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**Political participation of refugees in their country  
of nationality**

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## List of Abbreviations

AALCO	Asian-African Legal Consultative Organization
ACHR	American Convention on Human Rights
CAR	Central African Republic
CRRF	Comprehensive Refugee Response Framework
DIDC	Darfur-wide Internal Dialogue and Consultation
DPA	Department of Political Affairs
DPKO	Department of Peacekeeping Operations
ECCAS	Economic Community of Central African States
ECHR	European Convention on Human Rights and Fundamental Freedoms
HRLJ	Human Rights Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IDP(s)	Internally Displaced Person(s)
IJRL	International Journal of Refugee Law
IOM	International Organization for Migration
MINUSCA	United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MONUC	United Nations Mission in the Democratic Republic of Congo
OAS	Organization of American States
OAU	(former) Organization of African Unity
OCV	out-of-country voting
SDG(s)	Sustainable Development Goal(s)
SRSR	Special Representative of the Secretary-General
UDHR	Universal Declaration of Human Rights
UKHL	United Kingdom House of Lords
UN	United Nations
UNAMID	United Nations-African Union Mission in Darfur
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNHCR	United Nations High Commissioner for Refugees
UNOPS	United Nations Office for Project Services
UNRWA	United Nations Relief and Works Agency
UNTS	United Nations Treaty Series

## EXECUTIVE SUMMARY

The political participation of refugees in their country of nationality raises various issues in terms of rights and protection and the interaction of UNHCR with states and with other parts of the United Nations. The very nature of the unique mandate of providing international protection to refugees as defined in the 1950 Statute is that UNHCR is always dealing with individuals in at least two states with which it may have different Memoranda of Understanding and which may have different treaty obligations. Add to that any specific UN-wide operations as established by Security Council resolutions in one or both states in question.

With respect to states, as well as their international refugee law and international human rights law treaty obligations, all states are committed within the United Nations system to upholding rule of law and, by 2030, meeting the targets of the Sustainable Development Goals. Those various sources of duties and goals pertain to a greater or lesser extent in establishing the framework for the political participation of refugees in their country of nationality. However, there is no right per se to political participation, and voting rights generally only extend to citizens. Refugees may retain their nationality during their displacement, but can they assert their right to vote from outside the territory? Much will depend on the domestic laws of the country of nationality and the country of asylum to put any international obligation into effect. Yet, in terms of solutions for protracted refugee situations, an inclusive approach to political participation from the very outset of any peace process is most likely to ensure a durable and sustainable voluntary repatriation.

In terms of the rights under the various international instruments, the 1951 Convention relating to the Status of Refugees provides very little explicit guidance on political participation by refugees, indeed Article 2 requires them only to conform to the laws and maintain the public order of the country of asylum. On the other hand, Article 5 requires states to ensure rights provided in other international instruments. The International Covenant on Civil and Political Rights (ICCPR) grants citizens the right to vote, but does this have extraterritorial application? Freedom of expression and freedom of association and assembly, though, are accorded to everyone within the territory and subject to the jurisdiction of the state party.

UNHCR may have the mandate to provide international protection to refugees, but other UN actors take the lead on electoral processes and may need prompting to include refugees, outside the state in nearly all cases, in a meaningful way. While international protection includes ensuring their greatest degree of political participation, UNHCR also has to maintain its duty to be entirely non-political. The difference between non-political and non-partisan, the need to share information about refugees with the Department of Peacekeeping Operations (DPKO), the Department of Political Affairs (DPA) and the United Nations Development

Programme (UNDP) whilst preserving their guarantee of protection and upholding data protection and information security protocols, and operating vis-à-vis two separate states makes it difficult to manage all the competing pressures of the operation.

This paper provides a comprehensive overview of the different frameworks for considering how refugees might participate in their country of nationality whilst still refugees, setting out the international law as it applies to those refugees and the operationalization of interoperability within the UN as UNHCR seeks to provide permanent solutions by assisting governments. It needs to be noted that in practice there will be a host of non-legal factors that will have an impact on the participation of refugees in the political processes in the country of asylum.

## 1. INTRODUCTION

The United Nations High Commissioner for Refugees (UNHCR) was created in December 1950 as a subsidiary organ of the UN General Assembly and mandated to provide “international protection” and seek “permanent solutions for the problem of refugees by assisting Governments ...”.<sup>1</sup> UNHCR considers a solution to be achieved when a durable legal status is obtained which ensures national protection for civil, cultural, economic, political and social rights.<sup>2</sup>

At one level, the political participation of refugees in their country of nationality is self-evident, in terms of their protection, broadly understood,<sup>3</sup> and as regards achieving solutions for them and with them. However, in relation to the pertinent international law, the domestic laws of both the country of asylum and the country of nationality, and the practical context, there are many issues that will impact on the political participation of refugees in their country of nationality.

The thesis of this paper is that refugees could include a section of society that has been most alienated by the government of their country of nationality and that their participation in the process of rebuilding a state that respects international human rights law, the rule of law and good governance is essential. As such, where there is a possibility to take part in a peace process through a referendum or to participate in

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<sup>1</sup> Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, UNGA Resolution 428(V), para 1.

<sup>2</sup> UN General Assembly, *Note on international protection*, 16 June 2017, EC/68/SC/CRP.12.

<sup>3</sup> Protection is not just *non-refoulement*, documentation and registration, along with non-detention, but the range of civil, political, economic, social and cultural rights that are found in the 1951 Convention and international human rights law treaties - for example, the right to education requires schools and while children are in schools they are less threatened by exploitation, trafficking and abuse.

elections, it needs to be prioritized in the interests of peacebuilding and reconciliation in pursuit of durable and sustainable solutions.<sup>4</sup>

## 1.1 Scope

This paper explores the participation of refugees as defined in Article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees, (1951 Convention) and its 1967 Protocol,<sup>5</sup> in political processes in their country of nationality, in the light of applicable international refugee law and international human rights law, with due consideration for regional variations, before considering issues relating to implementation in practice.

Before turning to examine in more detail the specific rights pertinent to political participation, the relevant actors, and issues of implementation, there is one final matter that ought to be broached in this introductory section. Political participation in the country of nationality is most pertinent to voluntary repatriation as a durable and sustainable solution. However, voluntary repatriation is unfortunately often subject to protracted delay and many displaced persons achieve a degree of stability in their lives through formal or informal local integration. If a refugee has been in the country of asylum for say twenty years, it is incongruous that they may have no opportunity for political participation there,<sup>6</sup> especially in the light of the 2016 New York Declaration and the Comprehensive Refugee Response Framework<sup>7</sup> and the effective

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<sup>4</sup> Report of the United Nations High Commissioner for Refugees, Part II Global compact on refugees, A/73/12 (Part II), 13 September 2018, paras 87 and 89, available at <[http://www.unhcr.org/gcr/GCR\\_English.pdf](http://www.unhcr.org/gcr/GCR_English.pdf)>. Hereafter, GCR.

<sup>5</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, and *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267. See also the regional responses from Africa, the Americas and south and south-east Asia with their enhanced definitions of refugee status: Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, 1001 UNTS 45; (i) Cartagena Declaration, 1984, November 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc OEA/Ser.L/V/II.66/doc 10, rev 1, at 190-93 (1984-85), (ii) Cartagena +30, 'Brazil Declaration and Plan of Action: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (Brasilia, 3 December 2014) <<http://www.refworld.org/docid/5487065b4.html>>; Bangkok Principles, Asian-African Legal Consultative Organization (AALCO), Bangkok Principles on the Status and Treatment of Refugees, 31 December 1966, as adopted on 24 June 2001 at the AALCO's 40th Session, New Delhi – see also, Notes, Comments and Reservations Made by the Member States of AALCO, Introductory Remarks, para 2.

<sup>6</sup> On voting rights in the country of asylum, see Ziegler, *Voting Rights of Refugees*, 2017.

<sup>7</sup> See Secretary-General's Report, 'In Safety and Dignity: Addressing Large Movements of Refugees and Migrants' UN doc A/70/59 (21 April 2016) <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/70/59&=E%20](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/59&=E%20)>, the outcome document for the high-level plenary meeting of the General Assembly held on 19 September 2016; and UNGA res 71/1 (19 September 2016) (New York Declaration), Annex I (Comprehensive Refugee Response Framework) and Annex II (Towards a Global Compact for Safe, Orderly and Regular Migration). Paragraph 2 of the Comprehensive Refugee Response Framework (CRRF) provides that UNHCR has the lead in developing the CRRF, which may thus further expand the understanding of the 1950 mandate. The CRRF is also included in the final version of the GCR, above note 4.

2. The comprehensive refugee response framework will be developed and initiated by the Office of the United Nations High Commissioner for Refugees, in close coordination with relevant States, including host countries, and involving other relevant United Nations entities, for each situation involving large movements of refugees. A comprehensive refugee response should involve a multi-stakeholder approach, including national and local

inclusion of refugees as part of society within the country of asylum, for example, through paying taxes or as part of development planning by the state.<sup>8</sup> All that said, this paper is focusing on the political participation of refugees in the country of nationality, outlining normative and institutional challenges.

