Field Guide for NGOs* (UNHCR, May 1999) <https://www.unhcr.org/en-au/partners/partners/3bb9794e4/protecting-refugees-field-guide-ngos-produced-jointly-unhcr-its-ngo-partners.html>.
[35] UNHCR, *The UNHCR Tool for Participatory Assessment in Operations* (UNHCR, 2006) <https://www.refworld.org/docid/462df4232.html> ('*UNHCR Tool for Participatory Assessment in Operations'*).
[36] UNHCR, *UNHCR Handbook for Self-reliance* (UNHCR, 2006) <https://www.unhcr.org/en-au/publications/operations/44bf40cc2/unhcr-handbook-self-reliance.html>.
[37] UNHCR, *UNHCR Handbook for the Protection of Women and Girls* (UNHCR, January 2008) <https://www.unhcr.org/en-au/protection/women/47cfa9fe2/unhcr-handbook-protection-women-girls-first-edition-complete-publication.html>.
[38] UNHCR, *A Community-based Approach in UNHCR Operations* (UNHCR, January 2008) <https://www.unhcr.org/47f0a0232.pdf>.
[39] *UNHCR Tool for Participatory Assessment in Operations (*n 35) 1.
[40] Ibid.

discussions, and observation and spot checks. This mixed-methods approach is important because while focus groups are valuable to explore group responses to a topic of common concern, they are inappropriate for topics of increased sensitivity, such as personal accounts of sexual and gender-based violence.[41] In contrast, the tool notes that 'semi-structured discussions, or discussions at an individual or household level, are appropriate for obtaining more personal, detailed information and analysing problems that will not easily emerge in a group discussion', and 'observation and spot checks bring out complementary information and help to visualise particular problems.[42]

Since the development of this tool, UNHCR has sought to embed participatory assessments with refugees and others under its mandate into the work of its field and country offices. It has also suggested that participatory and community-based approaches are 'the way UNHCR does business' in its operations.[43] However, despite becoming central to UNHCR's work on the ground, very little is published about the extent and use of these participatory assessments in practice. UNHCR does not routinely release the findings from these participatory assessments, even in redacted versions, on its website Refworld. In accordance with UNHCR's Archives Access policy, they are also not generally shared with researchers or other external stakeholders for at least 20 years or more.[44]

This approach to the dissemination of the findings of participatory assessments is a missed opportunity. While the public release of refugees' information needs to be undertaken consultatively and in a manner that avoids harm to the refugees and communities involved, redacted, longitudinal data on the needs, ambitions, and suggestions of refugees from all regions where UNHCR operates would inevitably enhance understanding of the effectiveness and appropriateness of humanitarian responses over time and across contexts. It would also enable greater accountability towards affected communities. However, whether it is due to a lack of resources or prioritisation, this practice does not occur within UNHCR. Notably, this practice is also not dissimilar to participatory approaches taken

[41] Ibid 23.
[42] Ibid 23–24.
[43] UNHCR, *A review of UNHCR Participatory Assessments in 2012* (UNHCR, December 2013) ('*Review of UNHCR Participatory Assessments in 2012*') 4.
[44] See UNHCR, *UNHCR Archives access policy* (UNHCR, 2015) <https://www.unhcr.org/3b03896a4.html>.

by other international organisations, such as the United Nations Children's Fund ('UNICEF').[45]

In 2013, UNHCR released its only publicly available evaluation of its participatory assessments in operations. This evaluation was undertaken by UNHCR's Division of International Protection and examined a comprehensive range of documents from 2012 from UNHCR's country and field offices in 42 countries.[46] This evaluation made public a mixed record in relation to participatory assessments. On the one hand, UNHCR assessed that its staff carry out participatory assessments 'with real commitment – even enthusiasm' and do not see it as a mere bureaucratic requirement, despite the 'inherent complexity and challenges' related to participatory assessments. The evaluation also suggested that UNHCR investigates and records the problems and proposals raised by refugees and other displaced people under its mandate 'in considerable depth, and with a remarkable level of detail and fully in line with the Age, Gender and Diversity approach adopted by the organisation'.[47]

Yet, at the same time, UNHCR recorded by its own admission significant issues with the implementation of participatory assessments in practice. These issues included no standardised practices for capturing and reporting the findings of participatory assessments internally, a lack of consistency in terms of which refugees were consulted, a failure to allow refugees to choose the themes for discussion, and insufficient follow-up action with refugees.[48] The evaluation also found that:

> Although not investigated in depth, the last, fundamental component of the participatory approach – the direct involvement of persons of

[45] Like UNHCR, UNICEF has published its policies and approaches towards participatory assessments. However, it does not routinely publish the findings from its work in this area. See Irene Guijt, 'Participatory Approaches' (UNICEF Methodological Briefs: Impact Evaluation No 5, 2014) <https://www.unicef-irc.org/publications/pdf/brief_5_participatoryapproaches_eng.pdf>.

[46] These countries were located in Africa, the Americas, the Asia-Pacific, Europe and the Middle East and North Africa. The authors noted that 'the documents surveyed do not represent all the work UNHCR country and field offices do in terms of PA [participatory assessments], and that the documents submitted by each country do not necessarily represent all that country has done in terms of PA. However, the quantity and quality of the material reviewed is definitely sufficient to make an informed analysis of the implementation of Participatory Assessments in 2012': see *Review of UNHCR Participatory Assessments in 2012* (n 43) 2.

[47] Ibid 3.

[48] The evaluation noted that the content of participatory assessments was extraordinarily diverse, but generally related to nine different categories: healthcare; sexual and gender-based violence; shelter; education; host communities; arrest and detention; registration and refugee status determination; hygiene and sanitation; and local integration. See Ibid 3–6, 8.

> concern in implementing protection strategies they have helped to develop – appears to be lacking.[49]

While the report did not further elaborate on why this direct involvement in implementation was lacking, it is likely linked to the design of the participatory assessment tool itself, which is geared towards extracting information from refugees for the purposes of UNHCR's strategic planning at the operations level. The tool mentions the importance of involving refugees in the 'implementation, monitoring, and evaluation of services'.[50] However, it provides no specific measures or suggestions for how this collaboration could or should occur. Instead, the tool outlines that a 'multifunctional team' (that does not comprise refugees) should be responsible for identifying follow-up actions and for informing refugees 'the overall findings of the participatory assessment, resulting actions, short and long term and next steps as well as any limitations'.[51] This approach does not envisage participation as a mutual decision-making process where power is shared jointly between UNHCR and refugees.

Although no further public evaluation has been undertaken since this date, issues related to UNHCR's participatory assessments appear to be ongoing. For example, UNHCR's Board of Auditors recorded in its 2020 audit a situation where the UNHCR country office in Niger was required to keep in storage more half a million bars of soap because they were not needed by the refugee community. The Board of Auditors considered that it was 'questionable as to whether the needs were assessed because the beneficiaries produce soap themselves' and 'such an amount of soap has never been needed'.[52] This example demonstrates a basic disconnect between the donors, UNHCR and the refugee communities who are the target of such support.

Even more problematic given its potential impact on rights, refugees and their representatives appear to have been left out from some decision-making processes linked to field operations almost entirely, such as the design and development of UNHCR's digital data collection technologies. These technologies represent one of most significant developments in UNHCR's operational work over the past twenty years. Through the

[49] Ibid 3.
[50] *UNHCR Tool for Participatory Assessment in Operations* (n 35) 7.
[51] The tool indicates that this team should comprise UNHCR staff, along with 'partners, governmental counterparts, NGOs, other United Nations agencies, and donors, as appropriate'. Ibid 7, 40–41, 48–49.
[52] UNHCR 2020 Financial Report (n 9) [47].

development of its Population Registration and Identity Management EcoSystem (known as PRIMES), UNHCR now has the capacity to digitally register refugees, administer cash-based payments digitally, collect and manage biometric data such as fingerprint and iris scans, and generate audit reports from a single sign-on business suite.[53] UNHCR has pursued this digital transformation of refugee governance to improve its delivery of services and to provide better accountability with various stakeholders.[54] In the context of the COVID-19 pandemic, this transformation has also enabled the deployment of new forms of remote humanitarian assistance.[55] However, these developments have largely occurred without meaningful consultation with refugees.[56]

Since the development of these technologies, there have been growing concerns among refugees and others, particularly as they relate to cybersecurity risks, privacy rights, and procedural risks connected to automated decision-making and the misuse of refugees' digital identities.[57] One incident that has been the source of significant controversy was UNHCR's involvement in a joint registration exercise with the government of Bangladesh in Cox's Bazar which led to the transfer of Rohingya refugees' biometric data to the government of Myanmar between 2018 and 2021. UNHCR has defended its involvement in this collection and sharing of data with the country of origin (the government responsible for the persecution of the Rohingya) on the basis that refugees 'were separately and

[53] According to UNHCR, more than 15 million individuals were registered on the PRIMES platform at the end of 2020 and the technology was deployed in 100 different operations around the world. See Ibid [9], [156].
[54] For a more comprehensive list of UNHCR's reasons, see UNHCR, *Data Transformation Strategy 2020-2025: Supporting protection and solutions* (UNHCR, September 2019) <https://www.unhcr.org/5dc2e4734.pdf> ('*Data Transformation Strategy 2020-2025*') 8–9.
[55] This includes the conduct of registration interviews through video calls using smartphones. See UNHCR 2020 Financial Report (n 9) [9].
[56] For example, UNHCR notes that its 2020-2025 Data Transformation Strategy was developed 'in a collaborative process, based on essential inputs from the UNHCR High Commissioner, Senior Executive team, UNHCR staff in Geneva, Copenhagen, the Regional Bureaux and many field offices, as well as partner organization staff and external consultants'. The strategy itself highlights that 'UNHCR data and information activities will be guided by the interests and rights of the people we seek to serve and the communities around them', however it does not appear that this people-centred approach was applied to the development of the strategy itself. See *Data Transformation Strategy 2020-2025* (n 54) 2, 7. See also Kerrie Holloway and Oliver Lough, 'Although shocking, the Rohingya biometrics scandal is not surprising and could have been prevented', *Overseas Development International* (Blog post, ODI, 28 June 2021) <https://odi.org/en/insights/although-shocking-the-rohingya-biometrics-scandal-is-not-surprising-and-could-have-been-prevented/>.
[57] See Kristin Bergtora Sandvik, 'The Digital Transformation of Refugee Governance' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 1007, 1008–1009.

expressly asked whether they gave their consent to have their data shared with the Government of Myanmar' and 'individual counselling in their languages was carried out'.[58] However, this defence has been disputed by refugees and civil society organisations who have suggested that individualised consent was not always solicited, and, when it was, Rohingya refugees were not always aware that they could refuse this request and still receive protection and assistance.[59]

More broadly, there are concerns as to the absence of refugee input in the design of these policy objectives and the lack of transparency and legal accountability surrounding the use of this data. In 2018, UNHCR signed a memorandum of understanding ('MOU') with the Myanmar government to 'support the creation of conditions for the return of refugees from Bangladesh'.[60] In the same year, UNHCR also signed a MOU with Bangladesh on data sharing.[61] Yet, neither of these MOUs are open to public scrutiny, including from the refugees impacted by these arrangements. This lack of transparency significantly undermines the capacity of refugees to give informed consent.

Problematically, UNHCR's 2018 'model agreement' on the sharing of personal data with governments in the context of registration has very weak accountability protections with regards to the transfer of refugees' data to countries of origin. Article 7.1 of the model agreement simply provides that:

> Under no circumstances shall personal data shared under this Agreement be disclosed to the country of origin of the refugees and

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[58] UNHCR, 'News comment: Statement on refugee registration and data collection in Bangladesh', *UNHCR* (Press Release, UNHCR, 15 June 2021) <https://www.unhcr.org/en-au/news/press/2021/6/60c85a7b4/news-comment-statement-refugee-registration-data-collection-bangladesh.html>.

[59] See Human Rights Watch, 'UN Shared Rohingya Data Without Informed Consent', *Human Rights Watch* (News release, Human Rights Watch, 15 June 2021) <https://www.hrw.org/news/2021/06/15/un-shared-rohingya-data-without-informed-consent>; also, Zara Rahman, 'The UN's Refugee Data Shame', *The New Humanitarian* (Geneva, 21 June 2021) <https://www.thenewhumanitarian.org/opinion/2021/6/21/rohingya-data-protection-and-UN-betrayal>.

[60] See UNHCR and UNDP, 'UNHCR and UNDP sign a Memorandum of Understanding (MOU) with Myanmar to support the creation of conditions for the return of refugees from Bangladesh', *UNHCR* (Press Release, 6 June 2018) <https://www.unhcr.org/en-au/news/press/2018/6/5b1787e64/unhcr-undp-sign-memorandum-understanding-mou-myanmar-support-creation-conditions.html>.

[61] Reference to this MOU is made in UNHCR, 'News comment: Statement on refugee registration and data collection in Bangladesh', *UNHCR* (Press Release, UNHCR, 15 June 2021) <https://www.unhcr.org/en-au/news/press/2021/6/60c85a7b4/news-comment-statement-refugee-registration-data-collection-bangladesh.html>.

> asylum-seekers concerned with the exception of data processed in the context of a tri-partite agreement for voluntary repatriation under the auspices of UNHCR.[62]

The exception included in this article means that there is no independent or external oversight of UNHCR's choice to share refugees' data with the country of origin, including from the refugees themselves. There is also no clear legal threshold for when this data can be shared, as 'data processed in the context of a tri-partite agreement' can occur at any time, including prior to a fundamental change in circumstances in the country of origin.

### *6.1.3 UNHCR's funding of refugee-led organisations*

In addition to UNHCR's approaches to employing and consulting with refugees, another source of tension in UNHCR's engagement with refugees has been the lack of any specific mechanism or policy within UNHCR's framework to financially support refugee-led organisations in the provision of their work as 'implementing partners'. Currently, UNHCR spends on average 30 per cent of its entire budget engaging international and non-governmental organisations (and to a lesser extent governments) to implement projects under its mandate.[63] In 2020, this was the equivalent of almost $1.4 billion USD.[64] International NGOs received $640 million USD of this amount (46%), while national NGOs received $571 million USD (41%) and governments $176 million USD (13%).[65]

Refugee-led organisations are not strictly prohibited from seeking to partner with UNHCR in the implementation of its projects. However, for many years the procedural rules pertaining to implementing partners have significantly curtailed refugee-led organisations from applying in practice. Notably, in 1996 UNHCR's *Operations Management Handbook for UNHCR's Partners* outlined that NGOs needed to meet four basic procedural conditions before being considered for recruitment as an implementing partner. These conditions were that the NGO be: (a) legally registered; (b) have the authority to open and manage a bank account in the country of implementation; (c) be able to demonstrate financial reliability

[62] UNHCR, *Model agreement on the sharing of personal data with Governments in the context of registration* (UNHCR, 2018) <https://www.unhcr.org/en-ie/50a646c79.pdf>.
[63] For analysis of UNHCR's legal mandate to delegate assistance and protection responsibilities to 'implementing partners', see Maja Janmyr, *Protecting Civilians in Refugee Camps: Unable and Unwilling States, UNHCR and International Responsibility* (Martinus Nijhoff, 2014) 310–341.
[64] UNHCR 2020 Financial Report (n 9) [221].
[65] Ibid [225].

through the production of official annually audited financial statements; and (d) be willing to adhere to the rules and procedures of UNHCR [and of the UN and of States] and comply with the laws and policies of the country in which they operate.[66] Additionally, the handbook also outlined that:

> A prerequisite for any UNHCR implementing partner is that the partner must be willing to work with all intended beneficiaries, regardless of their race, religion, nationality, political opinion or gender, and must provide assistance on the basis of agreed needs only, without linking this, either directly or indirectly, to any ethnic, religious or political consideration.[67]

Each of these conditions has limited the capacity of refugee-led organisations from entering into partnership agreements with UNHCR. This is because refugee-led organisations frequently operate in contexts where they are unable to legally register and open bank accounts, and the refugees involved often have been refused the legal right to work in the country of asylum. Additionally, refugee-led organisations are often established to support specific refugee communities that they are connected to, based on cultural, ethnic, religious, and/or national grounds.[68]

In recent years, UNHCR has begun to show increasing interest in addressing these challenges and promoting and partnering with refugee-led organisations. This interest has arisen in part due to the successful advocacy of refugee representatives and refugee-led initiatives. It has also been driven by the push towards localisation within humanitarian responses,[69] and the disruptions caused by the COVID-19 pandemic. These disruptions have made it more difficult for external service providers to access and support refugees directly and has forced them to further engage with refugee-led initiatives.[70]

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[66] *Programme Management Handbook for UNHCR's Partners* (n 16) 2.2
[67] Ibid 2.1.
[68] See Evan Easton-Calabria and Kate Pincock, 'Refugee-led social protection: reconceiving refugee assistance' (2018) 28 *Forced Migration Review* 2; also, Yotam Gidron and Freddie Carver, 'International Organisations and "Local" Networks: Localisation and Refugee Participation in the Ethiopian-South Sudanese Borderlands' (2022) 41(1) *Refugee Survey Quarterly* 1.
[69] This is discussed in more detail below.
[70] See Mustafa Alio et al**,** 'By refugees, for refugees: refugee leadership during COVID-19, and beyond' (2020) 64 *Forced Migration Review* 76; also, Chris Larsen and Mark Malloch-Brown, 'Why refugees can, and should, lead solutions to displacement', *Thomson Reuters Foundation News* (London, 25 July 2021) <https://news.trust.org/item/20210719084233-ji0x1/>.