### *Political Participation of Refugees in the Westphalian Paradigm*

- Need to recognise international and domestic obligations of at least two states
- Obligations and mandates of different international organizations
- Different sub-disciplines of public international law
  - International refugee law
  - International human rights law
  - Soft law

The state remains the principal actor in international law, which is fundamentally designed to regulate relations between states. However, the political participation of refugees in their country of nationality raises issues that go beyond the simple inter-state framework: in classical international law, individuals are meant to be represented by the state of which they are citizens when they travel abroad,<sup>9</sup> but refugees, by definition,<sup>10</sup> although outside their country of nationality, are unwilling or unable to avail themselves of the protection of that state. On the other hand, they do fall within the international protection mandate of UNHCR.<sup>11</sup>

UNHCR's 1950 Statute<sup>12</sup> provides that for refugees falling under the organization's mandate, it shall provide international protection and assist governments as they seek permanent solutions for refugees. Indeed, since refugees must be in a different state, their political participation in their country of nationality gives rise to a complex matrix of relationships within the international and domestic frameworks: the refugee with UNHCR; UNHCR with the country of nationality and the country of asylum, both, either or neither of which may be parties to the 1951 Convention,<sup>13</sup> through two separate memoranda of understanding; UNHCR with other United Nations agencies

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authorities, international organizations, international financial institutions, regional organizations, regional coordination and partnership mechanisms, civil society partners, including faith-based organizations and academia, the private sector, media and the refugees themselves.

<sup>8</sup> See The Sustainable Development Goals (SDGs), 'Transforming our World: The 2030 Agenda for Sustainable Development' UNGA res 70/1 (25 September 2015), Goal 10:

Goal 10. Reduce inequality within and among countries

...

10.2 By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, *origin*, religion or economic or *other status*. (Emphasis added)

<sup>9</sup> See Crawford, *Brownlie's Principles of Public International Law*, 8<sup>th</sup> ed. 2012, 607 et seq.

<sup>10</sup> See Article 1A.2 1951 Convention, above note 5.

<sup>11</sup> 1945, 892 UNTS 119.

<sup>12</sup> Above note 2.

<sup>13</sup> Above note 5.

with their own distinct mandates that pertain to political participation; the refugee with the domestic laws of the country of asylum and the country of nationality; and the country of asylum and the country of nationality, including in the context of the extraterritorial reach of international human rights obligations.

## **2. The Law – Rights and Political Participation**

- 1951 Convention relating to the Status of Refugees
  - Refugee definition
  - Articles 2, 5, 15, and Preamble
- 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa
  - Article III
- ICCPR
  - Articles 1, 18-21, 25, 27
  - General Comment 25
- Convention on Migrant Workers
  - Articles 41 and 42
- Regional Mechanisms

In order to understand the various relationships and interactions at play when examining the political participation of refugees in their country of nationality, it is worth setting out the basic legal framework as provided in international and regional refugee and human rights law.

This section explores the range of rights available in international refugee law, international human rights law and regional mechanisms to promote political participation by refugees in their country of nationality.

### **2.1 The 1951 Convention and 1967 Protocol**

At first blush, the 1951 Convention provides scant support for the political participation of refugees in their country of nationality. To be fair, the 1951 Convention aims to define beneficiaries of refugee status and allocate to such refugees a progressively increasing range of basic rights, and has little or nothing to say about the country of nationality or about durable solutions, so expecting provisions on political participation in the country of nationality in particular is somewhat unrealistic.

According to Article 1A(2) of the 1951 Convention, as amended by the 1967 Protocol,<sup>14</sup> a refugee is someone who is outside their country of nationality with a well-founded fear of persecution based on one of five grounds, race, religion, nationality, membership of a particular social group or political opinion, and is unable or unwilling to avail themselves of the protection of their country of nationality; or, in

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<sup>14</sup> Above note 5.

the case of stateless persons, instead of country of nationality, reference would be to country of habitual residence.<sup>15</sup>

'Outside', itself, is a relative term. While a refugee must be outside to be recognised as a refugee,<sup>16</sup> they do not automatically cease to be a refugee or within UNHCR's mandate if they return to their country of nationality, at least until they have a stable and durable repatriation. Some complex and overlapping questions arise out of this continuing mandate for refugees within the country of nationality after they return. First, refugees who return to the country of nationality are sometimes then displaced internally.<sup>17</sup> Secondly, returning refugees often form mixed populations with internally displaced persons (IDPs) – promoting voluntary repatriation is facilitated if everyone is included and it adds credibility to the electoral process. Given that UNHCR has an extended mandate that includes conflict-driven IDPs,<sup>18</sup> the likelihood that any political participation process for returning refugees will require application of the law pertaining to IDPs is high.<sup>19</sup> That said, the specific situation of the political participation of IDPs in their own right, separate from the context of returning refugees, is beyond the scope of this paper.

One other aspect of the refugee definition needs to be addressed at the outset – “country of nationality”. UNHCR also has the mandate for stateless persons.<sup>20</sup> Statelessness leads to disenfranchisement generally, but for the purpose of this paper, stateless persons are included only to the extent that they are refugees, whether that be because statelessness was the basis for the persecution that led to flight or as a consequence of being displaced.

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<sup>15</sup> See the 1969 African Convention, Cartagena 1984, and the Bangkok Principles, all above note 5. The 1969 African Convention does, as will be seen, add a further complication to the political participation of refugees in their country of nationality. The regional customary international law in the Americas, which allows states to grant asylum in embassies, is not within the purview of this analysis – *The Asylum Case (Colombia v Peru)* [1950] ICJ 266.

<sup>16</sup> *Regina v Immigration Officer at Prague Airport and another*, ex parte European Roma Rights Centre and others [2004] UKHL 55.

<sup>17</sup> See Hall, *Escaping War: Where to Next?*, Norwegian Refugee Council/ Internal Displacement Monitoring Centre, 2018 <<http://www.internal-displacement.org/library/publications/2018/escaping-war-where-to-next>>; see also, Rushing, 'Today's returning refugees, tomorrow's IDPs', <<http://www.internal-displacement.org/library/expert-opinion/2017/todays-returning-refugees-tomorrows-idps/>>.

<sup>18</sup> <http://www.refworld.org/idps.html>. See also Türk and Eyster, 'Strengthening Accountability in UNHCR', 22 IJRL 159 (2010).

<sup>19</sup> See Guiding Principles on Internal Displacement 1998, UN doc E/CN.4/1998/53/Add.2, (Guiding Principles), and African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 22 October 2009 <<http://www.refworld.org/docid/4ae572d82.html>>. Guiding Principle 22 is relevant in this context:

22.1 Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights:

...

(c) The right to associate freely and participate equally in community affairs;

(d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right.

<sup>20</sup> See UNGA res 50/152, 9 February 1996, paragraphs 14-16.

### 2.1.1 Cessation – Article 1C

While the refugee definition may seem reasonably straightforward in most cases,<sup>21</sup> there are a series of situations that pertain to political participation by refugees that render it more complicated in practice. First, refugee status is never meant to be permanent, that is, it should be resolved by refugees finding a sustainable and durable solution. For instance, this may be achieved through resettlement in a third country, or that they integrate (in the words of the Statute, ‘assimilate’) and potentially naturalize, becoming a citizen of the country of asylum as promoted by Article 34 of the 1951 Convention, or they re-avail themselves of the protection of the country of origin or any new country of nationality under Article 1C. Under Article 1C, refugee status can be lost if the refugee voluntarily re-avails themselves of the protection of their country of nationality.<sup>22</sup> The critical question then in the context of this analysis is thus whether political participation indicates they have so re-availed themselves and whether it matters if they returned to their country of nationality to vote? Equally, does the fact that elections are taking place suggest that because “the circumstances in connection with which [they were] recognized as a refugee have ceased to exist”, they can no longer “continue to refuse to avail [themselves] of the protection of the country of [their] nationality”, giving rise to cessation of status under Article 1C(5)?

Cessation is a topic that affects both refugees and UNHCR’s mandate of providing international protection. From the perspective of the refugee and the two states, the question is whether political participation fulfils the Article 1C criteria which hold that refugee status ceases if sub-paragraphs 1 or 4 are satisfied:

- C. This Convention shall cease to apply to any person falling under the terms of section A if:
- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
  - ...
  - (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution.

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<sup>21</sup> And the complex cases will not be about refugeehood, but about the nature of the relevant state(s), particularly where an individual has been displaced due to the partition of a state without necessarily having a defined and registered nationality under the new structure – for example, Eritreans who were in Ethiopia when Eritrea was created and have never ‘returned’ (*Secretary of State for the Home Department v ST (Eritrea)* [2010] EWCA Civ 643). On a question which is distinct from that of eligibility for protection under Article 1D or otherwise of the 1951 Convention, do Palestinians outside the UNRWA region who qualify as 1951 Convention refugees have the right to participate in the elections in the Occupied Palestinian Territories of the West Bank and Gaza? And what if they had never lived in the West Bank or Gaza?

<sup>22</sup> See Fitzpatrick and Bonoan, ‘Cessation of Refugee Protection’, in Feller, Türk and Nicholson, *Refugee Protection in International Law* (2003) 491, and Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Reissued Geneva, December 2011, paragraphs 111-39 (hereafter 1979 Handbook).

The question is whether there is a stable re-availment of the protection of the country of nationality. Return alone does not mean there is cessation, the situation is much more complex and potentially fluid. For the refugee and for UNHCR there are issues surrounding registering to vote that might require sharing personal information with the country of nationality at a time when the refugee is not certain that they feel safe to return or even engage with that state.<sup>23</sup>

It may be that some refugees will not return to their country of nationality for any elections because of fears that pertain to that specific group - for instance, they are part of a minority group that previously suffered persecution at the hands of whichever other group was in power. Does that constitute a circumstance where as part of international protection, UNHCR facilitates the political participation of most refugees, but continues to offer international protection across the border for this specific minority group? Such a scenario would seem consistent with the Statute and the 1951 Convention, which allows for different responses to cessation through the provisos to Article 1C(5)/(6).<sup>24</sup> On the other hand, should UNHCR, working with other UN actors, try to ensure additional protection for such refugees in order to better facilitate a durable and sustainable solution that would be a truer reflection of universal suffrage?

The practical aspects of providing a framework for cessation should be set out in tripartite agreements between the country of asylum, the country of nationality and UNHCR on a more or less formal basis. The 2017 Note on International Protection indicated that it had facilitated voluntary repatriation for forty different states.<sup>25</sup> It requires experience to manage expectations on all sides if a protracted displacement is to come to an end in a manner that properly engages the refugee population in a peaceful manner.<sup>26</sup> As part of UNHCR's Article 35 supervisory function, it should have the lead on voluntary repatriation and states ought to recognise its role under the Convention and Statute.<sup>27</sup> The 'Cartagena +30, Brazil Declaration and Plan of

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<sup>23</sup> For information on how UNHCR protects the privacy rights of those on whom it holds data, see UNHCR, 'Policy on the Protection of the Personal Data of Persons of Concern to UNHCR' (15 May 2015) <<http://www.refworld.org/cgi-bin/tehis/vtx/rwmain>>. This is recognised as the gold standard on data protection within the United Nations.

<sup>24</sup> Article 1C.5 and 1C.6, above note 5.

Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality/ former habitual residence.

Although the reference is to Article 1A.1 refugees, it has been extended by custom to include those falling within 1A.2, as well – see the 1979 Handbook, above note 22, 136.

<sup>25</sup> Above, note 2, paragraph 52.

<sup>26</sup> See, UNAMID Press Release, 25 January 2015, 'Darfur Internal Dialogue and Consultations process launched in El Fasher', available at <<https://unamid.unmissions.org/25-jan-15-darfur-internal-dialogue-and-consultations-process-launched-el-fasher>>.

<sup>27</sup> Cf. It would appear that the return of Colombian refugees from Ecuador does not fully respect UNHCR's role and mandate. According to an email from Manuel Oviedo (kindly translated by Elena Boffelli, LLM in International Human Rights and Humanitarian Law 2016-17), at the VIth meeting of the Tripartite Mechanism,

Action' urges governments in the region to "establish tripartite mechanisms between the country of origin, the country of asylum, and UNHCR to facilitate voluntary repatriation processes, considering the participation of refugees as a regional good practice."<sup>28</sup>

### 2.1.2 *Exclusion – 1F*

The second situation concerns exclusion under Article 1F. At one level, this presents no problem because the Convention does not apply to anyone who falls within Article 1F and who is outside the remit of UNHCR's mandate.<sup>29</sup> Nevertheless, they would otherwise qualify as refugees. The very people who might have been most opposed to the incumbent regime may very well be the ones with respect to whom there are serious reasons for considering that they have committed war crimes, crimes against humanity, crimes against peace, or serious non-political crimes. Given the nature of such crimes, exclusion may be justified, but is the person advocating secession for part of a state, threatening its territorial integrity and, thereby, the maintenance of international peace and security; or fighting for the self-determination of peoples?<sup>30</sup> Should such people not have the assistance of UNHCR in facilitating their political participation? The traditional and correct answer is clearly no, but other United Nations actors are not restrained by the exclusion clause and it will be for those actors to ensure the voice of excluded refugees is heard.

This example indicates the difficulty in some non-international armed conflicts to uphold Article 1F of the 1951 Convention, the United Nations Charter and, as will be seen, the right of peoples to self-determination.

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upon the request made by the Ecuadorian delegation for the drafting of a voluntary repatriation protocol, the delegation of the Colombian Government asserted that UNHCR Colombia does not have the mandate for repatriation. Finally, it was agreed to draft such a protocol as if there were a specific agreement between UNHCR and the Government of Ecuador on this issue. See the 'VI Meeting of the Tripartite Mechanism on Refugees', Ecuador-Colombia-UNHCR-IOM, Quito, 25 September 2017.

12. The Ecuador delegation agrees with UNHCR on the importance of developing a Roadmap with concrete guidelines and procedures to facilitate the coordination of the voluntary repatriation of those refugees of Colombian nationality who wish to return from Ecuador. The Ecuadorian Government will inform the Colombian Government of such initiative, if it is deemed appropriate.

<sup>28</sup> Above, note 5, Brazil Declaration of 3 December 2014, p.5.

<sup>29</sup> 1950 Statute, above note 1. The language of Paragraph 7d is different from that of Article 1F of the 1951 Convention:

7 Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:

...

(d) In respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights.

<sup>30</sup> UN Charter, above note 11, Articles 1.2, 1.3 and 2.4; Article 1F.c, 1951 Convention, above note 5.

### 2.1.3 *The right to political participation and the 1951 Convention*

If one qualifies as a refugee, to what extent does international refugee law facilitate the political participation of refugees in their country of nationality?

Article 15 of the 1951 Convention provides the one reference that might be pertinent:

#### *Article 15 - Right of association*

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.

It only applies to refugees lawfully staying in the territory of the country of asylum, which suggests that they have been recognised as falling within Article 1A(2), at least, and have been accorded some residency status.<sup>31</sup> Further, this is not a right to participate in political affairs generally, but only with respect to “non-political and non-profit-making associations and trade unions” – nothing in Article 15 would promote engagement with electoral processes in the country of asylum. In addition, it only accords the same rights as would be granted to any other foreign national. While it might seem unfair for refugees to be put in some preferential position, it needs to be remembered that refugees lack the protection of their country of nationality within the country of asylum and did not choose to relocate like other foreign nationals.

On the basis of the above, Article 15 cannot in and of itself form the basis for any right to political participation in the country of nationality.

Furthermore, Article 2 can be equally problematic in this context:

#### *Article 2 - General obligations*

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.

The *travaux préparatoires* to the 1951 Convention make clear that ‘public order’ in Article 2 does not bear the same meaning as its use in Article 32.<sup>32</sup> Article 2 states the obligation upon a refugee to comply with laws and regulations of the country in which

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<sup>31</sup> On lawfully staying, see Weis, *The Refugee Convention, 1951 the Travaux Préparatoires*, 33, available at <<http://www.refworld.org>> 193, and Goodwin-Gill and McAdam, *The Refugee in International Law*, 524-28 (2007).

<sup>32</sup> Courts in Austria have apparently assimilated ‘public order’ in the two provisions, however. See *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, Article 2 at p.7, written by Professor Atle Grahl-Madsen in 1963 and re-published by the then Department of International Protection in October 1997 (available at: <http://www.refworld.org/docid/4785ee9d2.html>), citing *Stojanoff v Sicherheitsdirektion für das Bundesland Oberösterreich* (judgement of 12 December 1956, ref. 1949/55/2).

s/he is. The drafters fully appreciated that the provision made in the Article was axiomatic and need not be explicitly stated. However, it was considered useful to include such a provision in order to produce a more balanced document as well as for its psychological effect on refugees and/or countries considering admitting refugees. The representative of France proposed a second paragraph to this Article, explicitly permitting Contracting States to restrict the political activity of refugees. The Committee felt that such a provision was too broad, and might be misconstrued as approving limitations on areas of activity of refugees which are in themselves unobjectionable. The Committee also felt that a provision of this kind was unnecessary and that in the absence of a provision to the contrary any sovereign government retained the right it has to regulate any activities on the part of an alien which it considers objectionable. The failure to include such a provision is not to be interpreted as derogating from the power of governments in this respect. In an effort to meet at least in part the view of the representative of France, the phrase “including measures for the maintenance of public order” was included.<sup>33</sup>

Given the reference to conformity with the laws and regulations of the country of asylum, the maintenance of public order has been interpreted as referring to activities contrary to national security, whether that be as regards internal or external manifestations of security. At one level, this could include trying to influence elections taking place in the country of nationality unless there were to be in place a formal mechanism for such engagement as agreed between the two states involved and UNHCR.

On the other hand, the views on political activities by refugees expressed in the *travaux préparatoires* stem from the fear at the outbreak of World War II that Nazi collaborators might be passing as refugees and that specific context is rarely applicable, especially at the point where voluntary repatriation is being considered. Moreover, the 1951 Convention is a living and dynamic instrument and international human rights law has moved on significantly in this regard since the time of its drafting, so it needs to be read more broadly, too.

Related to Article 2 is Article III of the 1969 OAU Convention:<sup>34</sup>

*Article III – Subversive Activities*

1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations as well as with measures taken for the maintenance of public order. He shall also abstain from any subversive activities against any Member State of the [AU].

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<sup>33</sup> From the Report of the first session of the Ad Hoc Committee, E/1618 at 40-41, cited in Weis, above note 31. 33. See also, UNHCR Commentary, above note 32, at Article 2, paragraph (8).

<sup>34</sup> Above, note 12.

2. Signatory States undertake to prohibit refugees residing in their respective territories from attacking any State Member of the [AU], by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.

There is no individual consequence set out in the Article for its violation, but it could be brought within Article I(4)(g).<sup>35</sup> While there are parallels with Article 2 of the 1951 Convention, on appropriate facts, 'subversive activities could be brought within the remit of Article 1F(c), applied retroactively, or Article 33(2)'s 'danger to the security' limb. Only if the subversive activities were to fall within Article 1F(c) or Article 33(2) of the 1951 Convention, however, could a state use them to remove a refugee's protection under the 1969 OAU Convention. Article III, and for that matter Article 2 of the 1951 Convention, must be read in the light of Articles 25 and 19 ICCPR on the right to take part in the conduct of public affairs and to vote and on freedom of expression, respectively.<sup>36</sup> Moreover, like all the provisions that disapply the Convention or remove the guarantee of *non-refoulement*, the state would still have to respect international human rights law. In *Organisation mondiale contre la torture, Association Internationale des juristes démocrates v Rwanda*,<sup>37</sup> the African Commission of Human Rights protected refugees under the African Charter of Human and Peoples' Rights who were about to be deported on grounds of subversive activities regarding their country of nationality.

Nevertheless, the 1951 Convention does provide one avenue for promoting political participation. The Preamble refers expressly to the Universal Declaration of Human Rights 1948,<sup>38</sup> which provides in Articles 18-21 for the rights to freedom of thought, freedom of expression and opinion, freedom of association and, most pertinently, in Article 21:

*Article 21*

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by

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<sup>35</sup> Article I, 1969 Convention, above note 5.  
Article I. Definition of the term "Refugee"

...