In 2020, for example, UNHCR's NGO Innovation Awards were dedicated to the work of refugee-led organisations who delivered innovative responses to refugees during the COVID-19 pandemic. From a record 410 nominations, seven winners were selected who each received $15,000 USD.[71] During the awards ceremony, UNHCR's High Commissioner Filippo Grandi stated that 'more than any other type of organization':

> Refugee-led organizations have proven to be the most important and effective at finding innovative and local solutions to the challenges faced in their own communities during these difficult times.[72]

Further, in 2021, UNHCR also initiated consultations with refugee representatives, academics, and other stakeholders to consider how a refugee-led organisation may be defined for the purposes of future partnerships with UNHCR.[73]

Through ongoing collaboration, these developments may lead to increased funding and support for refugee-led organisations. Yet, as at the time of writing, the eligibility barriers that refugee-led organisations face to becoming implementing partners with UNHCR largely remain intact.[74] Further, UNHCR's funding of refugee-led organisations currently remains substantially smaller than the payments UNHCR makes to other non-governmental organisations through its partnership agreements. While UNHCR does not currently report on payments made to refugee-led organisations specifically, a simple comparison of the known funds awarded to refugee-led organisations from the 2020 UNHCR NGO Innovation awards ($95,000 USD in total) can be made with the substantially larger funds directed to NGOs through its partnerships ($1.2 billion USD in 2020).[75]

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[71] For a list of the winners, see UNHCR Staff, 'Awards honour refugee-led response to COVID-19 pandemic', *UNHCR* (Web Page, UNHCR, 25 March 2021) <https://www.unhcr.org/en-au/news/stories/2021/3/605cbddd4/awards-honour-refugee-led-response-covid-19-pandemic.html>.

[72] Ibid.

[73] As at the time of writing, these consultations are ongoing. Through a consultancy with the Asia Pacific Network of Refugees and Act for Peace, I have had the opportunity to personally participate in these consultations.

[74] See, for example, UNHCR, *Standard Format Bipartite Project Partnership Agreement (UNHCR with non-governmental and other not-for-profit partners)* (UNHCR, 2015) <https://www.unhcr.org/ngo-consultations/ngo-consultations-2015/IPMS-Annex-Bipartite-PPA.pdf>; also, UNHCR, *UNHCR Partnership Handbook* (UNHCR, May 2019) 3.2.1.

[75] As UNHCR does not track its funding to refugee-led organisations, care is needed when comparing and interpreting these figures. Some of UNHCR's funding to NGOs through its partnership agreements may ultimately find its way to refugee-led organisations.

### 6.2 Other support for refugee-led programmes and services

Given the long-term sidelining of refugee-led organisations from institutionalised responses to refugees, it has often been assumed that humanitarian assistance to refugees has almost exclusively been provided by governments, international organisations, and civil society organisations. This assumption has in part arisen due to paternalistic perceptions of refugees as helpless beneficiaries. It has also arisen due to the lack of academic research seeking to understand the contributions refugee communities make to their own protection. Quite simply, until recently, very few researchers and other stakeholders have turned their attention to the roles of refugees as providers of protection and assistance. This section provides firstly a non-exhaustive overview of some of the ways in which refugees have provided protection and assistance to refugees around the world. It then considers some emergent trends among donors and international aid organisations towards greater inclusion of refugees in programme and service delivery.

#### *6.2.1 Refugee-led protection and assistance*

Emerging evidence from a variety of different contexts has revealed that refugee-led programmes and services often provide a critical role in addressing unmet gaps in protection on the ground. For example, in a comparative ethnographic study across four research sites in Uganda and Kenya, Kate Pincock, Alexander Betts and Evan Easton-Calabria have demonstrated that refugees often engage in a diverse array of protection activities for the benefit of their communities.[76] Although often small in scale, these activities include education programmes, vocational training, psychosocial support, microfinance and business initiatives, community sport groups and legal representation. Significantly, these initiatives have emerged despite the barriers to funding and registration that refugee-led initiatives face.

Similar trends can also be observed in other parts of the world. In Indonesia, for example, refugee-led initiatives in Jakarta and West Java have emerged to play a central role in the provision of education to refugee communities.[77]

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[76] Pincock, Betts and Easton-Calabria (n 6) 12.

[77] See Thomas Brown, 'Refugee-led education in Indonesia' (2018) 28 *Forced Migration Review* 10; also 'HELP: Dreaming of a Better Future for Asylum Seekers & Refugees', *NOW! JAKARTA* (Jakarta, 4 December 2017) <https://nowjakarta.co.id/people/community/help-dreaming-of-a-better-future-for-asylum-seekers-refugees>.

Beginning in 2014 with the establishment of the Cisarua Refugee Learning Centre in West Java, there are now over 10 refugee-led education providers in Indonesia providing education to over 1800 refugee students.[78] This growth of refugee-led education programmes has occurred in part because refugee children in Indonesia are denied access to education in local Indonesian schools. It has also arisen because, despite political suggestions that refugees only 'transit' in Indonesia, refugees increasingly find themselves in protracted situations where opportunities to return, resettle or move elsewhere are limited.[79] Over time, these refugee-led schools have become important hubs for the community to meet to share information, identify at-risk refugees, and organise sports and other activities.[80] They have also inspired the development of refugee-led initiatives in other areas of service provision.[81]

Even in some refugee camps, such as those on the Thai/Burma border, refugee communities have taken steps to implement protection initiatives of their own accord. Since 1984, when the camps were first established in Thailand, international NGOs and international organisations have controlled the supply of funding and resources to the camps.[82] However, for many years the day-to-day management of the camps have been coordinated by the Karen Refugee Committee and the Karenni Refugee Committee through a community-based camp management approach.[83]

Under this approach, the Karen and Karenni Refugee Committees have developed guidelines to elect Camp Committees to oversee health clinics,

[78] Muzafar Ali, 'Cisarua Refugee Learning Centre: The first refugee-led school in Indonesia and how it inspired an education revolution' (Web page, UNHCR, 6 March 2020) <https://globalcompactrefugees.org/article/cisarua-refugee-learning-centre>; also, for a documentary film on the subject, see Jolyon Hoff, *The Staging Post* (Documentary film, Light Sound Art Film, 2018) <https://thestagingpost.com.au/>.

[79] For further analysis of the concept of 'transit' in the Indonesian context, see Robyn C Sampson, Sandra M Gifford and Savitri Taylor, 'The myth of transit: the making of a life by asylum seekers and refugees in Indonesia' (2016) 42(7) *Journal of Ethnic and Migration Studies* 1135.

[80] Ibid.

[81] See, for example, the work of the Refugees and Asylum seekers Information Centre, available at <https://www.raicindonesia.org>.

[82] For a detailed breakdown of the coordination structure in place, see The Border Consortium, *Annual Report 2020* (TBC, 28 July 2021) <https://www.theborderconsortium.org/wp-content/uploads/2021/07/TBC-Annual-report-2020.pdf> Appendix 1, 44.

[83] The KRC is responsible for managing the seven refugee camps that host primarily Karen refugees, including the largest camp on the border, known as Mae La. Meanwhile, the KnRC is responsible for governing the two northernmost camps, Ban Mai Nai Soi and Ban Mae Sur. See The Border Consortium, *Annual Report 2020* (TBC, 28 July 2021) <https://www.theborderconsortium.org/wp-content/uploads/2021/07/TBC-Annual-report-2020.pdf> 10; also, Olivius (n 5).

schools and the distribution of rations.[84] The Camp Committees also take responsibility for safeguarding the camps' physical environment and administering justice in the camps, including through sophisticated dispute resolution systems.[85] Significantly, the Camp Committee election guidelines aim to ensure that women represent at least 30 percent of the candidates running for leadership roles within the camps.[86] Governments, UNHCR and other stakeholders often (but not always) permit this self-management of camps because it contributes, as Jana Lipman indicates, 'to camp security and organization without additional costs'.[87] In some contexts, this permission is also coupled with an aim to target traditionally marginalised groups in decision-making, such as women and youth communities.[88]

Although few studies have been undertaken on the impacts of refugee-led initiatives in urban and camp contexts, preliminary research suggests that refugees often see community-led support as serving a central protection function. In a survey of 8000 refugees and host community members in Uganda and Kenya conducted by the University of Oxford, nearly 90 per cent of respondents indicated that they would reach out to either the community or family and friends in case of an emergency. In contrast, very few respondents indicated that they would ask UNHCR or an NGO for support.[89] While this survey has a bias towards the immediacy of response given its focus on emergency situations, it nevertheless highlights the important role of refugees as providers of assistance.

### *6.2.2 The Grand Bargain and its 'Participation Revolution'*

Among donors and international aid organisations, there have been some efforts to reform the international policy framework to enhance the inclusion of refugees and affected communities in programme and service

[84] See Burma Link, *Displaced in Thailand: Refugee Camps* (Fact sheet, Burma Link, 27 April 2015) <https://www.burmalink.org/background/thailand-burma-border/displaced-in-thailand/refugee-camps>.
[85] See Rosa da Costa, 'The Administration of Justice in Refugee Camps: A Study of Practice' (Research Paper, UNHCR Legal and Protection Policy Research Series, March 2006) <https://www.refworld.org/pdfid/4417f9a24.pdf> 19.
[86] The Border Consortium, *Annual Report 2020*, 10.
[87] Jana K Lipman, *In Camps: Vietnamese Refugees, Asylum Seekers, and Repatriates* (University of California Press, 2020) 68. Lipman's research details how Vietnamese refugees organised themselves in camps across Southeast Asia in order to make the camps more habitable.
[88] See, for example, UNHCR's 2001 review of its repatriation and reintegration operation in Liberia, discussed in Chapter 7.1.3 1.
[89] Alexander Betts, Kate Pincock and Evan Easton-Calabria, 'Refugees as Providers of Protection and Assistance' (Research Paper, University of Oxford Refugee Studies Centre Research in Brief 10, 12 December 2018) 2.

delivery in recent years. Notably, in response to the UN Secretary-General's High-Level Panel report on humanitarian financing,[90] and as part of the World Humanitarian Summit in Istanbul, representatives of 18 donor countries and 16 major international aid organisations from United Nations agencies, international NGOs and the International Red Cross and Red Crescent Movement endorsed what was called a 'Grand Bargain' in 2016.[91] This document committed to reform the 'humanitarian ecosystem' by, among other things, providing increased support and funding to local responders on the frontline, and by undergoing a 'participation revolution' to 'include people receiving aid in making the decisions which affect their lives'.[92]

Some of the barriers that donors and international aid organisations identified for reform in this document included overly-complicated reporting requirements, excessive use of earmarked and single-year funding, a disproportionate amount of humanitarian funding retained by international aid organisations, and a lack of transparency as to 'how funding moves from donors down the transaction chain until it reaches the final responders and, where feasible, affected people'.[93] On the specific issue of participation, aid organisations and donors further highlighted the need to develop common standards and a coordinated approach for community engagement, and to improve leadership and governance mechanisms 'to ensure engagement with and accountability to people and communities affected by crises'.[94] Since the launch of this initiative in 2016, several other donor governments

[90] See United Nations High-Level Panel on Humanitarian Financing, *Too important to fail—addressing the humanitarian financing gap: Report to the Secretary-General* (United Nations HLP, January 2016).
[91] *The Grand Bargain – A Shared Commitment to Better Serve People in Need* (Istanbul, 23 May 2016) <https://interagencystandingcommittee.org/system/files/grand_bargain_final_22_may_final-2_0.pdf>. The 18 countries that initially endorsed the Grand Bargain were: Australia, Belgium, Bulgaria, Canada, Czech Republic, Denmark, European Commission, Germany, Italy, Japan, Luxembourg, The Netherlands, Norway, Poland, Sweden, Switzerland, United Kingdom, and the United States of America. The 16 international aid organisations that endorsed the initiative in 2016 were: the Food and Agriculture Organization of the United Nations, InterAction, the International Committee of the Red Cross, the International Council of Voluntary Agencies, the International Federation of Red Cross and Red Crescent Societies, the International Organization for Migration, the Steering Committee for Humanitarian Response, UNICEF, the United Nations Development Programme, the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), UNHCR, the United Nations Population Fund, the United Nations Office for the Coordination of Humanitarian Affairs, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), the World Bank, and the World Food Programme.
[92] Ibid 2, 10.
[93] Ibid 4–5, 11–13.
[94] Ibid 10.

and aid organisations have endorsed the document, and there is currently discussion as to the operationalisation of a 'Grand Bargain 2.0'.[95]

Although not directly linked to the Grand Bargain initiative, this trend towards 'localisation' and increased participation with, and funding to, affected communities can also be seen in the initiatives of some donors and aid organisations working specifically with refugees. For example, in 2021 philanthropists Chris Larsen and Lyna Lam awarded $10 million USD to a coalition of six organisations for the purposes of resourcing refugee-led organisations across ten countries.[96] This funding is likely one of largest grants ever awarded to refugee-led organisations since the development of the modern international refugee regime. According to the funding proposal, the coalition plans to deploy a 'pay-it-forward' funding model to resource 50 refugee-led organisations over a five-year period. The benefits proposed by this model include facilitating refugee-led organisations to implement programs that are 'community-driven, culturally aware and legitimized by refugees', and enabling refugees and refugee-led organisations to be better positioned to access international funding and work within international organisations in the future.[97] Other initiatives are taking similar approaches to supporting refugee-led organisations, albeit with different amounts of funding available.[98]

Other than funding, there have also been some examples of NGOs seeking to reform their internal governance systems to include refugees more formally in their decision-making processes. The organisation Asylum Access, for example, which provides both direct service provision to

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[95] See Victoria Metcalfe-Hough et al, *The Grand Bargain at five years: An Independent Review* (Overseas Development Institute, June 2021) 26.

[96] At the time of the award, this coalition comprised the Refugee & Asylum seekers Information Centre (based in Indonesia), RefugiadosUnidos (based in Colombia), Young African Refugees for Integral Development (based in Uganda), Basmeh & Zeitooneh (based in Lebanon and Iraq), Saint Andrew's Refugee Services (based in Egypt) and Asylum Access (based in the USA, but with offices in other countries as well). See 'Resourcing Refugee Leadership: For Inclusion and Solutions' (Web page, Asylum Access, 2020) <https://www.resourcingrlos.org/>. Following this award, Asylum Access was able to secure further funding for this initiative. For details, see UNHCR, 'Nothing About Us, Without Us: 7 ways you can promote refugee leadership', *Global Compact on Refugees Digital Platform (*Web page, 2 March 2022) <https://globalcompactrefugees.org/article/nothing-about-us-without-us-7-ways-you-can-promote-refugee-leadership>.

[97] 'Resourcing Refugee Leadership: For Inclusion and Solutions' (Web page, Asylum Access, 2020) <https://www.resourcingrlos.org/>.