4. This Convention shall cease to apply to any refugee if:

...

(g) he has seriously infringed the purposes and objectives of this Convention.

<sup>36</sup> UNGA res. 2200A (XXI), 21 UNGAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171 (ICCPR).

<sup>37</sup> <caselaw.ihrda.org/doc/27.89-46.91-49.91-99.93/print/>

<sup>38</sup> UNGA res 217A (III) (10 December 1948) (UDHR).

universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

It is worth noting that freedom of expression has been interpreted in the intervening years to protect political speech very strongly.<sup>39</sup> And Article 5 of the 1951 Convention sets out that nothing therein can be deemed to impair any rights granted to refugees apart from the Convention:

*Article 5 - Rights granted apart from this Convention*

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

While the UDHR is not binding in and of itself, it does reflect, at least in part, customary international law. Moreover, the UDHR, referred to in the Preamble to the 1951 Convention, formed the basis for the ICCPR and Article 21 is reflected in Article 25 of the latter, while non-discrimination, which would apply to the treatment of refugees, is one aspect of the UDHR that is widely accepted as reflecting custom.<sup>40</sup> Moreover, the binding quality of the UDHR for with respect to the United Nations itself and its operations raises a series of questions discussed below.<sup>41</sup>

## **2.2 International Human Rights Framework**

While international refugee law is part of the framework for this analysis, international human rights law also shapes political participation, perhaps even more so. Indeed, it might be assumed that international human rights law applies, without considering the context of displacement.

International human rights law treaties are like any other, binding upon ratification and applicable only in so far as the treaty stipulates. In the case of most of the international human rights law treaties and their regional equivalents, they apply to every individual within the territory and jurisdiction of the state party. Under Article 2 of the ICCPR, the rights are available to everyone “within its territory and subject to its jurisdiction” and they are to have access to an effective remedy to meet any violation of such rights.<sup>42</sup> According to Human Rights Committee General Comment

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<sup>39</sup> *Stankov and United Macedonian Organisation “ILINDEN” v Bulgaria* App. No. 29221 and 29225/95, European Commission of Human Rights, 29 June 1998, European Court of Human Rights (First Section), 2 October 2001.

<sup>40</sup> See Charlesworth, the Universal Declaration of Human Rights, in Oxford Public International Law, available at <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e887>>.

<sup>41</sup> Below, note 88

<sup>42</sup> Above, note 36.

### Article 2

1. Each State Party to the present Covenant undertakes 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, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

15 on the rights of aliens,<sup>43</sup> that is "irrespective of his or her nationality or statelessness". That said, paragraph 2 of the General Comment states that Article 25 on political participation is restricted to citizens. In General Comment 31, the Committee expanded on the scope of Article 2(1): it applies to all individuals, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.<sup>44</sup> This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances.<sup>45</sup>

It will be suggested below that during negotiations on transition, at least within a UN framework, the country of nationality ought to assume an inclusive approach *vis-à-vis* refugee nationals in other states as regards Article 25 ICCPR – that would entail seeking to ensure such refugee nationals can participate in transitional planning and elections in co-operation with the country of asylum.

In terms of regional human rights treaties, all of them protect everyone within the territory and jurisdiction.<sup>46</sup> As such, they are in line with the ICCPR. Furthermore, there is relevant jurisprudence from the European Convention on Human Rights (ECHR) that is transposable to the other mechanisms, discussed below in §0.

Beyond international human rights law *stricto sensu*, the 2015 Sustainable Development Goals<sup>47</sup> and rule of law<sup>48</sup> have a part to play in this analysis. The

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2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

<sup>43</sup> Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), paragraph 1, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.1 at 18 (1994).

<sup>44</sup> Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).

<sup>45</sup> Above, note 44, paragraph 10.

<sup>46</sup> See Article 2, African Charter on Human & Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5 (1981), 21 ILM 58 (1982) – hereafter African Charter; Article 1 American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123 (1969) – hereafter ACHR; Article 1 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (1950) – hereafter ECHR.

<sup>47</sup> Above, note 8.

<sup>48</sup> Report of the Secretary-General, S/2004/616 (23 August 2004), along with Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 2012, UNGA res 67/1 (24 September 2012) para 2. See also, Gilbert and Rüschi, 'Rule of Law and UN Interoperability', 30 IJRL 31 (2018).

Preamble to the SDGs provides that "no-one will be left behind", which clearly includes refugees and asylum-seekers. Goals 5 and 16 are most relevant:

Goal 5: Achieve gender equality and empower all women and girls;

Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

The targets for each goal to see how far states have moved to achieve the Agenda by 2030 that are pertinent to this study include:

5.5 Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life.

...

16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all

...

16.6 Develop effective, accountable and transparent institutions at all levels

16.7 Ensure responsive, inclusive, participatory and representative decision making at all levels

The targets bolster the interpretation of international human rights law standards so as to achieve effective and comprehensive political participation that facilitates durable and sustainable solutions for refugees. They also make the link with rule of law as part of the response of states that wish to transition to representative government. Furthermore, paragraph 9 of the Declaration to the SDGs provides as follows:<sup>49</sup>

9. We envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all.... One in which *democracy, good governance and the rule of law*, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. (emphasis added)

Finally, one of the advantages of incorporating the SDGs and rule of law into promoting the political participation of refugees is that, unlike treaties, there is no need to show ratification by states.

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<sup>49</sup> Above, note 8.

### 2.2.1 *International Covenant on Civil and Political Rights*

Before turning to specific rights under the ICCPR, the reach of the Covenant needs to be considered. As discussed above, Article 2 protects persons “within its territory and subject to its jurisdiction”.<sup>50</sup> That would extend to sending someone to another state where their rights and freedoms would be violated.<sup>51</sup> In the European context, it has been suggested that in appropriate circumstances, it would include a state exporting materials without proper controls that then violated the rights of individuals in a third state.<sup>52</sup> It also includes cases where the authorities of one state are operating in a third state.<sup>53</sup> What has never been addressed is whether there are obligations to nationals under international human rights law when they are overseas.<sup>54</sup> Is the corollary of Article 2 extending all the rights in the ICCPR to everyone “within its territory and subject to its jurisdiction” bar Article 25 that is only accorded to citizens, that they must ensure wherever practicable the Article 25 rights to citizens, including refugees, overseas? Unlike other nationals abroad, refugees did not choose to relocate but fled persecution.

#### *Article 25*

There is no right to political participation *per se*. Thus, while Article 25 is the primary right in this context, it is not the only relevant provision.

#### *Article 25*

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Refugees do not lose their nationality or citizenship, they are simply unwilling or unable to avail themselves of the protection of the country of nationality. Thus, refugees, as citizens of the country of nationality, have the rights set out in Article 25. The question is, however, what are the obligations of the state with respect to Article 25 as regards citizens outside the territory? States establish their own electoral laws, but is there a special rule for states in transition *re* refugees? Does Article 25 place any obligation on the country of asylum to facilitate voting or other means of political

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<sup>50</sup> Above, note 36.

<sup>51</sup> *Judge v Canada*, CCPR/C/78/D/829/1998, 2003.

<sup>52</sup> *Tugar v Italy* App No.22869/93, European Commission of Human Rights, 18 October 1995.

<sup>53</sup> See General Comment 31, above note 44, paragraph 10.

<sup>54</sup> It may be that where a national overseas faces the death penalty, a state may have a duty to intervene, that goes beyond what is provided for in the Vienna Convention on Consular and Diplomatic Relations 1961, 500 UNTS 95.

participation from overseas?<sup>55</sup> Given that UNHCR's mandate of international protection towards refugees includes assisting governments to promote voluntary repatriation,<sup>56</sup> does the duty of states to co-operate with UNHCR under Article 35 of the 1951 Convention or Paragraph 8(a) of the 1950 Statute require the country of nationality and the country of asylum to facilitate political participation with a view to achieving a durable and sustainable solution through voluntary repatriation?<sup>57</sup>

According to General Comment 25, states are meant to be inclusive in relation to the participation of citizens:

“11. 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. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.”

While it says nothing about those overseas, the reference to residence requirements *vis-à-vis* refugees is extremely pertinent; a similar exhortation as regards persons standing for election in paragraph 15 refers to residency requirements as discriminatory without any reference to homelessness.<sup>58</sup> Furthermore, in meeting SDG 16 of promoting “peaceful and inclusive societies for sustainable development, [providing] access to justice for all and [building] effective, accountable and inclusive institutions at all levels”, all states need to “[ensure] responsive, inclusive, participatory and representative decision-making at all levels”.<sup>59</sup>

Finally, the nationality laws of some countries, whether by design or accident, require citizens overseas to register with the consulate or risk losing their nationality: clearly, that might run foul of obligations under the 1961 Convention on the Reduction of

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<sup>55</sup> HRC General Comment 25, CCPR/C/21/Rev.1/Add.7, 27 August 1996:

8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.

Freedom of expression under Article 19 ICCPR is not constrained by international borders.

<sup>56</sup> Paragraph 8(c), 1950 Statute, above note 1.

<sup>57</sup> And see UNGA res 45/150, paragraph 10, 18 December 1990, on appropriate UN bodies giving assistance with respect to elections. Like all UNGA resolutions, it has no inherent binding quality.

<sup>58</sup> In *Ignatane v Latvia*, Communication No. 884/1999, Human Rights Committee, 25 July 2001, the Human Rights Committee found that limitations on political participation had to be reasonable and objective – paragraph 7.3.

<sup>59</sup> Above, note 8, Target 16.7.

Statelessness,<sup>60</sup> but, regardless, it will be practically difficult for any refugee to be able to meet such a requirement – and loss of nationality would not appear to be a reasonable and objective interference with political participation. Furthermore, given that Article 25 is a right of citizens, it will be even more difficult to ensure the participation of stateless refugees, so UNHCR’s international protection mandate will again be to the fore if an inclusive and comprehensive election is to be facilitated.

### *Articles 18-21 ICCPR*

Political participation depends on freedom of thought, expression association and assembly. As Article 19 makes clear:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) **For the protection of national security or of public order (*ordre public*), or of public health or morals.**

(Emphasis added)

Again, the role of UNHCR in working with both the country of nationality and the country of asylum to facilitate voluntary repatriation includes enhancing state capacity to be able to provide refugees with these rights. The organization’s expertise of working with refugees for nearly seventy years will reduce the risk of threats to national security or public order when channelling information to refugees in the country of asylum or enabling their return to the country of nationality.<sup>61</sup>

The relevance of all these articles to political participation is seen in their inclusion in Human Rights Committee’s General Comment on Article 25.<sup>62</sup> Moreover, these rights

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<sup>60</sup> 989 UNTS 175.

<sup>61</sup> It is not just that information can be passed on from the country of nationality at the time of any election or peace process, through ensuring access to education and training in the country of asylum, UNHCR can help prepare the refugee community to resume its political function as part of the population, even if displaced across a border.

<sup>62</sup> Above, note 55, paragraphs 12, 25 and 26.

25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.

are not limited to citizens like Article 25, so the country of asylum's obligations under Article 2 extend to refugees in the territory of the state. It is in these circumstances, where a durable and sustainable solution can be achieved by UNHCR working with both states to ensure the full enjoyment of the rights of refugees, that the interplay of international human rights law and international refugee law is most apparent. It also places limits on how one can interpret Article 2 of the 1951 Convention and Article III of the 1969 OAU Convention. In addition, beyond the international legal obligations, UNHCR can further facilitate capacity building in both states, including incorporating the international standards in domestic legislation, for the promotion and protection of the rights of refugees, by also drawing on the rule of law and the SDGs.

### ***Article 27 ICCPR***

Article 27 provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 is a particularly complicated provision,<sup>63</sup> even more so when one seeks to apply it in the case of refugees. Traditionally, minorities have to be nationals of the state where they seek to assert their Article 27 rights,<sup>64</sup> but that would render it

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<sup>63</sup> See Gilbert, 'Refugees, Minorities and International Law', *Konrad Adenauer Stiftung Monitor (SE Asia)*, June 2016; 'The Protection of Minority Rights under the ECHR: is a Protocol Needed?', 10 *European Yearbook of Minority Issues* 179 (2013); 'The Contribution of the European Court of Human Rights to the Promotion of the Effective Participation of National Minorities: Groping in the Dark for Something that Might Not Be There' 16 *International Journal of Minority and Group Rights*, 611 (2010); 'The Cultural and Political Autonomy of Minorities', *L'Observateur des Nations Unies*, 2007-2, vol.23, 225 (2008); 'Expression, Assembly, Association' for Weller and Moucheboeuf, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (2007), 149; 'Article 5' and 'Article 6' in Weller, *Commentary on the Council of Europe's Framework Convention for the Protection of National Minorities*, (2005), at 149 and 172, respectively; 'Individuals, Collectivities and Rights' in Hercock and Xanthaki (eds), *Minorities, Peoples and Self Determination: Essays in Honour of Patrick Thornberry* (2005), 139; 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', 24 *Human Rights Quarterly* 736 (2002); 'Autonomy and Minority Groups - A Right in International Law?' 35 *Cornell International Law Journal* 307 (2002); 'Religio-Nationalist Minorities and the Development of Minority Rights Law', 25 *Review of International Studies* 389 (1999); 'Minority Rights under the Council of Europe' in Wheatley and Cumper, *Minority Rights in the 'New' Europe* (1999) 53; 'Religious Minorities and their Rights: A Problem of Approach', 5 *International Journal on Minority and Group Rights* 97 (1998); 'The Council of Europe and Minority Rights', 18 *Human Rights Quarterly* 160 (1996); 'The Legal Protection Accorded to Minority Groups in Europe', 23 *Netherlands Yearbook of International Law* 67 (1992). See also, O'Nions, 'Minority and cultural rights of migrants', in Chetail and Bauoz, *Research Handbook on International Law and Migration* 239 (2014).

<sup>64</sup> See Capotorti, 1977 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', ¶568 (1991):

[A] group numerically [smaller] to the rest of the population of a State, in a non-dominant position, whose members - *being nationals of the State* - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language. (Emphasis added)

redundant *vis-à-vis* refugees. On the other hand, General Comments 23<sup>65</sup> and 31<sup>66</sup> both hold that Article 27 applies to everyone on the territory: does this place an increased obligation on the country of asylum to facilitate political participation of such refugees *vis-à-vis* the country of nationality, as part of enabling them to enjoy their own culture?<sup>67</sup>

Minority participation is crucial to encouraging voluntary repatriation, but minorities are often the last to return – it is a particular problem where many fled generalized violence, but the minority population had suffered persecution as well as the general disruption created by an armed conflict or other generalized violence. Furthermore, can they return to their original location within the country of nationality (where they may be entitled to vote) or do they have to relocate, which again might restrict political participation and might limit their right to enjoy their own culture because the minority population is now dispersed across the country?

The interface of minority rights, international refugee law and international human rights law provides a rich platform for promoting political participation of refugees.

### *Article 1 ICCPR*

Article 1 is the right of peoples to self-determination – it is not a right of individuals and cannot be prayed in aid as part of an individual communication under the Optional Protocol before the Human Rights Committee.<sup>68</sup> That said, the Human Rights Committee held in *Apirana Mahuika* that in certain cases it can be utilised for the better interpretation of Article 27.<sup>69</sup>

In this particular context, Article 1 may be of use with respect to the inclusion of refugees in the political participation process. First, assuming that the refugee population in the country of asylum constituted a minority in the country of

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<sup>65</sup> Human Rights Committee General Comment 23(50) (Article 27) (Fifteenth Session, 1994), UN Doc. CCPR/C/21/Rev.1/Add.5, 1994.

<sup>5.1</sup> The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

<sup>66</sup> Above, note 44, paragraph 9.

<sup>67</sup> NB. In one sense, it is the corollary of persecution of minorities in the country of nationality that first led them to seek refugee status in the country of asylum.

<sup>68</sup> Above, note 36. See also, Communication No.167/1984, *Bernard Ominayak, Chief of the Lake Lubicon Band v Canada*, Views adopted 26 March 1990, UNGAOR, 45th Sess., Supp. No.40, A/45/40, 11 HRLJ 305 (1990) at paragraph 13.3; and, Communication No.413/1990, *A.B. v Italy, South Tirol Case*, Decision on Admissibility 2 November 1990, 12 HRLJ 25 (1991) at paragraph 3.2. See also, Communication No.547/1993, *Apirana Mahuika v New Zealand*, Views adopted 15 November 2000, where the Human Rights Committee held that “the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular Article 27” - paragraph 9.2.

<sup>69</sup> Above, note 63.

nationality before flight, then one might read into the idea of ‘peoples’ asserting the right to self-determination through elections or the peace process that it must include all the peoples of the country of nationality, including the refugees currently in the country of asylum. If the transition is to be truly inclusive, then political participation under Article 25 has to embrace refugees. Furthermore, while Article 1 has been used in an Article 27 communication before the Human Rights Committee, there is nothing to say that away from individual complaints, states parties to the ICCPR, if they are to ensure the rights under the Covenant to all individuals within its territory and subject to its jurisdiction, must adopt an Article 1 analysis for other rights including Article 25. In many ways, self-determination relates most closely to ideas of political participation embodied in Article 25 and the refugee population outside the country of nationality must be included in that ‘self’ so that no-one is left behind.<sup>70</sup>

States have recognised that self-determination of peoples is one of the principles of the United Nations,<sup>71</sup> so UNHCR can readily promote inclusive approaches to refugees in processes that foster voluntary repatriation as part of the Charter commitments of states: in that vein, under Article 1(4) of the Charter, the United Nations is “[to] be a centre for harmonizing the actions of nations in the attainment of these common ends”.

### *2.2.2 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<sup>72</sup>*

Although not directly on point for refugees, Articles 41 and 42 are of interest as affording support for the extra-territorial reach of Article 25 ICCPR by way of analogy in line with traditional rules of interpretation that provide for later treaties being used to interpret earlier ones:

#### *Article 41*

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

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<sup>70</sup> Above, note 55.

<sup>71</sup> See Article 1.2, UN Charter, above note 11.

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

<sup>72</sup> UNGA res. 45/158 (1990); 2220 UNTS 3.

2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

#### *Article 42*

1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.

2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.

3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

It makes little or no sense that those who have voluntarily relocated in another state should have a right to participate in public affairs and to vote if refugees are denied the same right, especially as part of any transitional process to restore a sense of normality and cohesion to the state and thereby encourage durable and sustainable solutions.

#### 2.2.3 *Regional mechanisms*<sup>73</sup>

The regional human rights mechanisms in Africa, the Americas and Europe are much stronger than the Human Rights Committee applying the ICCPR. And, although there are some differences in the texts,<sup>74</sup> most of the rights are found in each of the various instruments, such that the jurisprudence from one treaty body can be applied, *mutatis mutandis*, before their equivalents in other regions. Thus, the European Court of Human Rights in dealing with freedom of expression, freedom of association and non-discrimination has held that it can protect political participation.<sup>75</sup>

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<sup>73</sup> Above, note 46.

<sup>74</sup> Cf. Article 16 ECHR, above note 46.

Article 16 – Restrictions on political activity of aliens

Nothing in Articles 10 [freedom of expression], 11 [freedom of association] and 14 [non-discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens. See Aria and Wouters, 'Restrictions on Political Activity of Aliens', *Theory and Practice of the European Convention on Human Rights*, Van Dijk and Van Hoof (5<sup>th</sup> ed., 2018) at 1077.