[98] See, for example, Bonnie Chiu, 'Calls for Shifts in Philanthropy towards Refugee Leadership', *Forbes* (New Jersey, 1 October 2020) <https://www.forbes.com/sites/bonniechiu/2020/10/01/calls-for-shifts-in-philanthropy-towards-refugees-leadership/>.

refugees and targeted advocacy in numerous countries, announced at the Global Refugee Forum in 2019 that it would undertake several reforms to its governance structures as part of its commitment to meaningful refugee participation. Among these reforms, it pledged that 50% of all new board members would be from the refugee community. Further, it announced that it would fill at least 50% of open staff and leadership positions with a member of the refugee community. To meet these commitments, Asylum Access recognised that it would need to also establish recruitment and hiring practices that increase the number of refugee applicants.[99]

Other organisations, such as Saint Andrew's Refugee Services in Cairo, Egypt, have similarly transitioned towards a governance model that is inclusive of refugees. In an interview with the Executive Director in November 2019, Christopher Eades outlined that in the previous five-year period the organisation had specifically targeted the recruitment of refugees, to the extent that 85 per cent of the 390 staff members were refugees, including 80 per cent of programme leaders.[100] Additionally, he indicated that the organisation had established governance mechanisms that were entirely controlled by refugees. This included a Youth Advisory Board that was made up of former unaccompanied child refugees, and a Safeguarding Board comprising refugees only. At the time of the interview, Eades indicated that the organisation was also in the process of establishing a Steering Committee made up of refugees, which would be responsible for designing and selecting projects for funding and would 'essentially have veto power over what the organisation is doing'. Eades described this governance structure as 'not just of refugee participation, but of refugee control and ownership'.[101] Significantly, this transition evolved not just from concerted effort, but from considerable investment in training and skills development over a sustained period.[102]

[99] See Asylum Access, *Asylum Access Global Refugee Forum Pledges* (Asylum Access, 2019) <https://www.asylumaccess.org/wp-content/uploads/2020/12/Asylum-Access-global-refugee-forum-pledges-2.pdf>.
[100] Interview with Christopher Eades, Executive Officer at the St. Andrews Refugee Service (12 November 2019).
[101] Ibid.
[102] See, for example, Haramain A Jebrail and Rebecca Leabeater's overview of StARS's programme aimed at hiring refugee lawyers with 'the intention of building the capacity of qualified members of the refugee community in Cairo to represent refugees in their RSD process with UNHCR': see Haramain A Jebrail and Rebecca Leabeater, 'Refugee Lawyers in Egypt', *Refugee Law Initiative Blog on Refugee Law and Forced Migration* (Blog post, University of London, 26 October 2020) <https://rli.blogs.sas.ac.uk/2020/10/26/refugee-lawyers-in-egypt/>.

### *6.2.3 The scale of support and persistent barriers*

Initiatives such as these demonstrate some shifts in thinking and approaches to the inclusion of refugees in the provision of programmes and services. However, care is needed not to assume that these initiatives are representative of broader trends in the humanitarian system. In an independent review of the Grand Bargain initiative produced by the Overseas Development Institute in 2021 and commissioned by its signatories, the authors assessed that while there has been some progress towards humanitarian reform since 2016 – particularly in the areas of increased cash-bash assistance to affected communities and some improvements among donors and aid organisations in working jointly to assess and analyse needs – signatories to the Grand Bargain had failed to meet their self-set targets in relation to a number of reform areas, including the increased provision of funding to local responders.[103]

In relation to the Grand Bargain's so-called commitment to a 'participation revolution', the authors noted that there is now an agreed working definition of participation, a collation of good practice and several indicators and tools for engaging affected communities in practice.[104] However, by and large, work in this area 'suffered from a lack of consistent political interest and ambition from the collective of signatories', and that 'five years on, there is no evidence that – at system level – humanitarian response has become more demand-driven'.[105] The authors suggested that this may be partly caused by persistent high levels of risk aversion among donors and aid organisations, along with a limited willingness to accept 'failures' or transfer ownership of responses to affected communities.[106] They also noted that many actors do not have the trust of affected populations, which complicates the formation of new partnerships and relationships.[107]

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[103] Metcalfe-Hough et al (n 95) 17–30.

[104] For further details on this definition, see IASC Grand Bargain Participation Revolution Work Stream, *Agreed, practical definition of the meaning of "participation" within the context of this workstream* (Inter-Agency Standing Committee, 8 March 2017) <https://interagencystandingcommittee.org/system/files/participation_revolution_-_definition_of_participation.pdf>.

[105] Metcalfe-Hough et al (n 95) 85.

[106] Ibid 94.

[107] Ibid 88. This finding also emerged during the interviews I conducted on the subject. Eades, for example, noted that in the context of Egypt, that 'UNHCR goes to refugee communities when there is a problem, for example, when they are protesting outside UNHCR. There is no relationship of trust between them at all. When they do meet them, they have nothing to build upon in terms of trying to secure outcomes'. Interview with Christopher Eades, Executive Officer at the St. Andrews Refugee Service (12 November 2019).

Other analysis of the localisation agenda has reached similar conclusions as to its impact to date but has given alternative explanations for its failures and limitations. For example, in a survey conducted by George Washington University in 2021 with 248 humanitarian sector workers on the issue of power and inequality in the humanitarian sector, 62 per cent of respondents from the Global North indicated that a major barrier for creating more trust between local and international agencies was racism of international agencies, while 68 per cent of respondents from the Global South said that international agencies treat local agencies as inferior.[108] Among all respondents, 52 per cent indicated that racism has had a major impact on support for localisation, with an additional 32 per cent of respondents indicating that it had a minor impact.[109]

In her analysis on localisation, racism, and decolonisation, Smruti Patel has suggested that:

> Racism remains a structural ingredient in the mindsets of aid-providing countries that see themselves as 'developed', and in the institutional practices that shape international aid and 'development cooperation'. It ignores how that development was also enabled through colonial plunder and ongoing post-colonial resource extraction that shifts much more wealth to the West than it returns in terms of aid funding.[110]

One of the implications of this racialized mindset within humanitarian service delivery is that it has led to reluctance to truly transfer ownership and power to affected communities. As Oliver Lough and Sorcha O'Callaghan have argued, 'humanitarians remain heavily focused on participation as a means to improve their projects, not to truly share or hand over power. They solicit "feedback", "ideas", and "suggestions" to "inform" decisions that they still ultimately make'.[111]

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[108] Michael Barnett, *Humanitarian Survey: Power and Inequality in the Humanitarian Sector* (George Washington University, May 2021) <https://cpb-us-e1.wpmucdn.com/blogs.gwu.edu/dist/b/3958/files/2021/07/Topline-Localization-Survey.pdf>.
[109] Ibid.
[110] Smruti Patel, 'Localisation, racism and decolonisation: Hollow talk or real look in the mirror?', *Humanitarian Practice Network* (Blog post, HPN, 29 September 2021) <https://odihpn.org/blog/localisation-racism-and-decolonisation-hollow-talk-or-real-look-in-the-mirror/>.
[111] Oliver Lough and Sorcha O'Callaghan, 'Five years on from the World Humanitarian Summit: lots of talk, no revolution' (Blog post, ODI, 24 May 2021) <https://odi.org/en/insights/five-years-on-from-the-world-humanitarian-summit-lots-of-talk-no-revolution/>.

From a different perspective, others have critiqued the gendered nature of the localisation agenda. Shima Bahre, for example, a woman refugee from Darfur and co-founder of the Sudanese Women for Peace and Development Association in Uganda, has reflected from her own position in 2021:

> I have heard about the localisation process in humanitarian aid, but I do not feel its effect. What I do feel, and experience on a daily basis, are the numerous ways women – especially refugee women – are discriminated against in the humanitarian system.[112]

Some of the specific examples Bahre highlighted as evidence included the lack of representation of refugee women in humanitarian decision-making, the expectation that women refugee-led organisations compete for funding on the same time scale as male refugee-led organisations, and the common practice among international humanitarian organisations of offering only voluntary or stipend positions to women.[113] These reflections highlight some of the structural challenges that persist in the delivery of programmes and services to refugee women.[114]

Finally, although several donor states endorsed the Grand Bargain's commitment to increased involvement of local and affected communities in humanitarian responses, some of those same states remain reticent to embrace similar approaches when implementing programmes and services for refugees within their respective jurisdictions. For example, Australia has been a signatory of the Grand Bargain commitment since its launch in 2016.[115] The Australian government also made a pledge at the Global Refugee Forum in December 2019 that it would work towards the meaningful engagement of refugees in decision-making.[116] However,

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[112] Shima Bahre, 'How the aid sector marginalises women refugees', *The New Humanitarian* (Geneva, 15 March 2021) <https://www.thenewhumanitarian.org/opinion/first-person/2021/3/15/How-the-aid-sector-marginalises-women-refugees?>.

[113] Ibid.

[114] For further analysis of this issue, see Michelle Lokot, 'Skewed Allegiances: Recalibrating Humanitarian Accountability towards Gender' (2021) 40(4) *Refugee Survey Quarterly* 391.

[115] See Australian Government Department of Foreign Affairs and Trade, *Grand Bargain in 2019: Annual Self Report – Narrative Summary* (Inter Agency Standing Committee, 3 March 2020) <https://interagencystandingcommittee.org/system/files/2020-04/Australia%20Self-report%202020%20-%20Narrative_0.pdf>.

[116] See Statement of Australia, 'Engage, Participate, Advocate: Young People and Women Leading' (Speech, United Nations Global Refugee Forum, 16 December 2019, 00:57:43) <https://conf.unog.ch/digitalrecordings/index.html?guid=public/60.2092/0E742915-7C38-44FF-896B-26BEFDCDAFD4_15h04&position=0>.

through its domestic policies of indefinite detention and offshore processing, it has fundamentally sought to disempower refugees and strip them of their autonomy to make decisions as to how best to live their lives.[117] Since the implementation of these policies, numerous reports have shown how the government's prolonged and indefinite detention of refugees and asylum seekers has had devastating impacts on their mental and physical health and well-being.[118] This approach is fundamentally in opposition to the direct involvement of refugees and refugee-led organisations in the delivery of rights-based programmes and services to refugees.

### 6.3 Commentary

The above analysis reveals that despite increased recognition and support for refugee inclusion in programme and service delivery in recent years, the international legal and policy framework remains insufficiently developed to ensure the meaningful and sustained participation of refugees in the delivery of rights-based programmes and services. Currently, where refugee participation occurs in programme and service delivery, it is largely motivated by a utilitarian desire to improve programme efficiency rather than a belief that such participation is required by law or necessary to guarantee refugee rights.[119] This approach to refugee participation has at times led to some positive practices, such as the significant increase in private sector funding to refugee-led organisations since the COVID-19 pandemic. However, in other arenas it has only led to limited or tokenistic forms of participation, where refugees are consulted but not included in the implementation of programmes, or not consulted at all. Furthermore, many barriers still prevent the meaningful participation of refugees in the delivery of programmes and services.

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[117] See Chapter 1 for more detail on this.

[118] See UNSW Law, *Kaldor Centre Principles for Australian Refugee Policy* (UNSW, March 2022) 9; also, *Inquest into the death of Omid Masoumali* (Coroners Court of Queensland, Coroner Ryan, 2016/1752, 1 November 2021) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0008/699119/cif-masoumali-o-20211101.pdf>.

[119] Writing about the situation in Bangladesh, Oliver Lough et al suggest that 'in the context of a crisis that is deeply underpinned by the systematic denial of human rights to an entire population group and its profoundly disempowering consequences, the language of rights and empowerment is also oddly absent from humanitarian discourses on participation. Instead, participation continues to be seen largely in terms of improving programme effectiveness and efficiency': see Oliver Lough et al, 'Participation and inclusion in the Rohingya refugee response in Cox's Bazar, Bangladesh: 'We never speak first'' (Humanitarian Policy Group Working Paper, October 2021) <https://odi.org/en/publications/participation-and-inclusion-in-the-rohingya-refugee-response-in-coxs-bazar-bangladesh-we-never-speak-first/> 8.

To what extent is this practice consistent with the international legal and policy framework governing refugee participation in this area? As discussed in Chapter 2, some laws do require the participation of refugees in programme and service delivery. In relation to children, for example, the United Nations Committee on the Rights of the Child has argued that Article 12 of the *1989 Convention on the Rights of the Child* ('CRC') requires that the views and wishes of unaccompanied and separated children, including child refugees, be considered when determining matters such as care and accommodation requirements.[120] Additionally, in the context of the women, peace and security agenda, the UN Committee on the Elimination of Discrimination against Women has recommended that States parties to the *1979 Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW') 'promote the meaningful inclusion and participation of internally displaced and refugee women in all decision making processes, including in all aspects related to the planning and implementation of assistance programmes and camp management'.[121]

Both the *2016 New York Declaration for Refugees and Migrants* ('New York Declaration')[122] and the *2018 Global Compact on Refugees* ('Global Compact on Refugees')[123] also articulate some non-binding commitments to include refugees in the delivery of programmes and services. Paragraph 31 of the New York Declaration commits states to work towards ensuring the full, equal and meaningful participation of refugee women 'in the development of local solutions and opportunities'.[124] More broadly, Paragraph 34 of the Global Compact on Refugees provides that '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'.[125]

However, by and large, the international legal framework governing refugee participation in programme and service delivery remains inchoate and patchy. UNHCR's Tool for Participatory Assessment in Operations

[120] Committee on the Rights of the Child, *General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2005/6 (1 September 2005) [25], [79].
[121] Committee on the Elimination of Discrimination against Women, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc CEDAW/C/GC/30 (1 November 2013) [57].
[122] *New York Declaration for Refugees and Migrants*, UNGA Doc A/RES/71/1 (3 October 2016) ('New York Declaration').
[123] *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2 August 2018).
[124] New York Declaration [31].
[125] Global Compact on Refugees [34], emphasis in original.

specifically advocates for a human rights-based approach to participation, even if it does not meet its own aspirations.[126] Yet, most practice is shaped by policy rather than law. The definition of participation developed by signatories of the Grand Bargain, for example, focuses on participation as a means to ensuring that humanitarian responses are 'relevant, timely, effective and efficient'.[127] This definition makes no mention of the *rights* of affected persons to be heard in decision-making processes that impact them. Further, as discussed in Chapter 3, many civil society organisations who do support the inclusion of refugees in the design and implementation of their programmes indicate that they do so because they consider it morally the right thing to do, rather than something that is required of them as a matter of law.

The absence of a clear rights-based legal framework to refugee participation in the delivery of programme and services is problematic for several reasons. First, it has led to inconsistencies in application where refugees are included in some decision-making processes but not others. This can be seen in UNHCR's attempts to consult with refugees through its participatory assessments but exclude refugees in other areas, such as in the development of its digital data collection technologies. Second, it has led to a framework where, as Oliver Lough et al note, participation is often seen as 'an optional extra or separate technical process' rather than a 'central component of all activities'.[128] This is a concern in the context of scarce funding and resources and where participation is not always efficient but takes additional time to implement.[129]

Third, the absence of a rights-based legal framework has inhibited growth of efforts aimed at overcoming barriers to refugee participation in service delivery. States, international organisations, and donors have made some progress towards addressing these barriers, such as by considering more flexible funding arrangements to refugee-led organisations. However,

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[126] See *UNHCR Tool for Participatory Assessment in Operations* (n 35) 12. For legal analysis of this approach, see Chapter 2.

[127] See IASC Grand Bargain Participation Revolution Work Stream, *Agreed, practical definition of the meaning of "participation" within the context of this workstream* (Inter-Agency Standing Committee, 8 March 2017) <https://interagencystandingcommittee.org/system/files/participation_revolution_-_definition_of_participation.pdf>.

[128] Oliver Lough et al (n 119) 64.

[129] This is partially acknowledged in UNHCR's 2001 review of its repatriation and reintegration operation in Liberia, which recognises that 'effective participation is an inherently time-consuming process'. See Jeff Crisp, *The WHALE: Wisdom we Have Acquired from the Liberia Experience: Report of a regional lessons-learned workshop, Monrovia, Liberia, 26-27 April 2001* (UNHCR, EPAU/2001/06, May 2001) [42].

without being obligated to do so, progress remains slow and too often the status quo is accepted. Donors also often direct financial support primarily towards refugee-led initiatives that can effectively fashion themselves according to the priorities and agendas of those donors.[130] Finally, a predominantly voluntary approach to the participation of refugees in service delivery has meant that there is limited accountability when stakeholders exclude refugees from these decision-making processes.

Among humanitarian aid organisations, the fear or risk of losing financial support means that time and resources are more often directed towards ensuring accountability to donors rather than to refugees and affected populations.[131] Refugees can sometimes submit a complaint or a suggestion for feedback to the organisation or body with whom they are seeking to engage. Yet, field research indicates that affected communities are not always aware of these mechanisms,[132] and when they are, often find these mechanisms alienating and dysfunctional.[133] This approach to accountability falls significantly short of a rights-based remedy through a judicial or administrative process. As Diana Martin et al have noted, 'there is a lack of an independent oversight or ombudsman body, leaving the humanitarian accountability system self-regulatory in nature'.[134] Beyond this, there is also a failure to include refugees in the design of complaints mechanisms and to develop accountability procedures that accommodate local understandings and cultures.

### *6.3.1 Legal alternatives? The case of Kenya*

The problems associated with the current international legal framework governing the participation of refugees in programme and service delivery gives rise to questions regarding alternatives. What would a legal obligation to consult with refugees in the design and implementation of rights-based

[130] See Gidron and Carver (n 68). Pincock, Betts and Easton-Calabria similarly have noted how the most successful community organisations in Kakuma refugee camp have been those that 'effectively mimic humanitarian narratives on what refugees need and show themselves as well-placed to deliver these pre-determined objectives': Pincock, Betts and Easton-Calabria (n 6) 108.
[131] Diana Martin, Sarah Singer and Bethan Mathias, 'Humanitarian Accountability in Displacement Contexts: Five Years on from the Grand Bargain' (2021) 40(4) *Refugee Survey Quarterly* 349, 359.
[132] See CHS Alliance, *Humanitarian Accountability Report. Are We Making Aid Work Better for People* (CHS Alliance, 2020) <https://www.chsalliance.org/get-support/resource/har-2020/> 46–50.
[133] See Oliver Lough et al (n 119) 63.
[134] Martin, Singer and Mathias (n 131) 359.

services and programmes to refugees look like in the international refugee regime? Is there a precedent for such a reform at any level of governance?

Among states around the world, the only country known to the author that has established a legal obligation to consult with refugees on its territory to date is the government of Kenya. Under Article 10 of the Kenyan constitution, public participation is identified as a national value and principle of governance that requires all state organs, state officers, public officers, and other persons in Kenya to engage in public participation when making or implementing public policy decisions. In the case of *Okiya Omtatah Okoiti v Refugee Affairs Secretariat (RAS) Kenya & 2 others* [2020], the High Court of Kenya confirmed that this constitutional requirement is not limited to citizens or permanent residents, but rather extends to all members of the public who 'will be directly affected by those decisions', including refugees where appropriate.[135]

This case focused specifically on the enactment of new Refugee Community Leader Election Guidelines by the Kenyan government and UNHCR Kenya (the Guidelines). In this case, refugee representatives raised concerns that the new Guidelines required leaders of refugee groups in Kenya to be elected solely based on their areas of residence as opposed to the previous practice of being elected based on their ethnicity or nationality. They also petitioned that the Guidelines denied refugee communities the opportunity to vet and nominate the candidates of their choice. This was because the Guidelines required candidates to first apply for nomination and clearance online before being able to vie for election. Finally, the representatives argued that the Guidelines were enacted in violation of the Kenyan constitution because they were developed without any prior consultation with the refugees involved.

In response to these claims, the Refugee Affairs Secretariat of Kenya and the Attorney General of Kenya argued that 'the elections in the refugee community are not a matter of right'. They also argued that the demand of the refugee representatives that the refugee elections be based on ethnicity 'would be tantamount to eroding Kenya's national system of elections which is based on regional delimitations and not ethnic groups'.[136] UNHCR Kenya, although listed as a respondent, did not make any interventions in this case.

[135] *Okiya Omtatah Okoiti v Refugee Affairs Secretariat (RAS) Kenya & 2 others* [2020] eKLR <http://kenyalaw.org/caselaw/cases/view/203986/> [29].
[136] Ibid [21]–[22].

The High Court of Kenya, in considering these matters, found that while the government and UNHCR had met with the refugee communities to discuss the new Guidelines, this meeting was a 'sensitization exercise' that focused on raising awareness about the existence of the new Guidelines and advising refugees as to how they were to be implemented.[137] The meetings were not designed to gather input from the refugee communities to inform the development of the Guidelines, as the Guidelines were already finalised.

When considering whether this approach was consistent with the requirement of public participation under the Kenyan constitution, the High Court found that the failure to 'hold any public forum to gauge the concerns and obtain the input of the refugee community' infringed 'the legitimate expectation held by the refugees that the Guidelines governing the election of their leaders would be subjected to public participation'.[138] The Court declared that the Guidelines be quashed due to their inconsistency with the Kenyan constitution, and further noted that while the government and UNHCR are not bound by the views of the public, they 'are bound to give the stakeholders an opportunity to be heard' and to take this input into consideration.[139] While this case is unique in its approach to refugee participation, it nevertheless points towards an alternative framework to participation that stems first and foremost from legal obligation.

## Conclusion

This chapter has considered to what extent and in what ways refugees have been able to participate in decisions relating to the delivery of programmes and services on the ground. The chapter has examined UNHCR's approaches to including refugees in the delivery of services at the operation level, as well as the current limitations of this. The chapter has then explored emergent trends in relation to the recognition and funding of refugee-led organisations, and the transition among some NGOs towards greater inclusion of refugees within their organisational leadership. Finally, the chapter has examined the legal dimensions of the participation of refugees in programme and service delivery, and the novel approach taken by Kenya to require public participation (including refugees) as a constitutional requirement.

[137] Ibid [30].
[138] Ibid [36].
[139] Following on from another precedent, the Court noted that '[P]ublic participation does not necessarily mean that the views given must prevail. It is sufficient that the views are taken into consideration together with any other factors in deciding on the legislation to be enacted': Ibid [33].

In analysing this material, this chapter has found while there has been increased recognition and support for the participation of refugees in the provision of protection services in recent years, the international legal and policy framework remains insufficiently developed to ensure the meaningful and sustained inclusion of refugees in the design and implementation of these services. Positive practices have emerged, such as the significant increase in private sector funding to refugee-led organisations since the COVID-19 pandemic and the transition towards refugee inclusion in the governance of some NGOs. However, in other institutions and decision-making areas, refugee participation has been limited to either restricted forms of consultation with limited involvement of refugees in the implementation of services, or no consultation at all. Further, numerous barriers still exist which prevent or limit the meaningful participation of refugees in programme and service delivery.

The limitations of this international legal and policy framework indicate that reform is needed. In the next chapter, this thesis considers different approaches and reforms that could further enable the meaningful participation of refugees in the design and implementation of policies that affect them.

# || PART III ||

# ENHANCING THE PARTICIPATORY FRAMEWORK

# || 7 ||

# IMPROVING REFUGEE PARTICIPATION IN PRACTICE AND LAW

## Introduction

Given the deficiencies in the current international legal and policy framework governing refugee participation, this chapter looks forward towards different approaches and policy reforms that could further enable the meaningful participation of refugees in the design and implementation of policies that affect them. The chapter begins by considering how participatory approaches in the international refugee regime could be improved in practice. In particular, the chapter reflects on many of the barriers that currently prevent refugees from more active and meaningful engagement in decision-making processes and considers how these barriers can be dismantled or minimised to enable more effective and meaningful participation. Following this, the chapter explores the merits of different international law reform options that could be pursued to address some of the gaps and grey areas that currently exist in the international legal framework.

In introducing and analysing these proposals for reform, this chapter starts with two important caveats. First, although there are several potential benefits to including refugees in relevant decision-making processes (as canvassed in detail in Chapter 3), caution is needed not to create false expectations as to what reforms to the legal and policy framework governing refugee participation are likely able to achieve.[1] As John Cohen and Norman Uphoff reflected in the context of rural development as far back as 1980:

> participation is not a panacea. While its neglect has often been devastating to project results, simply introducing it will not necessarily make projects successful. In many instances,

[1] As Oliver Bakewell has suggested, care is needed not to overplay the room for refugees to manoeuvre and suggest that refugees may have more autonomy than they really have. See Oliver Bakewell, 'Some Reflections on Structure and Agency in Migration Theory' (2010) 36 *Journal of Ethnic and Migration Studies* 1689.

> participation appears to be necessary but not sufficient for good results.[2]

Within the context of the international refugee regime, increased refugee participation may improve protection responses, empower refugees, and enhance governance standards. But it is unlikely to emancipate refugees from many of the structural barriers they currently face in their search for protection and solutions. For instance, the participation of refugees in relocation decisions such as resettlement and repatriation decisions 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.[3]

Second, the reform proposals explored in this chapter are intended to contribute to the ongoing conversation regarding how refugees can more meaningfully participate in decision-making processes that affect them. The suggestions presented here are not intended to resolve these issues conclusively or comprehensively. While I have aimed throughout this thesis to foreground and bring greater attention to the views of refugees (including through research interviews), the reforms suggested here, except where explicitly stated, should not be interpreted as necessarily reflective of refugees' desires and aspirations.

### 7. 1 Addressing Barriers to Participation

For refugees to have a more meaningful say in decision-making processes that affect them, far more work needs to be undertaken by all stakeholders in the international refugee regime to both understand and help remove barriers that currently prevent effective refugee participation. These barriers are numerous, and oftentimes interconnected. Many of these barriers have been flagged in the previous chapters of this thesis. They include, among other things, barriers related to the denial of refugee rights in countries of

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[2] John Cohen and Norman Uphoff, 'Participation's place in rural development: seeking clarity through specificity' in Andrea Cornwall (ed), *The Participation Reader* (Zed Books, 2011) 34, 55. James Milner has similarly suggested that 'meaningful refugee participation is not a panacea for the limitations of the global refugee regime': James Milner, 'The Politics and Practice of Refugee Participation in the Governance of the Global Refugee Regime' (Research Paper, Canadian Political Science Association Annual Conference, 31 May 2021) 17.

[3] To address these issues, there is a need for further reform to the ways in which states and other stakeholders share responsibility for providing protection and solutions to refugees. For more on this subject, see, for example, Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar, 2016); also, Alexander Betts, Cathryn Costello and Natascha Zaun, *A Fair Share: Refugees and Responsibility-Sharing* (Delmi, December 2017) <https://www.delmi.se/en/publications/report-and-policy-brief-2017-10-a-fair-share-refugees-and-responsibility-sharing/>.

asylum; ongoing protection risks to refugees; lack of financial and capacity support for refugee participants; concerns over the representative dimensions of refugee participation; communication barriers; and resistance from some actors to structural change. Additionally, specific groups of refugees – such as refugee women, refugee children, LGBTIQ+ refugees, refugees with disabilities and older refugees – often face compounding barriers to participation. Without being comprehensive, these additional challenges may relate to the prevalence and impact of sexual and gender-based violence on refugee women and girls,[4] or 'structures and systems that may be inherently homophobic, biphobic, transphobic, intersexphobic, ableist, classist, racist and xenophobic', for example.[5]

Although it is beyond the scope of this chapter to address each of these barriers comprehensively, this chapter highlights some of the key areas where meaningful refugee participation could be improved based on the international legal standards already in place. These areas include establishing safe and enabling environments for the physical and digital security of refugees; funding and supporting refugee preparedness; grappling with the representative dimensions of refugee participation; and institutionalising appropriate listening among various stakeholders.

### *7.1.1 Creating safe and enabling spaces for refugee participation*

One of the main areas where meaningful refugee participation could be improved is through the development of safe and enabling environments for the participation of refugees in decision-making processes. Currently, many refugees experience legal insecurity and uncertainty, where their presence in the country of asylum is either only informally accepted or is recognised by a time-limited visa with no guarantee of permanent protection. This insecure legal status is often coupled with threats of forced deportation and restrictions on refugees being able to move freely throughout the country of asylum. Additionally, refugees often fear reprisal, persecution, or other

[4] Global Refugee-led Network, *Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action* (Asylum Access, December 2019) ('*Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action*') 18.

[5] See Tina Dixson, Renee Dixson and Eliana Rubashkyn, Canberra Statement on the access to safety and justice for LGBTIQ+ asylum seekers, refugees and other forcibly displaced persons (Canberra, November 2019) <http://bit.ly/cbr-statement> [10]. The Canberra Statement emerged from the Queer Displacements: Sexuality, Migration and Exile conference held on 13-15 November 2019 in Canberra, Australia. This conference was organised by two queer refugee women and brought together academics, NGOs, policy makers, government agencies, activists and refugees to discuss the issues of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) forced displacement.

serious harm from non-state actors as well. This may involve non-state actors from within the community where they have sought asylum, as well as non-state actors from the country they have fled.

Other than impacting the protection of refugees broadly, this lack of security and certainty for refugees has implications for the ability and willingness of refugees to participate in decision-making processes. For example, refugees may be fearful of speaking out against government policies due to the risk, real or perceived, of either being forcibly returned to their country of origin or denied permanent protection in the country of asylum. Alternatively, in some contexts, state laws and policies may pre-emptively dissuade refugees from complaining about their predicament because they may perceive it as impacting upon their likelihood of receiving a durable solution elsewhere.[6] Refugees may also self-censor their views due to fear of community reprisal or other harm.

To address these barriers, there is a need for states to ensure the provision of human rights to refugees on their territory in accordance with extant international human rights law obligations. As canvassed in Chapter 2, these rights are numerous, and include the rights to freedom of expression, freedom of movement, freedom of association, the right to work, protection from refoulement, among others. The fulfilment of these rights is critical to enabling refugees to be able to participate peacefully, safely, and sustainably in decision-making processes that materially impact their human rights. It is through the fulfilment of these rights that refugees can speak without fear of reprisal, persecution, or other serious harm. The fulfilment of these rights also enables refugees to freely form and join organisations and other group-based initiatives, to elect and financially support chosen representatives, and to advocate collectively on matters that affect them.

Yet, even in contexts where states have yet to ensure each of these human rights protections for refugees under their effective control, efforts still need to be made by governments and other stakeholders to create safe and

[6] In Indonesia, for example, several refugees remain reluctant to complain about the actions of UNHCR and Indonesia because they worry that public expression of their concerns may impact their chances of being offered a resettlement place in another country. Some refugees are also reluctant to engage in refugee-led initiatives due to a belief that doing so may impact their opportunity of resettlement. This perception arises in part due to the lack of transparency surrounding the resettlement selection process. For more on the situation in Indonesia, see Sitarah Mohammadi and Sajjad Askary, 'Refugees live in destitution in Indonesia: Years of limbo and suffering leads refugees to protests for many weeks now for resettlement', *Refugee Council of Australia* (Blog post, RCoA, 10 January 2022) <https://www.refugeecouncil.org.au/refugees-live-in-destitution-in-indonesia/>.
For more on the importance of transparency in the resettlement process, see Chapter 5.2.1.

enabling environments for refugee participation. As the Global Refugee-led Network has suggested in its guidelines on meaningful refugee participation, '[e]ven before host governments have built or enacted legal and policy solutions that protect refugee participation, they can offer refugee advocates ad hoc safeguards that promise indefinite safety before, during and after moments of engagement'.[7] This may involve creating safe spaces for refugees to meet, organise, and consider their own interests, or it may take the form of offering appropriate training and resources on digital security and privacy, for example.

### *7.1.2 Funding and supporting refugee preparedness*

A second key area where meaningful refugee participation could be improved is through additional funding, training, and other support which facilitates the preparedness of refugees to be able to participate. As the Global Refugee-led Network indicated, there is a need to recognise and address the 'disparities in privilege that refugee advocates experience with respect to education, work experience and familiarity with the professional culture of refugee response'.[8] Further, it is important to recognise that '[m]any refugee advocates have not been formally trained in areas that some refugee response sector leaders take for granted, from policy advocacy to communications to project management'.[9] This lack of training may be a consequence of their displacement, where refugees may have experienced interruptions in their education or career development.[10]

The previous chapters of this thesis have brought attention to some promising practices of stakeholders seeking to proactively support the development of refugees' capacities and resources to build effective refugee engagement. NGOs such as Asylum Access and Saint Andrew's Refugee Services, for example, have invested in leadership training and skills development in recent years to enhance refugee leadership in programme and service delivery. Advocacy groups such as the Refugee Council of Australia similarly have sought to financially support advocates from refugee backgrounds to participate in international dialogues on refugee protection, with the intention that they can subsequently provide greater input into the development of international law and policies that affect

[7] *Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action* (n 4) 18.
[8] Ibid.
[9] Ibid.
[10] Ibid.

refugees.[11] Incrementally, initiatives of this kind assist in making refugee participation more sustainable. For example, many of the refugee advocates supported by the Refugee Council of Australia have subsequently gone on to play formative roles in the development of refugee-led initiatives, such as the Global Refugee-led Network and the Asia Pacific Network of Refugees.[12]

Yet, despite these developments, these initiatives do not necessarily reflect common practice in the international refugee regime to date. So far, UNHCR has assigned only small fractions of its budget towards preparing refugees and refugee-led organisations for engagement in decision-making processes that affect them. Other major donors similarly have evidenced little political or economic interest towards building refugees' capabilities and resources in governance. While in 2016 several governments and international aid organisations committed to undertaking a 'participation revolution' in the humanitarian ecosystem through the Grand Bargain initiative, five years on there has been little progress towards this commitment.[13] Further, in relation to decisions relating to the voluntary repatriation of refugees, most decisions are made without engagement with refugees' chosen representatives and there is little evidence demonstrating an interest among states and others towards building the capacity of refugee-led initiatives to enable substantive, group-based participation in these processes.[14]

The reticence among states and others to invest in refugees' preparedness for participation is in large part due to political will. As Chapter 5 revealed in relation to return decisions, states and other actors are often reluctant to support (financially or otherwise) refugees' political participation in contexts where that participation is likely to give rise to advocacy or views contrary to states' interests. Further, in contexts where states predominantly seek to exclude or curtail refugees' access to protection, states often see little value in incorporating the viewpoints of refugees. As political theorist Natasha Saunders has documented in her work on 'the refugee problem', in

[11] See Paul Power, 'Refugees Advocate for their rights' (2019) 34 *Refugee Transitions* 46; also, 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>.
[12] Power (n 11) 47.
[13] See Chapter 6.2.2 for more detail on this.
[14] See Chapter 5.1 for further information.

these political contexts '[t]he active engagement of and with refugees… is neither sought nor welcome'.[15]

Yet, even among stakeholders supportive of facilitating refugee participation, there are challenges as to how funding and support for refugee preparedness in participatory initiatives should be pursued. What is the role of external actors in this area? Is it necessary for these initiatives to be bottom-up and led by refugees themselves, or can others play a role? If so, what should that role be? While the answers to these questions are ultimately dependent on context, academics caution against extremes. On the one hand, it is important for external stakeholders not to impose their ideas or proposals onto refugees without consultation and agreement. This approach to skills development and support is unlikely to result in significant structural change.[16] At its worst, this approach can also reinforce power inequalities and the oppression that refugees experience.