<sup>75</sup> *United Communist Party of Turkey (TBKP) v Turkey* App. No.133/1996/752/951, European Court of Human Rights, 30 January 1998, at paragraph 24. See also, *Sidiropoulos v Greece*, App. No. 57/1997/841/1047, European Court of Human Rights, 10 July 1998.

41. Mention of the consciousness of belonging to a minority and the preservation and development of a minority's culture could not be said to constitute a threat to 'democratic society. (...) [The] existence of minorities and different cultures in a country was a historical fact that a 'democratic society' had to tolerate and even protect and support according to the principles of international law.

In one regard, however, the three regional mechanisms could provide a legal route for refugees to claim a right to political participation through self-determination. The regional mechanisms all provide that nothing therein shall be a limitation on other human rights obligations of the country of asylum or the country of nationality,<sup>76</sup> which would include Article 1 ICCPR. As such, when interpreting regional human rights treaties on the right to political participation, freedom of expression or freedom of association, the regional treaty bodies need to ensure that the right of peoples to self-determination is respected – to that end, if the ‘peoples’ of the state is accepted as including refugees from that state currently outside the territory, then their participation is guaranteed because they are part of the ‘self’.<sup>77</sup> This argument also bolsters the requirement accepted by all states under the SDGs, that no-one is left behind,<sup>78</sup> which in the case of refugees, must be pertinent to the country of asylum and the country of nationality.

#### 2.2.4 Conclusion

In sum, international human rights law does not expressly provide for a right to political participation for those citizens outside the relevant state. Nevertheless, having regard to international human rights law and regional human rights treaties, it is clear that for the relevant rights to be effective and inclusive, then 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. Moreover, as part of its supervisory capacity, UNHCR should enhance the capacity of both states as it seeks to facilitate voluntary repatriation through the protection and promotion of the human rights of refugees.

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See also, *Stankov*, above note 39, and *Sitaropoulos and Giakoumopoulos v Greece*, App. No. 42202/07, European Court of Human Rights (Grand Chamber) 15 March 2012, paras 72-79, available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-109579%22%7D> - the decision turned on the ability of the applicants to return to Greece to vote, something refugees cannot do *vis-à-vis* their country of nationality (I am grateful to Samarie Wijekoon Lofvendahl for reminding me of this case).

<sup>76</sup> See Articles 60 and 61, African Charter, Article 29(b) ACHR, and Article 53 ECHR, all above note 46.

<sup>77</sup> See Higgins, Comments, in Brölmann, Lefeber and Zieck, *Peoples and Minorities in International Law*, 1993, 29. Which is not to deny that Higgins recognizes the responsive nature of international law - *Problems and Process: International Law and How We Use It*, 1994. See also, General Comment 12 Article 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc.HRI\GEN\1\Rev.1, at 12, 1994, where the Human Rights Committee stated that “all states parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination”. See generally, Gilbert, ‘Autonomy and Minority Groups - A Right in International Law?’, above note 63, and the discussion of external and internal self-determination.

<sup>78</sup> Above, note 8.

### 3. Actors

- Within the framework outlined, various different actors facilitate political participation by refugees in their country of nationality
  - States under international law and specific treaty obligations
  - International organizations acting under different mandates and interacting with states and other international organizations
    - UNHCR – “... entirely non-political character”
    - DPA/ DPKO/ SRSG
      - Security Council resolutions promoting resolution of conflicts
    - UNDP
    - Special Procedures

#### 3.1 States

The primary actor in ensuring the political participation of refugees will be states and, in the given circumstances, the international obligations and domestic laws of two states, at minimum, will be pertinent. Each situation will be a case by case study having regard to the ratification history of each state, plus any reservations or declarations that the state has made. States treat their system of governance as beyond the oversight of international bodies, as “within the domestic jurisdiction of [the] state”.<sup>79</sup> Nevertheless, there is some evidence to suggest that treaty monitoring bodies are more prepared to challenge arbitrary and discriminatory domestic legislation pertinent to political participation. In *Sejdic and Finci*<sup>80</sup> the European Court of Human Rights held that the Bosnian Constitution violated the right to political participation by members of the Jewish and Roma minorities in terms of their rights under Article 3 of Protocol 1 to the ECHR.<sup>81</sup> It may be, therefore, that domestic laws placing hurdles in the way of political participation by refugees could be the object of strategic litigation as regards compatibility with international human rights law standards. Such hurdles might include rules regarding overseas registration and voting or on campaigning whilst overseas; alternatively, it might be that the laws of the country of asylum, in terms of how they restrict

<sup>79</sup> Article 2.7, UN Charter, above note 11.

<sup>80</sup> *Sejdic and Finci v Bosnia and Herzegovina*, App. No. 27996/06 and 34836/06, European Court of Human Rights (Grand Chamber), 22 December 2009.

<sup>81</sup> ETS 9 (1952).

Article 3 - Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

the rights of non-nationals to vote or engage in political activities, might require review to determine their compatibility with international human rights law standards.

Finally in this brief discussion on states and refugee participation, which necessarily has to be general because each state's obligations and laws will be different, there is one other element that will need to be considered separately for each situation: the memorandum of understanding between the state and UNHCR could contain restrictions that interfere with how the mandate of providing international protection can be fulfilled *vis-à-vis* upholding the human rights of refugees and asylum-seekers, whether that be in the country of asylum, in the country of nationality before return, or post-repatriation for returning refugees until a durable and sustainable solution is achieved.

### **3.2 The United Nations**

While UNHCR has the mandate to provide international protection to refugees, other branches of the UN have mandates for special political missions and peacekeeping operations that may be on-going, and for electoral assistance and development, all of which may be relevant to holding credible elections in any transitioning state.<sup>82</sup> The interplay of these organizations with states and their different governing bodies, mandates and roles needs to be discussed so as best to promote the political participation of refugees as part of the decision-making polity of the state.

#### **3.2.1 UNHCR**

As stated, Paragraph 1 of its Statute sets out the mandate of UNHCR:<sup>83</sup>

“The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”

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<sup>82</sup> It should also be noted that the UN Secretary-General's reform programme makes significant changes to these structures: see, UNGA res 72/357, 24 August 2017; UNGA res 72/525, 13 October 2017; UNGA res 72/266, 15 January 2018; UNGA res 72/236, 18 January 2018; UNGA res 72/199, 19 January 2018; UNGA res 72/772, 1 March 2018; and, UNHCR, 'Quick Guide to UN Reform: Peace and Security', 11 May 2018. I am grateful to Marije Van Kempen for her assistance and direction on these matters of UN reform.

<sup>83</sup> Above, note 2.

For this purpose, assimilation within community of the country of asylum is irrelevant, but the rest of the paragraph does have bearing: what is 'protection' in this context, how can UNHCR assist governments, and what is the role of civil society?

As regards the second limb of Paragraph 1 of the Statute, dealing with UNHCR's mandate to seek permanent solutions, such as voluntary repatriation, by assisting governments, it provides the authority to work with both governments and incorporate refugees within the process: voluntary repatriation requires participation in a variety of forms - stabilization plans, National Development Plans, the peace process and any fresh elections. In this regard, Article 35 of the 1951 Convention alongside Paragraphs 2, 8, 10, 11, 12, 17 and 18 of the Statute all have to be brought to bear and it is not always straightforward to apply these provisions as a discrete, linear series of steps to be taken, rather it is more akin to a set of converging alternative paths that together facilitate the ultimate objective of achieving political participation for refugees in their country of nationality.

Before exploring how UNHCR can facilitate political participation, it is important to discuss an apparent major constraint on such activities. Paragraph 2 of the 1950 Statute provides as follows:

“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.”

How can UNHCR engage in the political participation of refugees if its work “shall be of an entirely non-political character”? While UNHCR must be impartial in all situations in order to preserve its operational credibility, Paragraph 2 relates to acting in a non-partisan manner in every situation. UNHCR has a mandate of international protection for refugees and that includes being able to enhance their inclusivity in any process designed to achieve durable and sustainable solutions – that will be a political process, but it does not challenge the non-political character of UNHCR's work. That said, as will be considered below, the constraint may still inhibit UNHCR's activities if it cannot guarantee an inclusive and non-partisan political process. To that end, it includes the idea of facilitating participation by refugees on their own terms, which assumes that there will be consultation. As the CRRF makes clear:<sup>84</sup>

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<sup>84</sup> Above, note 7.

“12. To ensure sustainable return and reintegration, States, United Nations organizations and relevant partners would:

(a) Recognize that the voluntary nature of repatriation is necessary as long as refugees continue to require international protection, that is, as long as they cannot regain fully the protection of their own country;

(b) Plan for and support measures to encourage voluntary and informed repatriation, reintegration and reconciliation;

...

**(d) Support efforts to foster reconciliation and dialogue, particularly with refugee communities and with the equal participation of women and youth, and to ensure respect for the rule of law at the national and local levels;**

**(e) Facilitate the participation of refugees, including women, in peace and reconciliation processes, and ensure that the outcomes of such processes duly support their return in safety and dignity;”** (Emphasis added)

As a consequence, UNHCR needs access to all refugees if the process is to be non-partisan – it is no good engaging with some groups of refugees in a state about voluntary repatriation to their country of nationality if others from the same state are not included. And that raises questions about the wider diaspora. While the vast majority of refugees stay close to their country of nationality, there will always be some who find refuge in states much further away – most Somalis, for instance, went to Kenya, but there were sizeable populations in the United Kingdom and the United States. Does UNHCR have to ensure their participation if its work is to be non-political? This will always be a question of degree and rules cannot be laid down outside the specific context, but it is a question that must always be addressed or at least considered.