On the other hand, it is equally the case that external stakeholders cannot simply shift responsibility for pursuing this transformative agenda onto those who are most impacted. As philosopher Olúfémi O Táíwò has illustrated in his writings on standpoint epistemology and race, one of the dangers of deferring or 'passing the mic' exclusively to those who are politically marginalised is that it can 'supercharge moral cowardice' among other stakeholders and shift 'onto individual heroes, a hero class … the work that is ours to do now in the present'.[17] Guy Goodwin-Gill states in a similar manner that '[t]he protection of rights is and ought to be the business of everyone; and that each of us is and ought to be responsible for finding a way to make protection a part of our life, professional or private, no matter how small the contribution may appear to be'.[18]

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[15] Natasha Saunders, *International Political Theory and the Refugee Problem* (Routledge, 2018) 181.

[16] Anna Purkey notes, for example, that '[w]hile these initiatives may succeed in imposing a veneer of change, one must question to what extent the information and the values and judgments that underpin that information are internalized by the refugee community'. See Anna Purkey, 'Transformative Justice and Legal Conscientization: Refugee Participation in Peace Processes, Repatriation, and Reconciliation' in Megan Bradley, James Milner and Blair Peruniak (eds), *Refugees' Roles in Resolving Displacement and Building Peace* (Georgetown University Press, 2019) 75, 90. See also, Sarah Meyer, 'The 'refugee aid and development' approach in Uganda: Empowerment and self-reliance of refugees in practice' (New Issues in Refugee Research Working Paper No 131, UNHCR, October 2006).

[17] Olúfémi O Táíwò, 'Being-in-the-Room Privilege: Elite Capture and Epistemic Deference' (2020) 108(4) *The Philosopher* 61 <https://www.thephilosopher1923.org/essay-taiwo>.

[18] Guy S Goodwin-Gill, 'Concluding Comments: Revisiting the Principles of Protection for Migrants, Refugees and Other Displaced Persons, One Year On' (2021) 54 *Cornell International Law Journal Online* 21, 23.

Although the specific areas of skills training and development required for effective participation among refugees are multifarious, one area particularly relevant for this thesis' subject matter is the acquisition of knowledge and skills related to the legal dimensions of participation. As socio-legal scholar Anna Purkey has argued in relation to her work on refugees' involvement in peace processes, it is important that refugee communities have a comprehensive understanding of 'how the law affects one's life and the role that law and legal institutions play as mechanisms of oppression as well as potential tools for change'.[19] This involves fostering an awareness among refugees of themselves as potential legal subjects, as well as a deeper understanding of how law currently facilitates and restricts the participation of refugees in decision-making.

While this process of 'legal conscientization', as Purkey calls it,[20] needs to be driven from within the refugee community, Purkey notes that it is unrealistic to expect that such a process will occur without any external engagement. The law, Purkey argues, 'even at its most informal, does involve a specialized body of knowledge that members of oppressed communities may or not possess on their own'.[21] Accordingly, external actors 'may act as resources, as repositories of knowledge, and potentially even facilitators who can help refugees navigate the legal world'.[22] At a practical level, this may be pursued through legal literacy initiatives, legal services provision, strategic litigation and other law reform initiatives.[23]

Among refugee communities, there appears broad support for working collaboratively with other stakeholders to enhance meaningful refugee participation. As co-founder of the Global Refugee-led Network Najeeba Wazefadost stated in an interview for this research, 'the sector needs to create opportunities for facilitating preparedness of refugee-led organisations, including training and mentorship opportunities. It also needs to initiate institutional self-reflection and to implement changes that dismantle power dynamics that have excluded refugees so far'.[24] Similarly, former refugee from Sudan Atem Atem has highlighted the importance of

[19] Purkey (n 16) 89.
[20] In developing this concept, Purkey draws on the concept of conscientization developed by Paulo Friere. This approach refers to 'learning to perceive social, political and economic contradictions, and to take action against the oppressive elements of reality'. Paulo Friere, cited in Ibid 88.
[21] Ibid 90.
[22] Ibid 91.
[23] Ibid.
[24] Interview with Najeeba Wazefadost, CEO of the Asia Pacific Network of Refugees and Co-Founder of the Global Refugee-led Network (20 January 2022).

building coalitions between refugee-led organisations and other stakeholders as a means to ensuring refugees are heard.[25] As these advocates make clear, it is not sufficient to simply just give refugees a seat at the table.

### *7.1.3 Representativeness*

A third key area for enabling the meaningful participation of refugees in decision-making processes is grappling with the issue of representativeness. As highlighted in the Introduction of this thesis, refugees rarely constitute (politically or culturally) a singular, homogenous group. Depending on context, refugees experience distinct structural challenges. These challenges shift over time, just like the nature of refugee status. Refugees also have diverse needs and aspirations, arising from their personal circumstances, including their age, gender and sexual orientation. How should the international legal and policy framework effectively grapple with the diversity of refugees' aspirations and needs in decision-making processes? Further, what is the best way to enable representative participation in the international refugee regime?

Until now, the international legal and policy framework governing the participation of refugees in decision-making has not adequately addressed the representative dimensions of refugee participation. International legal instruments such as the New York Declaration and the Global Compact on Refugees have emphasised broadly the importance of including refugees in relevant decision-making fora. To their credit, these legal instruments also highlight the importance of incorporating the perspectives of refugees that are usually further marginalised from these decision-making processes, such as refugee women, refugee children and refugees with disabilities.[26] However, beyond this, these instruments have stopped short of providing further procedural guidance as to how this should be achieved.

Further, other than some notable but small exceptions,[27] states, international organisations and other stakeholders have devoted little attention generally to the dynamics and practicalities of group-based refugee participation across a range of decision-making areas. As Lisa Richlen has noted, '[r]elatively little is known about what representation means from the perspective of forced migrants and within their communities. Who do they

[25] See Refugee Council of Australia, *Nothing About Us Without Us: Getting Serious About Refugee Self-Representation* (Refugee Council of Australia, July 2017) 3–4.
[26] See Chapter 2 for more detail.
[27] See, for example, the elections of refugee camp committees in Kenya and on the Thai/Burma border discussed in Chapter 6.

view to be a credible representative? What are their criteria for selecting representatives? What roles do trust, personal relationships and experience play in selecting representatives?'.[28]

This lack of attention to the representative elements of refugee participation is in part due to a lack of interest in facilitating the politicisation of refugee communities among states and other stakeholders. However, it is also due to an inherent focus towards the individual within modern international refugee law. As Chapter 5 discussed, this focus has emerged in part from international human rights law's intellectual mooring in Western liberal political philosophy, which centralises the rights of the individual and overlooks group rights which are not 'reducible either to the liberties of the citizen or to the prerogatives of the state'.[29] It is also a product of the historical context in which the 1950 *Statute for the Office of the United Nations High Commissioner for Refugees* ('UNHCR Statute') [30] and the 1951 *Convention relating to the Status of Refugees* ('1951 Refugee Convention')[31] were first drafted. During this period, there was a desire to move away from a focus on the rights of refugee groups and other 'minorities', and instead move towards individualised conceptions of refugeehood and human rights.[32]

This shift is generally celebrated as a positive development in international refugee law, given that it contributed to the 'universalisation' of the legal definition of a refugee and made access to international protection no longer contingent legally on belonging to a particular group.[33] After all, one of the

[28] Lisa Richlen, 'Representation, trust and ethnicity within refugee communities: the case of Darfurians in Israel' (2022) *Community Development Journal* (forthcoming) 2.
[29] S James Anaya, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' in Will Kymlicka (ed), *The Rights of Minority Cultures* (Oxford University Press, 1995) 321, 326.
[30] *Statute of the Office of the United Nations High Commissioner for Refugees*, UN Doc A/RES/428(V) (14 December 1950).
[31] *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
[32] For more on this conceptual shift from minority rights to individual rights in international law, see Helen O'Nions, *Minority Rights Protection in International Law: The Roma in Europe* (Ashgate, 2007) 186–190; also, Ivor C Jackson, *The Refugee Concept in Group Situations* (Martinus Nijhoff, 1999) 11–25.
[33] This 'universalisation' of the legal definition of a refugee was not immediate and remains contested by some scholars. As discussed in Chapter 2, when the 1951 Refugee Convention entered into force, states parties could opt to limit their obligations geographically to refugees fleeing events in Europe. The *1967 Protocol relating to the Status of Refugees* removed this geographical limitation. Nevertheless, there are strong arguments that the refugee definition still reflects Global North geopolitical interests. See, for example, Ulrike Kraus, 'Colonial roots of the 1951 Refugee Convention and its effects on the global refugee regime' (2021) 24 *Journal of International Relations and Development* 599.

main problems with the international refugee regime during the interwar years was that it offered protection to some national or ethnic groups and not others. However, it also has had consequences for group-based, representative participation of refugees, particularly in terms of the obfuscation of refugee polities. These consequences have largely gone unexamined until now.

*7.1.3 1 The selection of refugee representatives*

In practice, the implementation of representative refugee participation generally encounters two major challenges. The first challenge is determining how refugee representatives are selected and who they should be seen to represent. As Cornwall notes, '[t]he question of who participates – as well as who is excluded and who exclude themselves – is a crucial one'.[34] While there is broad consensus among refugees, states, UNHCR and others that refugee-led advocacy should strive to be as representative as possible, in practice the selection of refugee representatives is politically complex. Refugees have often highlighted problems associated with self-appointed or externally-selected individuals that fail to reflect the diversity of refugee experiences or fail to transmit those interests to relevant decision makers.[35]

Externally, states, UNHCR and others have also raised concerns about the representative dimensions of refugee participation. For example, the Assistant High Commissioner for Protection at UNHCR, Gillian Triggs, and Patrick Wall revealed in a 2020 journal article that a number of participants involved in the drafting of the Global Compact on Refugees questioned either publicly or privately the representativeness of the refugees who participated in the drafting process.[36] Prior to this, Jeff Crisp likewise suggested in 2001 in a review of UNHCR's repatriation and reintegration operations in Liberia that 'the notion of 'community' must … be

[34] Andrea Cornwall, 'Unpacking 'Participation': Models, Meanings and Practices' (2008) 43 *Community Development Journal* 269, 275.
[35] See, for example, the case of Sudanese refugee-led advocacy in Israel, in Richlen (n 28); also, The Global Summit of Refugees, *Policy Discussion and Outcomes Paper* (Network for Refugee Voices, August 2018) <https://www.networkforrefugeevoices.org/global-summit-of-refugees.html> ('*Global Summit of Refugees Outcomes Paper*') 6.
[36] Triggs and Wall further noted that, in the context of international policy discussions, '[o]nly some refugees are able to travel internationally, often those who have been resettled; others face insurmountable legal obstacles or burdensome administrative processes to obtain travel documentation and visas': Gillian D Triggs and Patrick CJ Wall, ''The Makings of a Success': The Global Compact on Refugees and the Inaugural Global Refugee Forum (2020) 32(2) *International Journal of Refugee Law* 283, 299.

deconstructed if the notion of participation is to be operationalized'. 'Community leaders', Crisp suggested:

> can be found in any population. But all too frequently they are adult males, unwilling or unable to represent the interests of women, girls, boys and other social groups. Special efforts must therefore be made to gain access to these often disempowered groups and to listen to their views.[37]

While refugee-led initiatives have on occasions sought to address these challenges by strengthening electoral processes,[38] undertaking due diligence to ensure representatives are 'active leaders in their communities',[39] and by increasing the numbers of representatives from groups that are frequently marginalised from decision-making processes,[40] external stakeholders have rarely supported and funded democratic initiatives such as these.

At the same time, refugee representatives have often challenged the unrealistic expectations of representation, pointing out that there is a double standard when external stakeholders question the representativeness of refugee leaders or refugee groups but do not help in any way to build or support the democratic structures that would facilitate greater representativeness.[41] Refugee leaders have also expressed concern about the way other stakeholders question the legitimacy and diversity of representatives as a means to limit or undermine refugee participation. As a refugee from the Network for Refugee Voices stated anonymously in relation to their involvement in international law and policy dialogues between 2016 and 2019:

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[37] Jeff Crisp, The WHALE: Wisdom we Have Acquired from the Liberia Experience: Report of a regional lessons-learned workshop, Monrovia, Liberia, 26-27 April 2001 (UNHCR, EPAU/2001/06, May 2001) [41]. See, also, Stefan Sperl and Machtelt De Vriese, *From emergency evacuation to community empowerment: Review of the repatriation and reintegration programme in Sierra Leone* (UNHCR, EPAU/2005/01, February 2005) [103]–[105].

[38] See, for example, the election of refugee leaders on the Thai/Burma border, discussed in Chapter 6.

[39] *Global Summit of Refugees Outcomes Paper* (n 35).

[40] For example, the Global Independent Refugee Women Leaders initiative at the international level, which seeks to increase the participation of refugee women in policy making; build the capacity of refugee women to engage locally; and advocates for inclusive human rights approaches to forced displacement. See 'Global Independent Refugee Women Leaders' (Web page, World Refugee & Migration Council, 2020) <https://wrmcouncil.org/girwl/>.

[41] See Mustafa Alio, 'Engage, Participate, Advocate: Young People and Women Leading' (Speech, United Nations Global Refugee Forum, 16 December 2019, 00:47:02) <https://conf.unog.ch/digitalrecordings/index.html?guid=public/60.2092/0E742915-7C38-44FF-896B-26BEFDCDAFD4_15h04&position=0>.

> The question of representation, although is a valid question we are asked, it is not always well-intended. Whoever comes to talk about this group [refugees] is going to be dismissed on certain grounds. You could be gay, black, Muslim, woman, but then you are not everything else, so you are not seen as representative. We had good diversity within our group but still we did not have enough, and you will never have enough.[42]

Similarly, members of the Global Refugee-led Network reported in 2022 that during consultations with UNHCR and other stakeholders in 2021:

> We were limited in access and abilities for direct representation, and faced unwarranted questions about our accountability, legitimacy, and whether our group is representative of global refugee populations.[43]

These comments highlight not only the challenges of 'mirror representation',[44] but also the concerns refugees have regarding the way questions about representation can be deployed as a political tool.[45]

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[42] Cited in Haqqi Bahram, 'Between Tokenism and Self-Representation: Refugee-Led Advocacy and Inclusion in International Refugee Policy' (Research Paper, Respond Working Paper Series, Global Migration: Consequences and Responses, Paper 2020/58, July 2020) <https://respondmigration.com/wp-blog/between-tokenism-and-self-representation-refugee-led-advocacy-and-inclusion-in-international-refugee-policy> 10.

[43] Shaza Alrihawi et al, *Power and The Margins: The State of Refugee Participation* (Global Refugee-led Network, January 2022) <https://wrmcouncil.org/publications/report/power-the-margins-the-state-of-refugee-participation/> 2.

[44] Mirror representation refers to the idea that a body of representatives should reflect the diversity of their constituents (in similar proportions to those that exist in the community). In his work on minority rights, Kymlicka argues in favour of a degree of mirror representation in certain contexts (including to overcome systemic disadvantage). However, he nevertheless recognises that mirror representation faces numerous conceptual challenges. He notes that 'the idea that the legislature should mirror the general population, taken to its logical conclusion, leads away from electoral politics entirely towards selection of representatives by lottery or random sampling'. Further, 'the claim that whites cannot understand the needs of blacks, or that men cannot understand the needs of women, can become an excuse for white men not to try to understand or represent the needs of others': See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press,1996) 138–141. From an alternative perspective, Anne Phillips has concerns with mirror representation, but notes that 'in querying the notion that *only* the members of particular disadvantaged groups can understand or represent their interests [one] might usefully turn this question round and ask whether such understanding or representation is possible without the presence of *any* members of the disadvantaged groups'. See Anne Phillips, 'Dealing with Difference: A Politics of Ideas or a Politics of Presence?' (1994) 1(1) *Constellations* 74, 89 Fn 12.