If that resolves the potential conflict with Paragraph 2 of the Statute, what is UNHCR’s mandate with respect to political participation?

Protection is elaborated upon in Paragraph 8 of the Statute. Under subparagraph (c), protection includes facilitating durable solutions, including voluntary repatriation.

“The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:

...

(c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;”

Promoting political participation enhances the likelihood that solutions will be durable and sustainable. That will require working with both the country of nationality and the country of asylum so that refugees are in a position to participate – in practice, it would be necessary for UNHCR HQ or regional hubs to ensure a co-ordinated approach is taken by the field offices in the country of nationality and the country of asylum. To that end, Article 35 of the 1951 Convention assists in providing a framework for co-operation:

*Article 35. - Co-operation of the national authorities with the United Nations*

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

- (a) The condition of refugees,
- (b) The implementation of this Convention, and
- (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Information on laws pertaining to political participation by refugees under Article 35(2)(c) will be of benefit in this context. It could also be argued that Paragraph 8(a) of the 1950 Statute,<sup>85</sup> which sets out that the High Commissioner provides for the protection of refugees under his competence by “[promoting] the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”, could justify working with states to adopt generic international human rights law treaties that equally protect refugees.

In that context, as discussed above, Article 25 ICCPR established a right to political participation for citizens of a state.<sup>86</sup> Interestingly in this regard, Human Rights Committee General Comment 25 provides some guidance that is particularly pertinent to refugees who may or may not have returned to the country of nationality at the time of any election:<sup>87</sup>

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<sup>85</sup> See also, 1950 Statute, above note 1. And the supervisory function under the Statute does not require states to have ratified any treaty.

<sup>86</sup> Above, note 55.

<sup>87</sup> Above note 55.

“20. ... States should take measures to guarantee the requirement of the secrecy of the vote during elections including absentee voting, where such a system exists.

22. State reports should indicate what measures they have adopted to guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors. Reports should describe the electoral system and explain how the different political views in the community are represented in elected bodies. **Reports should also describe the laws and procedures which ensure that the right to vote can in fact be freely exercised by all citizens and indicate how the secrecy, security and validity of the voting process are guaranteed by law.** The practical implementation of these guarantees in the period covered by the report should be explained.” (Emphasis added).

While there is nothing expressly about refugees, UNHCR can use its supervisory functions under the 1951 Convention and 1950 Statute to address their participation. The sense of inclusivity in the process reduces the fear of future displacement that makes it pertinent to both the country of nationality and the country of asylum.

Finally in this section on UNHCR, two points about its own accountability and responsibilities should be highlighted. While the UN does not ratify the international human rights law treaties that it promulgates, the Universal Declaration of Human Rights has been said to establish a set of norms for the organization.<sup>88</sup> Responsibility towards those within its mandate includes upholding their UDHR rights. And, as stated above, in many cases the Guiding Principles on Internal Displacement will also be relevant within the country of nationality for returning refugees and any mixed populations.<sup>89</sup> Paragraph 3 of the *Introduction: Scope and Principles* of the Guiding Principles states that they provide guidance to, amongst others, “(c) All other authorities, groups and persons in their relations with internally displaced persons; and (d) Intergovernmental and non-governmental organizations when addressing internal displacement”. As such, UNHCR should apply the Principles when

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<sup>88</sup> UDHR, above note 38. As to the institutionally binding quality of the UDHR within the UN, see Riedel, ‘Article 55(c)’ in Simma (ed), *The Charter of the United Nations* (2nd ed, 2002) vol II, 917–27, where it is argued that there is wide acceptance that art 55(c) of the UN Charter is binding on the organization (920 and 922–23) and that the UDHR represents the first step by UN organs to realize ‘the programme enshrined in Article 55(c)’ (925). See also Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011); Gilbert, ‘Implementing Protection: what refugee law can learn from IDP law ... and vice versa’ in Gilbert, Hampson, and Sandoval (eds), *The Delivery of Human Rights* (2011); Kinchin, ‘The Implied Human Rights Obligations of UNHCR’ 28 *IJRL* 251 (2016); and Mégret and Hoffmann, ‘The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities’ 25 *Human Rights Quarterly* 314 (2003).

<sup>89</sup> Above, note 19.

working in the context of internal displacement and seeking to facilitate the political participation of refugees. In addition, the 2012 High Level Meeting of the General Assembly provided that rule of law be applied to the United Nations as well.<sup>90</sup>

**“2. We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.”** [Emphasis added].

While rule of law is a complicated topic to apply at the international level and especially within the United Nations, it must be a ‘thick’ understanding of the term that is infused with international human rights law standards if it is to reflect the constituent documents that established the international organization.<sup>91</sup>

### 3.2.2 *The Security Council*

Attempting to facilitate the political participation of refugees will often take place in the context of a Security Council resolution. This resolution will call for elections and reconciliation and provide for the overall mandate and direction for the United Nations entities involved to support these political processes. As well as setting out the directions for the United Nations entities, Security Council resolutions also bring into play the obligations of those states sending forces as part of the mission to the extent that the Status of Forces Agreement does not establish immunities with respect to the actions of their troops.

In recent years, Security Council resolutions dealing with peacekeeping have increasingly referred to international refugee law. In trying to resolve the situations that have required the peacekeeping mission, there is often a reference to elections being held to promote reconciliation post-conflict. Less frequently, the Security Council makes specific reference to refugees as part of

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<sup>90</sup> Above, note 48 - emphasis added.

<sup>91</sup> See the UN Charter, above note 11, and UDHR, above note 38. As explained by the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence: see Report of the Special Rapporteur to the General Assembly, UN doc A/67/368 (13 September 2012) para 12.

[The] United Nations system, throughout all its organs, has clearly opted for a rich understanding of the notion [of the rule of law] that refers to human rights, *including a wide catalogue of political rights and, among them, democratic rights, the promotion of development and good governance.* (Emphasis added)

See also, Gilbert and Rüsich, above note 48.

the election process. For instance, in Security Council resolution 1925 (2010)<sup>92</sup> on the mandate of the mission to the Democratic Republic of Congo (MONUC), the Preamble supported “the efforts of the Government to finalize the electoral calendar for local, general and presidential elections within the constitutional framework, with a view to consolidate democracy and promote the rule of law”, and called, in paragraph 12(g) for steps to be taken to “create an environment conducive to the voluntary, safe and dignified return of internally displaced persons and refugees, or voluntary local integration ...”, but no reference was made to the relationship between these two aspects of the Resolution. Later resolutions have been more explicit in this regard. Security Council resolutions 2100) of 25 April 2013<sup>93</sup> and 2164 of 25 June 2014<sup>94</sup> relating to Mali, are clearer on the interplay of voluntary repatriation and elections. Paragraph 3 of Security Council resolution 2100 established an explicit framework for inclusive political participation:

“3. Urges the transitional authorities of Mali to hold free, fair, transparent and inclusive presidential and legislative elections as soon as technically possible, welcomes the stated commitment of the transitional authorities of Mali to organize presidential elections on 7 July 2013 and legislative elections on 21 July 2013, stresses the importance of ensuring an environment conducive to the holding of elections, in particular a secure environment prior to, during and following the electoral period, equitable access to State controlled media and provision for all eligible persons, *including internally displaced persons and refugees*, to participate in the electoral process and calls upon Member States, regional and international organizations, as requested by the transitional authorities of Mali, to provide support to the electoral process, including through financial resources, electoral observation capacity and related technical assistance.” (Emphasis added)

While this approach should be the norm, Resolution 2164 (2014) provided in its Preamble, that the Security Council welcomed,

“the successful holding of peaceful and transparent presidential elections on 28 July and 11 August 2013 as well as legislative elections on 24 November and 15 December 2013 in Mali, which constitute a major step in the restoration of democratic governance and the full return of

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<sup>92</sup> Adopted by the Security Council at its 6324th meeting, on 28 May 2010.

<sup>93</sup> Adopted by the Security Council at its 6952nd meeting, establishing the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). And see the Press Statement, available at <<https://www.un.org/press/en/2013/sc10987.doc.htm>>.

<sup>94</sup> Adopted by the Security Council at its 7210th meeting, on 25 June 2014.

constitutional order in Mali, and commending the people and authorities of Mali for the manner in which they were conducted, ....”

It seems less than likely that all refugees in the Malian diaspora had an opportunity to engage in political participation given that Resolution 2100 (2013) was only promulgated on 25 April 2013.<sup>95</sup> The Security Council resolution on the Central African Republic in this regard,<sup>96</sup> at least linked the desire for speedy elections with references to refugees and IDPs, which suggests an awareness of the special problems for political participation by those outside their country of nationality.

8. Urges in this regard the Transitional Authorities to accelerate the preparations in order to hold free, fair, transparent and inclusive presidential and legislative elections no later than February 2015 and to swiftly initiate the significant preparations and concrete measures necessary in this regard, including the urgent convening of a Conciliation framework in line with the communiqué of the ECCAS summit of January 2014, the launching of an inclusive political dialogue on the electoral framework and the completion of the technical and legal framework, *and emphasizes that elections should include IDPs and CAR refugees, the return of whom should be an important objective.* (Emphasis added)

Deadlines established in New York need to be realistic and reflect the context of mass displacement of parts of the population that was probably most deeply affected by the situation that gave rise for the need to flee in the first place. If the objective is to reduce the need to flee in the future, taking extra time to ensure the widest inclusivity is going to be more effective.

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<sup>95</sup> See UNDP document, ‘Round Table on Political Participation in Times of Mass Migration and Refugee Crises’, held on 9 December 2016, (2017), available at [www.undp.org](http://www.undp.org), kindly supplied by Niall McCann, Lead Electoral Adviser, UNDP.

<sup>96</sup> UNSC res 2149 (2014), Adopted by the Security Council at its 7153rd meeting, on 10 April 2014, relating to the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA). See also, paragraph 30.