[45] These concerns are not necessarily unique to the international refugee regime. In the context of conflict resolution, Anne Marie Goetz and Rob Jenkins have documented that

*7.1.3 2 Individualised vs representative participation*

The second major challenge in representative refugee participation arises when there is disagreement between the wishes and demands of the refugee community and the wishes and demands of the individual refugee. In the international refugee regime, this challenge can arise in any decision that has implications for groups of refugees. But it is commonly seen in the context of repatriation decisions.[46] For example, it may arise where a refugee wishes to return to their country of origin, even when the refugee community advocates against such returns, or, alternatively, when the community is supportive of repatriation, but the individual refugee does not voluntarily agree to return. In these scenarios, whose wishes shall prevail? How should the international legal and policy framework grapple with these tensions?

While there is some debate in political science literature as to how this issue should be approached,[47] this thesis has argued that group-based participatory rights of refugees should be developed in a manner that supplements rather than replaces refugees' individual rights. Taking this supplementary approach, this thesis suggests that in the case of disagreement between the wishes and demands of the refugee community and the wishes and demands of the individual refugee, the latter shall prevail.

Theoretically, this approach is taken to give primacy to the autonomy and agency of refugees. However, it is also adopted to protect refugees and others from illiberal practices of communities which seek to curtail the individual rights of its members. As discussed in Chapter 5, these illiberal practices may arise due to a militarised presence within a refugee community which pressures refugees to adopt a particular position on a decision, or when certain ethnic groups are given favour over others.

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'[a]n enduring obstacle to involving women's organizations in formal conflict-resolution processes is their lack of perceived legitimacy as actors who can either stop the fighting or build the peace. Mediators often raise the question of the political "standing" of women's organizations when pressed to hold consultations with women's groups': Anne Marie Goetz and Rob Jenkins, 'Agency and Accountability: Promoting Women's Participation in Peacebuilding' (2016) 22(1) *Feminist Economics* 211, 219.

[46]This is discussed in Chapter 5.3.

[47] For an alternative view, William Galston notes that the problem with insisting upon the prioritisation of individual autonomy and free choice is that '[m]any cultures or groups do not place a high value on choice and (to say the least) do not encourage their members to exercise it': see William A Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge University Press, 2010) 21.

Alternatively, it may arise on gendered grounds in contexts where refugee women or other constituents are excluded from representative refugee participation.

### *7.1.4 Institutionalising listening*

Another central aspect that could improve the meaningful participation of refugees in decision-making processes is through the institutionalisation of appropriate listening. Enabling refugee participation is not just about ensuring that refugees have a seat at the table to express their voice. It is also about how other stakeholders *listen* and *respond to* these voices. Are the views of refugee advocates actually taken seriously and considered appropriately by others? Are the institutions and fora themselves properly designed to enable appropriate listening to the views of refugees and other forcibly displaced persons? Failure to properly listen to refugee voices can cause further harm to refugee participants and the communities they seek to represent. It can also render participation tokenistic, reducing it to a form of display or theatre.

In his book *Listening for Democracy: Recognition, Representation, Reconciliation,* Andrew Dobson highlights that listening can take different forms. First, there is 'compassionate listening', which centres upon offering 'hospitality to another's pain' but does not necessarily lead to meaningful dialogue between different points of view.[48] Second, there is what he and others refer to as 'cataphatic listening'. This is where the listener is not listening attentively and is generally not taking into consideration the speaker's views. At its worst, cataphatic listening, Dobson suggests, 'is a tool of colonial domination in that the colonizing power can offer the appearance of listening but in such a way as to reproduce relations of power rather than have them challenged'.[49]

Lastly, there is 'apophatic listening', which involves 'opening the self to the other' and listening while keeping in check one's own biases and preconceived beliefs. The aim of apophatic listening is to absorb the speaker's message on its own terms, ask for clarification if necessary, and then process that information before responding. Dobson suggests that this latter form of listening is most suitable for democratic processes because it

[48] Andrew Dobson, *Listening for Democracy: Recognition, Representation, Reconciliation* (Oxford University Press, 2014) 64.
[49] Ibid 68.

more effectively leads to meaningful dialogue, and it is more capable of being a 'solvent of power'.[50]

While individuals can develop skills in apophatic listening, it is also necessary that institutions establish appropriate mechanisms, both physically and virtually. This can be addressed through a variety of methods, but generally involves undertaking proper record keeping of what was said, providing considered responses to reform proposals, and leaving space for non-scripted interventions, reflections, and alternative ideas to arise. As Dobson suggests, any truly deliberative procedure needs to be unpredictable in terms of its outcomes and it must support a form of participation that opens up the possibility of an outcome which the powerholders may not favour.[51]

So far, little research has been done to consider and address how institutional listening should be approached in relation to meaningful refugee participation. In international law and policy discussions, there have been some examples of refugees being invited to give prominent speeches and contribute to the debate, even though the law or policy under question has already been fixed and there is no institutional opportunity for others to respond to the refugee's suggestions.[52] There have also been instances where refugees have been cut off from speaking due to rigid time formats, even while giving testimony of their own experiences of persecution and other serious harm.

For example, prior to his murder in 2021,[53] Rohingya refugee leader Mohib Ullah travelled from Cox's Bazar refugee camp in Bangladesh to Geneva to give testimony before the United Nations Human Rights Council in March 2019 about the treatment and concerns of the Rohingya community. The United Nations News division reported on that date that this was the first time that the Human Rights Council had heard testimonies from Rohingya

[50] Ibid 80. For an analysis of the idea of institutional listening with regards to Indigenous participation and voice, see Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48(4) *Federal Law Review* 529.
[51] Dobson (n 48) 182, 188–189.
[52] See, for example, the experience of Mohammed Badran, documented in James Milner, 'The Politics and Practice of Refugee Participation in the Governance of the Global Refugee Regime' (Research Paper, Canadian Political Science Association Annual Conference, June 2021) <https://carleton.ca/lerrn/wp-content/uploads/Milner-CPSA-paper-refugee-participation-May-2021.pdf> 14.
[53] See Hannah Beech, 'Mohib Ullah, 46, Dies; Documented Ethnic Cleansing of Rohingya', *New York Times* (New York, 2 October 2021) <https://www.nytimes.com/2021/10/02/world/asia/mohib-ullah-dead.html>.

refugees.[54] Yet, Mohib Ullah was only permitted to speak for two minutes before he was cut off prior to finishing his speech.[55] This was the only time he participated directly in a United Nations high-level meeting. While the decision to stop him from continuing his speech was consistent with the procedural rules set for the meeting, it raises questions as to whether these rules need revising to enable appropriate listening to human rights victims and refugee representatives.

### 7.2 Legal reform

In addition to considering how refugee participation can be improved in practice, there is also a need to consider how the international legal framework governing the participation of refugees in decision-making processes could itself be improved through legal reform. As discussed in Chapter 2, the current international legal framework governing refugee participation is patchy. While some binding and non-binding commitments already exist in relation to refugee participation in international law, no explicit legal requirement mandating the participation of refugees in decision-making processes currently exists and there is generally a lack of legal clarity as to how refugees should be engaged in decision-making processes and when this is legally required.

This lack of clarity in the international legal framework governing refugee participation has contributed to some of the deficiencies found in the international refugee regime. Although the international legal framework is neither solely to blame for these deficiencies nor capable of remedying them on its own, reform to the international legal framework can assist in facilitating more meaningful refugee participation in decision-making processes in a variety of ways. As discussed in the Introduction to this thesis, it can help establish benchmarks and mutual obligations for states and other actors; it can identify and entrench best practices; and it can influence the interpretation and development of local, national and regional law. Additionally, international law can also clarify understandings of what refugee participation entails and when it is necessary.

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[54] 'UN rights expert calls for end to 'purgatory' of 'international inaction' facing Myanmar's remaining Rohingya', *UN News* (Geneva, 11 March 2019) <https://news.un.org/en/story/2019/03/1034461>.

[55] To hear the speech in full, see Mohib Ullah, 'Statement of Mr. Mohibullah, International Federation for Human Rights Leagues' (Speech, United Nations Human Rights Council Interactive Dialogue with the Special Rapporteur on the situation of human rights in Myanmar, 11 March 2019, 00:48:33) <https://media.un.org/en/asset/k16/k16jmrlokz>.

### *7.2.1 Reform to UNHCR's Executive Committee*

So far, the most prominent proposal for reform of the international legal framework relating to refugee participation has focused on including refugee representatives within UNHCR's Executive Committee and Standing Committee meetings. In 2019, refugee representatives at the Global Refugee Forum gave a joint statement calling on UNHCR and other stakeholders to support the establishment of at least one refugee observer seat on the Executive Committee and Standing Committee of UNHCR.[56] The Global Refugee-led Network repeated this recommendation in 2022, arguing for refugee representation to occur within ExCom by 2023.[57] This approach is akin to the sole observer seat granted to NGO representatives in 1997.[58] Taking a slightly different approach, the refugee-led organisation R-SEAT (Refugees Seeking Equal Access at the Table) has advocated for '20 ExCom Member States to formalize refugee participation in their respective national delegations' at the Executive Committee meetings.[59]

This push to include refugee representatives within UNHCR's Executive Committee and Standing Committee has some merit. These committees play a central role in shaping refugee programming and policy each year. UNHCR's Executive Committee meets annually and is responsible for reviewing and approving UNHCR's annual programming budget, which for 2022 amounted to close to $9 billion USD.[60] The Executive Committee also advises UNHCR on the exercise of its functions, and it drafts Conclusions on International Protection (ExCom Conclusions). These Conclusions reflect the consensus reached by Executive Committee members, which now number more than 100 United Nations member states,[61] on various protection issues. Although not formally binding as a matter of treaty interpretation, ExCom Conclusions contribute significantly to the interpretation of international refugee law around the world. Alongside the Executive Committee, UNHCR's Standing Committee generally meets

[56] See Shaza Alrihawi, 'Joint Statement by Refugees Reflecting on Outcomes and the Way Forward' (Speech, United Nations Global Refugee Forum, 18 December 2019, 1:46:56) <https://media.un.org/en/asset/k1u/k1ut0bwetr>.
[57] Shaza Alrihawi et al (n 43) 8.
[58] This is discussed in further detail in Chapter 2.2.
[59] 'Refugees Seeking Equal Access at the Table' (Web Page, 2022) <https://refugeesseat.org/>.
[60] UNGA, *Report of the Executive Committee of the High Commissioner's Programme on its seventy-second session* (4-8 October 2021), UN Doc A/AC.96/1220 (11 October 2021) [13](d).
[61] On 4-8 October 2021, the Executive Committee meeting involved 103 states as Executive Committee members, along with 42 states, 13 intergovernmental organisations, eight United Nations agencies and related organisations, and 12 NGOs as observers. See Ibid [2]–[8].

three times per year and contributes to the work of the Executive Committee.[62]

The formalised inclusion of refugee representatives within UNHCR's Executive Committee and Standing Committee could be an important, incremental step towards facilitating more meaningful dialogue between states, intergovernmental organisations and refugees in high-level decision-making. As James Milner, Mustafa Alio and Rez Gardi suggest, a 'refugee delegation that is representative of the significant diversity of refugee experiences and perspectives would bring considerable moral authority' to the Executive Committee's activities and it would 'contribute to the further emergence of a norm of meaningful refugee participation'.[63] Further, advocacy for refugee inclusion in UNHCR's Executive Committee is also politically strategic. It represents a 'SMART objective' in that it is specific, measurable, achievable, relevant and timebound.

Yet, questions remain as to what extent this reform would truly enable more meaningful refugee participation to occur, particularly if the inclusion of refugees only takes the form of a single seat with observer status. As Marion Fresia noted in 2014, the annual meeting of the Executive Committee is a 'highly ritualized' event and 'only the end point of a series of informal consultations between UNHCR and ExCom member states that are held throughout the year'.[64] Fresia's ethnographic research highlights that it is generally only in informal meetings with ExCom members prior to ExCom that real disagreements are discussed. In these meetings, ExCom member states are reticent to include non-governmental participants as they fear they 'would make public the political games sometimes played during negotiations'.[65] Beyond this, the Executive Committee represents only one decision-making forum where refugee protection decisions are made. Accordingly, there is also a need to consider whether more holistic alternatives should also be pursued, such as more substantial reforms to UNHCR's mandate.

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[62] For more on the functions of the Standing Committee, see UNGA, *Report of the Forty-Sixth Session of the Executive Committee of the High Commissioner's Programme*, UN Doc A/AC.96/860 (23 October 1995) [32].
[63] James Milner, Mustafa Alio and Rez Gardi, 'Meaningful Refugee Participation: An emerging norm in the global refugee regime' (2022) *Refugee Survey Quarterly* (forthcoming).
[64] Marion Fresia, 'Building Consensus within UNHCR's Executive Committee: Global Refugee Norms in the Making' (2014) 27(4) *Journal of Refugee Studies* 514, 518.
[65] Ibid 521.

### *7.2.2 Reform to UNHCR's Mandate*

In relation to UNHCR's work, a more comprehensive approach to ensuring the meaningful participation of refugees in decision-making processes would be to amend UNHCR's Statute to mandate the organisation to consult with or include refugees in the design and implementation of all its policy and programmatic activities. As discussed in Chapter 2, other than an implied commitment in relation to repatriation, UNHCR's Statute currently places no obligation on UNHCR to ensure the participation of refugees when designing and implementing protection responses that affect them. In practice, UNHCR has taken several steps to facilitate participatory processes in a range of decision-making areas of its own accord. However, as has been revealed throughout this thesis, these steps are often piecemeal, insufficient and at times inappropriate. Both past and present practice of UNHCR across a range of decision-making areas suggests that more is needed to compel UNHCR to engage meaningfully with refugees in its decision-making processes.

In recent years, there has been a broader debate as to whether the United Nations General Assembly should amend UNHCR's mandate to more clearly reflect its expanded roles, practices and needs. Guy Goodwin-Gill argued in 2021, for example, that UNHCR's Statute needs to be revisited 'both to do away with historical anomalies and redundancies, but more particularly, to reflect changes already made, to recognize formally the new realities, and to make clear provision for UNHCR's protection and assistance experience'.[66] Goodwin-Gill identified six specific revisions to UNHCR's Statute that he believes require reform. These include, among other things, amendments to the Statute's definition of a refugee, as well as the formal inclusion of stateless persons and internally displaced persons within UNHCR's mandate.[67] However, added to this list could be a provision designed at ensuring meaningful refugee participation (or the

[66] Guy S Goodwin-Gill, 'Look Both Ways: Future and historical perspectives on the Refugee Convention at 70' (Speech, American Society of International Law Annual Meeting, 24 March 2021) <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/GSGG_ASIL2021.pdf>.

[67] Ibid. In a separate article in 2016, Goodwin-Gill also proposed that UNHCR's funding model could be altered from a voluntary contributions model to a system where the known costs of existing refugee and displacement responses are guaranteed through payment via the United Nations General Assembly. This would also require an amendment to UNHCR's Statute. See Guy S Goodwin-Gill, 'The Movements of People between States in the 21st Century: An Agenda for Urgent Institutional Change' (2016) 28(4) *International Journal of Refugee Law* 679, 684.

participation of all affected communities that fall within UNHCR's mandate) within UNHCR's work.

A revision of this nature would compel the organisation to address more comprehensively refugee participation across a number of decision-making areas and fora. It would require the organization to consult with refugees in areas where participatory endeavors have been absent or weak, such as the negotiation of tripartite agreements, the development of data collection policies or declarations of cessation of refugee status. Additionally, it could also prompt the organisation to proactively recruit refugees and persons with lived experience of displacement into its programmatic and policy work, including in senior leadership positions.

However, this revision would not necessarily shift the practice of states and other stakeholders with regards to refugee participation. As Goodwin-Gill notes:

> Rewriting UNHCR's mandate does not mean … that new obligations are imposed on States besides those to which they have consented by becoming party to treaties, or which are applicable under customary international law. There has always been a disjuncture, and a certain 'creative' tension, between the institutional responsibilities of UNHCR, the obligations of States, and the latter's 'sovereign' interests – this is part of what makes international law a dynamic system.[68]

Accordingly, to address state practice in relation to meaningful refugee participation through international law reform, there is the need to consider other legal alternatives.

#### *7.2.3 A new legal instrument on meaningful refugee participation*

In terms of addressing state practice, one main reform option would be to develop a new international legal instrument that more clearly commits states and others to ensuring that refugees are heard in decision-making processes that affect them.[69] While a legal instrument of this nature could

[68] Goodwin-Gill (n 66).

[69] An alternative approach would be to amend the 1951 Convention relating to the Status of Refugees. However, it is broadly accepted that any attempt to revise the Refugee Convention to update its provisions for the contemporary international refugee regime would likely weaken existing protections. See, for example, UNHCR Executive Committee of the High Commissioner's Programme (Sub-Committee on the Whole of International Protection), *Protection of Persons of Concern to UNHCR Who Fall Outside the 1951*

theoretically take the form of a new binding international treaty or an Optional Protocol to the 1951 Refugee Convention, the more feasible alternative in the first instance is likely to involve refugees, states and other stakeholders negotiating a new United Nations declaration on the participation of refugees in decision-making. As Harry Hobbs and I have suggested, a declaration along these lines could play a foundational role in establishing clear principles and promoting best practice for actors to engage with and listen to refugees in decisions that affect them.[70] It could also lay the groundwork for future legal evolution over time.[71]

A declaration that specifically deals with the participation of refugees in decision-making could address several gaps and grey areas that currently exist in the current international legal framework. First and foremost, it could elaborate more explicitly a right of refugees to participate in matters that impact their rights. This right to participate would build on the web of interconnected rights that are found in international refugee and human rights law. These rights include the right to freedom of expression, the right to freedom of association, and the right to work, among others. Further, it would build on the participatory rights provided to particular groups of refugees, such as refugee women, refugee children and refugees with disabilities. Yet, significantly, it would also go beyond this to articulate in a new form a *right* of refugees to have a say in decisions that affect them.

Second, the declaration could include a 'good faith' provision to ensure that decision-makers take into account the views of refugees and provide evidence of this consideration where appropriate.[72] This provision would assist in embedding institutional listening into participatory processes. It would additionally help in ensuring that different stakeholders work collectively towards consensus or agreed outcomes. A provision of this nature emphasises that it is not sufficient to just give refugees a seat at a table. It highlights that meaningful participation requires other stakeholders to actively engage with and respond to the views of refugees.

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*Convention: A Discussion Note* (UNHCR, EC/1992/SCP/CRP.5, 2 April 1992) [7]; also, on the preference towards soft-law, see Triggs and Wall (n 36) 304–306.

[70] See Tristan Harley and Harry Hobbs, 'The Meaningful Participation of Refugees in Decision-Making Processes: Questions of Law and Policy' (2020) 32(2) *International Journal of Refugee Law* 200, 224–226.

[71] This legal evolution could involve establishing binding legal obligations relating to the participatory rights of refugees. Alternatively, it could also consider the potential of international law to address the participatory rights of rights-holders more broadly, including, for example, other forcibly displaced persons such as internally displaced persons and stateless persons.

[72] For more on the parameters of good faith in international law, see Chapter 3.2.

Third, the declaration could include provisions which more clearly detail the representative dimensions of refugee participation. It could offer clarification as to when stakeholders need to engage with refugees' chosen representatives, and the procedures necessary for this engagement. It could also provide guidance to states and other stakeholders as to what extent they need to enable representative refugee participation through funding and other support. Additionally, it could offer direction as to how the views of refugee representatives should be reconciled with the views of individual refugees when there is disagreement. As has been discussed throughout this thesis, each of these elements of representative refugee participation has been largely overlooked in the international legal framework to date.

Fourth, the declaration could demarcate more clearly the range of decision-making areas that require participatory engagement and offer clarification as to the scope of this engagement with respect to key decision-making areas. Like the approach taken in this thesis, this could be structured around areas such as law and policy development; durable solutions and other relocation decisions; and program and service delivery. Each of these decision-making areas materially impact upon refugees' human rights. But other potential approaches could also be suitable. Importantly, further clarification as to the scope of refugee participation across these decision-making areas would remove some of the ambiguity that currently exists in law and practice. It would also be consistent with the need for some flexibility in institutional design. This is important because any international arrangement must leave space for diverse and innovative smaller-scale measures.

Finally, the declaration could also focus on addressing the risks that refugees often face when participating in decision-making processes. It could incorporate provisions that commit states and other stakeholders to enabling safe and supportive environments that protect refugees' physical and digital security and well-being. The declaration could also make specific acknowledgement that refugees involved in participatory processes are human rights defenders and, therefore, should benefit from the protections and rights under the *Declaration on the Rights of Human Rights Defenders* (as it is commonly known).[73] Additionally, the declaration could specify that as much as refugees have a right to participate, they also have a right *not* to participate in decision-making processes. Refugees should not

[73] See *United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc A/RES/53/144 (8 March 1999) ('Declaration on the Rights of Human Rights Defenders').

be compelled to participate in situations where it poses a real risk to themselves or others.

What are the advantages of a new legal instrument along these lines? Although a United Nations declaration on the participation of refugees in decision-making would not impose legal obligations on states, it could provoke considerable moral authority, have political force, and contribute to the development and expansion of international law on refugee protection. As the United Nations Office of Legal Affairs has noted, declarations are 'formal and solemn' instruments that are 'suitable for rare occasions when principles of great and lasting importance are being enunciated'.[74] As such, there is 'a strong expectation that Members of the international community will abide by' them.[75] In practice, the experience of other United Nations declarations, such as the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), [76] suggests that 'soft law' instruments can influence legislative and constitutional drafting as well as judicial decisions across the globe.[77] A declaration on refugee participation may similarly influence international, regional, and state actors.

Beyond this, the drafting process itself can help generate legitimacy towards the instrument if it is properly and effectively negotiated with refugee input. This is a lesson that can be learnt from the development of UNDRIP. As Megan Davis, an Indigenous academic lawyer noted, the drafting of UNDRIP was 'the first time that states had drafted a human rights instrument directly with the rights-holders empowered by the instrument'.[78] Indigenous peoples were 'deeply involved in discussions and negotiations' at 'every step',[79] and their involvement clearly influenced the final text, which 'substantially reflect[s] indigenous peoples' own aspirations'.[80] As S

[74] UN ECOSOC, *Use of the Terms "Declaration" and "Recommendation": Memorandum by the Office of Legal Affairs*, UN Doc E/CN.4/L.610 (2 April 1962) [3].
[75] Ibid [4].
[76] *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2007) ('UNDRIP').
[77] Human Rights Council: 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) [4]. See further Harry Hobbs, 'Treaty Making 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.
[78] 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, 440.
[79] Lillian Aponte Miranda, 'Indigenous Peoples as International Lawmakers' (2010) 32(1) *University of Pennsylvania Journal of International* Law 203, 242.
[80] James Anaya, *Interim report of the Special Rapporteur on the situation*

James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples, stated, this involvement of Indigenous leaders, lawyers, and activists around the drafting table enhanced the instrument's normative weight and grounded the document in a 'high degree of legitimacy'.[81] In his words:

> 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 also the fact that it is the product of years of advocacy and struggle by indigenous peoples themselves.[82]

This engagement with the 'rights-holders empowered by the instrument' could similarly be deployed for the drafting of a United Nations declaration on the participation of refugees in decision-making.

## Conclusion

This chapter has focused on the third and final research question proposed in the Introduction to thesis, namely how could the legal and policy framework be improved to enhance the meaningful participation of refugees in decision-making. The chapter commenced by examining how meaningful refugee participation could be enhanced based on the international legal standards already in place. Specifically, the chapter explored how states and other actors can dismantle or minimise barriers to refugee participation, and how they can better address the representative dimensions of participation. Following this, the chapter considered how the international legal framework itself could be reformed to facilitate more meaningful refugee participation in decision-making processes. Central among these law reform proposals was the suggestion of drafting a new non-binding United Nations declaration that more clearly commits states and others to ensuring that refugees are heard.

It is hoped that these reform suggestions contribute to the ongoing conversation and debate among refugees, states, UNHCR, and other stakeholders regarding how refugees can more meaningfully participate in decision-making processes that affect them. The suggestions for reform presented in this chapter build upon and emerge from the findings of the previous chapters of this thesis. Nevertheless, they are not intended to

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*of human rights and fundamental freedoms of indigenous people*, UN Doc A/65/264 (9 August 2010) [60].

[81] Ibid.

[82] Ibid.

resolve these issues. For meaningful and legitimate reform to occur, there is a need for extended consultation every step of the way.

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# CONCLUSION

## Introduction

The push to enhance the meaningful participation of refugees in decision-making processes has emerged as one of the most significant issues in international refugee law and policy in recent years. Across the world, refugee-led networks and organisations have adopted the mantra 'nothing about us without us' and have advocated for refugees to be able to engage directly with states, international organisations and other stakeholders in decisions that affect them. States likewise have begun to recognise the value of meaningful participation and have made commitments through new international instruments towards enabling the participation of refugees in designated responses to refugees and displacement.

These developments represent a significant shift in thinking regarding refugee participation in international refugee law and policy. They signal a movement away from seeing refugees as passive victims and infantilised objects, and a movement towards seeing refugees as capable actors with agency and expertise. At a practical level, these developments have begun to prompt some shifts in refugee protection responses. With new investments from the private sector, civil society organisations and other stakeholders, these developments have also turned the pursuit of meaningful refugee participation and leadership into a multimillion-dollar industry.[1]

Yet, as flagged in the Introduction to this thesis, for these developments to be implemented effectively, greater clarity is needed as to what meaningful refugee participation looks like and how the international law and policy framework governing participation can be best designed. This need for clarity is important because failed efforts to appropriately include refugees in decision-making processes can adversely impact protection responses. They can also diminish the agency and dignity of refugees and undermine democratic ideals of good governance and accountability. It is because of these high stakes, of both success and failure, that greater precision and understanding is necessary.

[1] See, for example, the Resourcing Refugee Leadership Initiative discussed in Chapter 6.2.2.

## 8.1 Key findings

This thesis has contributed to debates and policy initiatives surrounding meaningful refugee participation by providing an in-depth analysis of the international legal and policy framework governing the participation of refugees in decision-making processes. Taking a mixed methods research approach that has combined doctrinal legal analysis with socio-legal research, the thesis has analysed for the first time the extant legal requirements on states and international organisations to consult with or include refugees in decisions that directly affect them. The thesis has unveiled new evidence that details how and to what extent refugees have been able to participate in different decision-making areas in practice. The thesis has also proposed novel reforms to improve the international legal and policy framework relating to refugee participation.

### *8.1.1 Participation in law and theory*

This thesis has structured these contributions in three parts. In the first part, the thesis sought to explore the first central research question, namely what does participation in decision-making refer to in the context of the international refugee regime. Chapter 2 commenced this exploration by examining the scope of extant legal requirements on states and international organisations to consult with or include refugees in decisions that directly affect them. Chapter 3 built on this legal analysis by unpacking further the conceptual meaning and scope of refugee participation in decision-making from a range of different disciplinary perspectives. This interdisciplinary approach was taken because understandings of participation in the international refugee regime do not always take their bearings from legal doctrine.

In undertaking this analysis, Chapter 2 found that the current legal framework governing refugee participation is patchy. While no explicit legal requirement mandating the participation of refugees in decision-making processes currently exists in international law, several civil and political rights relevant to the participation of refugees in decision-making need to be considered in practice. Subject to some limitations, these include the right to freedom of assembly, the right to freedom of association, the right to privacy, among others. There are also various consultative rights related to specific groups of rights-holders (women, children and persons with disabilities) that also provide some rights-based protections for refugees to participate in decision-making processes. Each of these

participatory obligations need to be implemented by states and other relevant stakeholders.

Beyond this, recent non-binding international instruments, including the 2016 *New York Declaration for Refugees and Migrants*[2] and the 2018 *Global Compact on Refugees*,[3] have advanced recognition of the importance of including refugees in decision-making processes that affect them. These instruments not only classify refugees as a legitimate stakeholder in the design and implementation of refugee responses, but, for the first time, they also set out commitments, albeit non-binding, from states towards enhanced refugee participation. These commitments are significant, yet they remain ambiguous in terms of how they are meant to be applied. Compared with the international laws that govern the participatory rights of other rights holders, there is also a question as to whether legal commitments relating to the participation of refugees in decision-making need to be further developed.

Building from this, Chapter 3 found that the concept of participation in decision-making needs to be treated with some care in the international refugee regime. This is due to its ability to accommodate a broad range of meanings and motives. As Andrea Cornwall highlighted, participation is 'an infinitely malleable concept…[that] can be used to evoke – and to signify – almost anything that involves people'.[4] It is for this reason that the term participation can quickly become a buzzword or a term of modern policy jargon that can be applied to a whole range of disparate undertakings. To address this imprecision, the chapter emphasised the importance of demarcating the types of decisions that demand or warrant refugee participation. The chapter found that while there is a tendency to consider commitments to the participation of refugees in decision-making processes as a single objective that can be uniformly applied across different settings, in practice there exists a range of different decision-making scenarios within the international refugee regime that need to be considered separately to consider the most appropriate or optimum level of participation for the decision at hand.

In addition to this, Chapter 3 analysed the normative justifications and motivations underpinning participatory approaches to refugee policy making.

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[2] *New York Declaration for Refugees and Migrants*, UN Doc A/RES/71/1 (3 October 2016).
[3] *Global Compact on Refugees*, UN Doc A/73/12 (Part II) (2 August 2018).
[4] Andrea Cornwall, 'Unpacking 'Participation': Models, Meanings and Practices' (2008) 43 *Community Development Journal* 269, 269.

The chapter found that there are several reasons why refugees should be meaningfully included in decision-making processes that affect them. These reasons relate to improving decisions and outcomes; enhancing refugee agency and dignity; and prospering better forms of governance. These reasons reflect both moral and instrumental motivations. Nevertheless, caution is needed when developing participatory projects. Participation can be tokenistic when it fails to enable participants to exercise any control or influence during the decision-making process. Participation can also be used more cynically as a tool to legitimise existing power relations and to curtail the formation of independent, autonomous decision-making processes. These risks do not necessarily cancel out the clear benefits that can arise from enhanced refugee participation, but they do highlight the need for continuing critical analysis.

### *8.1.2 Participation in practice*

Building on the legal and theoretical analysis explored in the first part of thesis, the second part explored in what ways and to what extent have refugees been included in different decision-making areas in practice. In Chapter 4, the thesis examined the participation of refugees in *the development of law and policy*, focusing specifically on the case study of refugee involvement in the development of early international refugee law and policy between 1921 and 1955. This chapter found that, contrary to widely held assumptions, persons with lived refugee experience exercised significant influence and thought leadership in the development of international refugee law and policy during this period. Nevertheless, refugees were not identified as independent stakeholders in legal and policy developments at this time. Further, since this period of reform, refugees have been rarely involved in the creation and reform of laws and policies that affect them as a recognised polity.

In Chapter 5, this thesis turned its focus towards the participation of refugees in decisions which involve the proposed movement of refugees from one sovereign jurisdiction to another, referred to as *relocation decisions*. The chapter examined firstly the involvement of refugees in decisions relating to their voluntary repatriation to their country of origin. It then considered decisions related to the resettlement of refugees from a state of asylum to a third state. In both these decision-making areas, the chapter demonstrated that the international legal and policy framework governing these decision-making areas provides some opportunities for refugees to voice their views on proposed relocations to third countries. However, these

opportunities are insufficient given the impacts of these relocation decisions on the human rights of refugees.

Finally, the thesis explored in Chapter 6 the participation of refugees in the delivery of *programmes and services*. This chapter considered firstly in what ways and to what extent UNHCR has included refugees in the design and implementation of its programmes and services at the local level. The chapter then examined nascent trends regarding the recognition and funding of refugee-led organisations, and the shift among some NGOs towards greater inclusion of refugees within their organisational leadership. Although some promising practices are emerging, this chapter found that, like the other decision-making areas, the international legal and policy framework remains insufficiently developed to ensure the meaningful participation of refugees in the delivery of programmes and services on the ground.

### *8.1.3 Enhancing the participatory framework*

Given the deficiencies of the international law and policy framework, the third part of this thesis focused on the final central research question, namely how the legal and policy framework could be improved to enhance the participation of refugees in decision-making processes. Chapter 7 began by considering how participatory approaches in the international refugee regime could be improved based on the international legal standards already in place. The chapter highlighted the importance of establishing safe and enabling environments for the physical and digital security of refugees and providing sufficient funding and support to facilitate refugee preparedness. The chapter also stressed the need to grapple with the representative dimensions of refugee participation, and the need to institutionalise appropriate listening among various stakeholders. These are important steps to ensure that refugee participation is developed and implemented appropriately.

Following this, the chapter considered the merits of different legislative options that could be pursued to further influence approaches to meaningful refugee participation. Among these reform options, the chapter argued in favour of developing a new legal instrument committing states and other stakeholders to recognise more comprehensively the rights of refugees to be heard in decisions that materially impact their human rights. The chapter suggested that a new legal instrument along these lines, most likely in the form of a United Nations declaration, could play a foundational role in establishing clear principles, addressing gaps and grey areas, and promoting

best practice for actors to engage with and listen to refugees in decisions that affect them. While the precise provisions of such an instrument would need to be drafted first and foremost with refugees themselves, a declaration of this nature could, among other things, elaborate more explicitly a right of refugees to participate in matters that impact their rights.

## 8.2 Future directions

It is a sad reality that most refugees today are not consulted or included in decision-making processes that affect them. Whether it is in relation to the development of laws and policies, the transfer of refugees from one jurisdiction to another, or the implementation of programmes and services, refugees have been regularly excluded from decisions that materially impact their human rights. This exclusion has occurred at both at the individual level, as well as at the group level through the failure to establish appropriate participatory measures with refugee representatives and refugee-led organisations. Unfortunately, this exclusion of refugees from decision-making processes has had real-world consequences. It has undermined refugees' agency and dignity. It has led at times to inefficient and inappropriate protection responses. It has also compromised notions of good governance.

In this context, what does the future hold for the push towards more meaningful refugee participation in the international refugee regime? With the various legal, political, social, and cultural barriers that still curtail meaningful refugee participation in practice, it is probably unrealistic to expect significant reform to occur overnight. While most actors generally support the idea of enhanced participation of refugees in the abstract, in its implementation participation is political. It 'constitutes a terrain of contestation', as Cornwall notes, 'in which relations of power between different actors, each with their own "projects", shape and reshape the boundaries of action'.[5] Given that those with power are often reluctant to relinquish it, departures from current practices can often be drawn out and agreements on reform can be difficult to accomplish. Often, as Phil Orchard notes, what eventually prompts substantive policy and normative change are crisis events which disrupt the status quo and drive actors to pursue different approaches.[6]

[5] Cornwall (n 4) 276.
[6] Phil Orchard, *A Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge University Press, 2014) 32–34, 242–244.

Nevertheless, there are some promising signs of change. This can be seen in the various policy reforms and initiatives discussed throughout this thesis. It can also be seen in the increasing array of stakeholders recognising the importance of meaningful refugee participation and advocating for its implementation in practice. This is an important element of legal and political reform. As Martha Finnemore and Kathryn Sikkink argue in their work on international norm dynamics and political change, new norms of behaviour 'do not appear out of thin air; they are actively built by agents having strong notions about appropriate or desirable behaviour in their community'.[7] Finnemore and Sikkink suggest that 'norm entrepreneurs' play a critical role in the shaping of new norms because they call attention to issues, dramatise them, and 'challenge existing logics of appropriateness'.[8]

From a different vantage point, there also appears a positive trajectory in international human rights law and policy more broadly towards greater recognition and consideration of the participatory dimensions of rights-holders. Although uneven at times, this trend can be seen in the human rights regimes governing women, children, persons with disabilities and Indigenous peoples.[9] While nascent, the international refugee regime is also starting to grapple with this conceptual shift. Collectively, these shifts in approaches and understandings, prompted and prodded by refugees themselves, have the potential to produce significant regime transformation going forward.

In terms of research, there are several avenues of investigation which could further enhance understanding in this area. As flagged in Chapter 1, this thesis has focused on refugees' formal inclusion in decision-making both before and at the time the decision is made, or what Peter Cane has referred to as contributory participation.[10] Other forms of participation – namely access to the electoral franchise and the capacity of refugees to contest decisions already made – have been peripherally considered in this thesis. However, it has been beyond the modest scope of this thesis to address these forms of participation comprehensively. While there has been a recent in-depth study on the voting rights of refugees,[11] there remains a need for a more holistic examination of the various ways and the extent to which

[7] Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52(4) *International Organization* 887, 896.
[8] Ibid 897.
[9] See Chapter 2.5 for more detail.
[10] Peter Cane, 'Participation and Constitutionalism' (2010) 38 (3) *Federal Law Review* 319, 320.
[11] See Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge University Press, 2017).

refugees are able to challenge decisions that impact them. These challenges range from complaints mechanisms in refugee camps to administrative and judicial review. These decisions may be made by states, international organisations, non-governmental organisations, or other stakeholders.

Beyond this, there is also the need for further interdisciplinary research to better understand the representative dimensions of refugee participation across different contexts. So far, there has been little investigation into how refugees form and maintain representative communities. What processes, democratic or otherwise, do refugees use to select and choose their representatives? What other factors influence these decision-making processes? Further, how can these processes be better supported by other stakeholders? This thesis has considered some notable examples of representative processes, such as the election of camp leaders in Kenya and on the Thai/Burma border,[12] and the emergence of the *Comisiones Permanentes* in Mexico.[13] These examples are informative, but they also point towards the need for more detailed analysis of representative polities across different levels of governance and in different geographical contexts.

Lastly, future research will also need to be directed towards understanding how refugee participation may contribute to, and be impacted by, new approaches to refugee protection in the international refugee regime. For example, new technologies are already beginning to replace and augment some decision-making processes that impact refugees. This can be seen in the development and proliferation of algorithmic and automated technologies which are starting to alter refugee status determination procedures.[14] It can also be seen in new approaches to the delivery of refugee protection services.[15] If implemented appropriately, new technologies have the potential to facilitate more meaningful engagement with refugees, particularly by overcoming some of the physical and logistical barriers that currently exist. Yet, they equally also have the potential to restrict or curtail meaningful refugee participation if left unchecked.[16] This is particularly the case if a human-rights based approach

[12] See Chapter 6.2.1 and Chapter 6.3.1.
[13] See Chapter 5.1.3.
[14] See Petra Molnar and Lex Gill, *Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada's Immigration and Refugee System* (University of Toronto, 2018) <https://citizenlab.ca/2018/09/bots-at-the-gate-human-rights-analysis-automated-decision-making-in-canadas-immigration-refugee-system/>.
[15] See, for example, the design and development of UNHCR's digital data collection technologies, discussed in Chapter 6.1.2.
[16] As Daniel Ghezelbash has argued, 'the risk with the reliance on technology, is that the voices of the asylum seekers and refugees subject to the policies are sidelined': see Daniel

to participation is not adopted and the international legal and policy framework remains insufficient to secure these protections.

## Conclusion

Despite recent commitments towards advancing the participation of refugees in decision-making processes, this thesis has demonstrated that the international legal and policy framework governing refugee participation has insufficiently provided for this to occur. In practice, refugees have been restricted from fully participating in a variety of decision-making areas. These areas include law and policy reform; the implementation of durable solutions and other relocation decisions; and the delivery of programmes and services for refugees. The international legal framework governing refugee participation also remains patchy and in need of reform.

By providing an in-depth analysis of the international legal and policy framework governing the participation of refugees in decision-making processes, this thesis has sought to contribute to the ongoing conversation as to what participation involves for refugees and how it should be addressed in international law and policy more broadly. As expressed at the beginning, it has not been the intention or purpose of this thesis to conclusively resolve these questions. Moving forward, if we are to develop a more just global order where refugees' right to be heard is respected, then it is important that refugees and their chosen representatives are at the forefront of this legal and political reimagining. It is through this approach, as former refugee Behrouz Boochani reflected from the confines of detention in Manus Island, that it may be possible 'to challenge the system in more profound ways'.[17]

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Ghezelbash, 'Technology and countersurveillance: holding governments accountable for refugee externalization policies' (2022) *Globalizations* (forthcoming) 9.

[17] Behrouz Boochani, *No Friend but the Mountains: Writing from Manus Prison* (Picador, 2018) 373.

# || ANNEX ||

This annex provides the citation details for the 31 tripartite repatriation agreements that have been published on UNHCR's database *Refworld* for the period between 1996 and 2021. These agreements are listed according to the date of the agreement. Analysis of these agreements is captured in Chapter 5 of this thesis.

1. *Accord tripartite entre le Gouvernement de la République d'Angola, le Gouvernement de la République Démocratique du Congo (RDC) et le Haut Commissariat des Nations Unies pour les Réfugiés (HCR) relatif au rapatriement volontaire des réfugiés congolais vivant en Angola dans la Province de Lunda Norte* (UNHCR, 23 August 2019) <https://www.refworld.org/docid/5d64df424.html>
2. *Tripartite Agreement for the Voluntary Repatriation of Central African Refugees Living in Cameroon between the Government of the Republic of Cameroon, the Governments of the Central African Republic and UNHCR* (UNHCR, 29 June 2019) <https://www.refworld.org/docid/5d2f244a4.html>
3. *Tripartite Agreement for the Voluntary Repatriation of Nigerian Refugees from Cameroon between the Government of the Republic of Cameroon, the Government of the Federal Republic of Nigeria and the United Nations High Commissioner for Refugees* (UNHCR, 2 March 2017) <https://www.refworld.org/docid/58c7e26f4.html>
4. *Accord Tripartite entre le Gouvernement du Burkina Faso, le Gouvernement de la Republique du Mali et le Haut-Commissariat des Nations Unies pour les Refugies pour le rapatriement volontaire des refugies Maliens vivant au Burkina Faso* (UNHCR, 9 January 2015) <https://www.refworld.org/docid/54b360614.html>
5. *Tripartite Agreement Between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya* (UNHCR, 10 November 2013) <https://www.refworld.org/docid/5285e0294.html>
6. *Tripartite Agreement Between the Government of the Republic of Liberia, the Republic of Côte d'Ivoire and the Office of the United Nations High Commissioner for Refugees for the Voluntary Repatriation of Refugees from Côte d'Ivoire Living in Liberia* (UNHCR, 11 August 2011) <https://www.refworld.org/docid/4f21501f2.html>

7. *Accord Tripartite Relatif au Rapatriement Volontaire des Refugies de la Republique Democratique du Congo Vivant en République du Congo* (UNHCR, 10 June 2010) <https://www.refworld.org/docid/5d08965e4.html>
8. *Extension of the Agreement Between the Government of Islamic Republic of Pakistan, the Transitional Islamic State of Afghanistan and the United Nations High Commissioner for Refugees Governing the Repatriation of Afghan Citizens Living in Pakistan* (UNHCR, 7 May 2010) <https://www.refworld.org/docid/555ae4e14.html>
9. *Tripartite Memorandum of Understanding Between the Government of the Kingdom of Sweden, the Government of the Islamic Republic of Afghanistan and the United Nations High Commissioner for Refugees* (UNHCR, 26 December 2007) <https://www.refworld.org/docid/4794c1832.html>
10. *Accord tripartite entre le gouvernement de la République islamique de Mauritanie, le gouvernement de la République du Sénégal et le Haut Commissariat des Nations Unies pour les réfugiés pour le rapatriement volontaire des réfugiés Mauritaniens au Sénégal* (UNHCR, 12 November 2007) <https://www.refworld.org/docid/475516b12.html>
11. *Agreement Between the Government of Islamic Republic of Pakistan, the Transitional Islamic State of Afghanistan and the United Nations High Commissioner for Refugees Governing the Repatriation of Afghan Citizens Living in Pakistan* (UNHCR, 2 August 2007) <https://www.refworld.org/docid/555ae4254.html>
12. *Joint Programme between the Government of the Islamic Republic of Iran, the Islamic Republic of Afghanistan, and UNHCR for voluntary repatriation of Afghan refugees and displaced persons* (UNHCR, 8 March 2006) <https://www.refworld.org/docid/55e6a1be4.html>
13. *Tripartite Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of the Sudan and the United Nations High Commissioner for Refugees for the Voluntary Repatriation of Sudanese Refugees in Ethiopia Back to the Sudan* (UNHCR, 27 February 2006) <https://www.refworld.org/docid/44044b924.html>
14. *Tripartite Agreement Between the Government of the Central African Republic and the Government of the Republic of the Sudan and the United Nations High Commissioner for Refugees for the Voluntary Repatriation of Sudanese Refugees in the Central African Republic Back to the Sudan* (UNHCR, 1 February 2006) <https://www.refworld.org/docid/44044a274.html>

15. *Tripartite Agreement Between the Government of Kenya and the Government of the Republic of Sudan and the United Nations High Commissioner for Refugees for the Voluntary Repatriation of Sudanese Refugees in Kenya to the Sudan* (UNHCR, 12 January 2006) <https://www.refworld.org/docid/43d0a54d4.html>
16. *Tripartite Agreement Sudan-DRC-UNHCR for the Voluntary Repatriation of the Refugees From the Republic of Sudan Living in the Democratic Republic of Congo* (UNHCR, January 2006) <https://www.refworld.org/docid/44044c224.html>
17. *Tripartite Agreement on the Voluntary Repatriation of Burundian Refugees in Rwanda* (UNHCR, 18 August 2005) <https://www.refworld.org/docid/44ae612dc6.html>
18. *Tripartite Memorandum of Understanding (the MoU) between the Islamic Transitional State of Afghanistan, the Government of Denmark and the United Nations High Commissioner for Refugees* (UNHCR, 18 October 2004) <https://www.refworld.org/docid/55e6a3dc4.html>
19. *Agreement for the Establishment of a Tripartite Commission for the Voluntary Repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees* (UNHCR, 14 December 2003) <https://www.refworld.org/docid/447e99f50.html>
20. *Joint Programme Between UNHCR and the Governments of Iran and Afghanistan for the Voluntary Repatriation of Afghan Refugees and Displaced Persons, 2003-2005* (UNHCR, 16 June 2003) <https://www.refworld.org/docid/42fb47e54.html>
21. *Tripartite Memorandum of Understanding Between the Government of the Netherlands, the Transitional Islamic State of Afghanistan, and the United Nations High Commissioner for Refugees* (UNHCR, 18 March 2003) <https://www.refworld.org/docid/42fb2c164.html>
22. *Agreement Between the Government of Islamic Republic of Pakistan, the Transitional Islamic State of Afghanistan and the United Nations High Commissioner for Refugees Governing the Repatriation of Afghan Citizens Living in Pakistan* (UNHCR, 17 March 2003) <https://www.refworld.org/docid/55e6a5324.html>
23. *Accord sur l'établissement d'une commission tripartite pour le rapatriement librement consenti des réfugiés angolais entre le Gouvernement de la République d'Angola, le Gouvernement de la République du Congo et le Haut Commissariat des Nations Unies pour les réfugiés* (UNHCR, 11 December 2002) <https://www.refworld.org/docid/447d838d4.html>

24. *Accord sur l'établissement d'une commission tripartite pour le rapatriement librement consenti des réfugiés angolais entre le Gouvernement de la République d'Angola, le Gouvernement de la République Démocratique du Congo et le Haut Commissariat des Nations Unies pour les réfugiés* (UNHCR, 9 December 2002) <https://www.refworld.org/docid/447d872d4.html>
25. *Agreement on the Establishment of a Tripartite Commission for the Voluntary Repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of Zambia and the United Nations High Commissioner for Refugees* (UNHCR, 28 November 2002) <https://www.refworld.org/docid/447d6a4c4.html>
26. *Agreement on the Establishment of a Tripartite Commission for the Voluntary Repatriation of Angolan Refugees between the Government of the Republic of Angola, the Government of the Republic of Namibia and the United Nations High Commissioner for Refugees* (UNHCR, 28 November 2002) <https://www.refworld.org/docid/447d8dca4.html>
27. *Tripartite Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland, the Transitional Islamic Administration of the Transitional Islamic State of Afghanistan, and the United Nations High Commissioner for Refugees* (UNHCR, 12 October 2002) <https://www.refworld.org/docid/3ee85bb04.html>
28. *Tripartite Agreement Between the Government of the French, the Government of the Islamic Transitional State of Afghanistan and United Nations High Commissioner for Refugees* (UNHCR, 28 September 2002) <https://www.refworld.org/docid/3edf5aad2.html>
29. *Joint Programme Between the Government of the Islamic Republic of Iran, the Interim Authority of Afghanistan, and UNHCR for Voluntary Repatriation of Afghan Refugees and Displaced Persons* (UNHCR, 3 April 2002) <https://www.refworld.org/docid/55e6a81b4.html>
30. *Agreement between the Office of the United National High Commissioner for Refugees and Government of Sudan and Government of Eritrea for the Voluntary Repatriation of Eritrean refugees in Sudan and their re-integration in Eritrea* (UNHCR, 7 April 2000) <https://www.refworld.org/docid/5ab11b664.html>
31. *Tripartite Agreement on the Voluntary Repatriation of Congolese Refugees from Tanzania* (UNHCR, 21 August 1997) <https://www.refworld.org/docid/3ee84d5b4.html>

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