30. Decides that the mandate of MINUSCA shall initially focus on the following priority tasks:

...

(b) Support for the implementation of the transition process, including efforts in favour of the extension of State authority and preservation of territorial integrity

...

(v) To devise, facilitate and provide technical assistance to the electoral process and make all necessary preparations, in support of the Transitional Authorities and working on an urgent basis with the National Electoral Authority, for the holding of free, fair, transparent and inclusive elections, including the full and effective participation of women at all levels and at an early stage, and the participation of CAR IDPs and refugees no later than February 2015, ....

### 3.2.3 UN entities with a mandate relating to political participation

UNHCR may have the mandate for the international protection of refugees, but other UN entities have the role of facilitating elections. In their eyes, refugees are but one facet of the electoral process and only where the Security Council has made an express reference to refugees as part its stabilization operations, is there an obligation under UN procedures and processes to incorporate them.<sup>97</sup> The discussion on international human rights law addresses some of the issues, but part of the problem is a narrow interpretation of political participation by some UN bodies and a failure to grapple with the full range of rights and obligations that are pertinent in this context.

Division of labour on supporting elections is set out in the policy directive on UN Electoral Assistance.<sup>98</sup> DPA has the overall responsibility for elections related aspects of Security Council Resolutions.<sup>99</sup> Within DPA sits the Electoral Assistance Division that brings together other relevant UN actors at the HQ level within the Inter-Agency Coordination Mechanism for Electoral Assistance.<sup>100</sup> UNDP for instance plays a large supporting role through its provision of capacity development support to national electoral bodies and the national elections process. UNHCR is not mentioned in the policy directive and is also not a member of the HQ Inter-Agency Coordination Mechanism for Electoral Assistance, but UNHCR has a role to contribute to UN Country Team discussions on the framework and practice of elections as part of the

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<sup>97</sup> In that regard, see Secretary-General Report, ‘Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization’, UNGA res 72/260 (1 August 2017):

42 ... Except in the specific case of persons governed by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the international normative framework does not guarantee voting rights for those who have left or fled their country.

See also, § 2.2.2 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, above, where the corollary is suggested that the subsequent Migrant Workers treaty provides a gloss on Article 25 ICCPR, especially for refugees who had no choice but to leave the country of nationality.

Furthermore, all United Nations actors need to uphold the Charter principles of the self-determination of peoples and non-discrimination, which requires an inclusive approach towards refugees whenever possible, one that is not to the fore in later language set out in paragraph 42 – “Whether or not to make arrangements for the exercise of political rights abroad is best decided by the Member State concerned, after thorough national consultations, and taking into consideration factors such as the size of the population in question, the costs involved, agreements with host countries and security and operational challenges”.

I am grateful to Maarten Halff of DPA for discussions on this issue.

<sup>98</sup> United Nations Focal Point for Electoral Assistance, Policy Directive: UN Electoral Assistance Supervision, Observation, Panels and Certification, 17 January 2013. Ref. FP/01/2013. Available at [http://toolkit-elections.unteamworks.org/?q=webfm\\_send/266](http://toolkit-elections.unteamworks.org/?q=webfm_send/266). I am grateful to Niall McCann of UNDP for discussions on this point. See also, DPA, ‘Principles and types of UN electoral assistance: policy directive’, 2012, and M. Halff, The United Nations approach to electoral management and support, Paper presented at the annual conference of the European Consortium for Political Research (ECPR) Oslo, September 2017, available at <https://ecpr.eu/Filestore/PaperProposal/46d31859-750d-4d33-8fc4-215c80b5b137.pdf>.

<sup>99</sup> The structure of the UN is undergoing reform and the Secretary-General’s recommendations can be found in UNGA res 72/772, Annex 1, above note 82.

<sup>100</sup> DPA, DPKO/DFS, UNDP, PBSO, UNOPS, UN Women and UNESCO. IOM, a related agency (UNGA res. 70/296 (25 July 2016)), is also part of this group. There are discussions for UNHCR to join the group.

international protection of refugees. As will be discussed below, it is not just international human rights law standards that need to be upheld and implemented by the UN bodies tasked with technical support on elections, although the full range of those obligations would certainly extend to include refugees outside their country of nationality, but also the Charter, the SDGs,<sup>101</sup> rule of law,<sup>102</sup> and the Human Rights Upfront Initiative.<sup>103</sup>

#### 3.2.4 *Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence*<sup>104</sup>

The Special Rapporteur is not directly involved in protection and elections, but as a special procedure he can investigate situations and his reports have expanded on transitional justice as understood by the United Nations. In his 2012 report, he recommended as follows:<sup>105</sup>

“82. The Special Rapporteur wishes to highlight that country experiences of these measures suggest that a purely formalist understanding of the rule of law has been insufficient to prevent violations and that the notion of the rule of law to which transitional justice bodies have sought to contribute is a robust one that links it with human rights, governance and development and that asserts its relevance for peace and social cohesion, including gender equality and the absence of discrimination on any grounds’.”

The 2012 report to the General Assembly also makes clear that rule of law in its ‘thick’ conception goes towards maintaining international peace and security that will help ensure that any voluntary repatriation is a sustainable and durable solution.

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<sup>101</sup> Above, note 8.

<sup>102</sup> Above, note 48.

<sup>103</sup> See Secretary-General Ban Ki-moon, ‘Renewing our commitment to the peoples and purposes of the United Nations’ (22 November 2013) <[http://www.un.org/apps/news/infocus/speeches/statments\\_full.asp?statID=2068#.VZ010HhUi5c](http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=2068#.VZ010HhUi5c)>; see also UN Deputy Secretary-General Jan Eliasson, ‘Deputy Secretary-General’s Remarks at Briefing of the General Assembly on Rights Up Front’ (17 December 2013) <<https://www.un.org/sg/en/content/dsg/statement/2013-12-17/deputy-secretary-generals-remarks-briefing-general-assembly-rights>>.

<sup>104</sup> This Special Procedure was created by the Human Rights Council on 29 September 2011 under A/HRC/RES/18/7, having regard, *inter alia*, that ... when designing and implementing strategies, policies and measures to address gross human rights violations and serious violations of international humanitarian law, the specific context of each situation must be taken into account *with a view to preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation* (emphasis added).

<sup>105</sup> Above, note 91.

#### 4. Issues of Implementation<sup>106</sup>

Even if the political participation of refugees can be justified under international refugee law and international human rights law, there are still several practical hurdles that will need to be cleared.

- UNHCR Mandate
  - 1950 Statute, Paragraphs 1, 2, 8, 17 and 18
  - UN Charter, Preamble, Articles 1 and 2
- Cessation under Article 1C
  - How far does political participation indicate a re-availment of country of nationality protection
- Participation

##### 4.1 UNHCR mandate

As an Article 22 subsidiary organ of the General Assembly, UNHCR is bound to uphold the Charter, including the self-determination of peoples and the promotion of and respect for human rights.<sup>107</sup> Thus, if the self-determination of peoples includes those citizens displaced across international borders, then ensuring as far as possible that refugees can participate in the political processes of transition is part of its inherent mandate.

The requirement for UNHCR to be “entirely non-political” in Paragraph 2 of its Statute is open to misinterpretation. Working inside the country of nationality with returning refugees inevitably means engaging with the government in order to provide “international protection”. In the area of elections or negotiations within a peace process, in order to provide international protection there have to be political activities:<sup>108</sup> for example, UNHCR’s Colombia office supported the Office of the High Commissioner for Peace in 2016 in the dissemination of the peace agreement abroad, including in workshops with refugees outside of Colombia “in key countries of

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<sup>106</sup> Some of the following has been prefaced in the discussions above about the actors and the various rights.

<sup>107</sup> Sub-paragraphs (2) and (3), UN Charter, above note 11.

<sup>108</sup> UNHCR’s mandate of protecting refugees gives it a special function at such times, but it is worth noting that the wider UN family will also be involved in the election process and UNHCR will need to co-operate and co-ordinate while, at the same time, establishing clear lines of demarcation that guarantee international protection while remaining non-political, something that is not part of the mandate of DPA, UNDP or DPKO, for instance. In that regard, can UNHCR facilitate the work of DPA, DPKO and UNDP during an election if they are inevitably working closely with any incumbent government?

reception”.<sup>109</sup> Upholding refugee rights and promoting conditions that facilitate voluntary repatriation and reintegration will inevitably require working with political actors in the country of nationality including government, politicians (national and local), and civil society<sup>110</sup> – for example, if the refugee community in the country of asylum wants to establish political parties to represent the voice of the displaced population. As long as that broad engagement is non-partisan, then Paragraph 2 of the Statute will not be compromised.<sup>111</sup>

However, in some circumstances, UNHCR will need to disengage from assisting refugees to participate, even if negotiations with governments continue: if the election is not being carried out in a fair and open manner and favours one party, UNHCR cannot be seen to assist refugees in those circumstances. If the country of asylum will not give access to all refugee groups so as to permit them to participate in an otherwise fair election, UNHCR may have to offer no support to any refugees. On the other hand, monitoring and reporting on any pressure and intimidation of refugees in election processes is clearly part of international protection as required under the Statute.

## 4.2 Participation

This paper has focused on peace processes and elections. States need to ensure the inclusion of refugees in any consultations on achieving peace and may need to adapt their election laws so as to permit those outside the territory to participate in any ballot. The Darfur-wide Internal Dialogue and Consultation (DIC) involved all sectors of the Darfuri society, including refugees from Darfur.<sup>112</sup> In order to enhance inclusivity, the DIC called on refugees in the process to raise awareness of the process. Where the states fail to engage with

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<sup>109</sup> I am grateful to UNHCR for this information. It is interesting that a choice had to be made about how wide the net needed to be cast to include sufficient of the refugee diaspora. See also, the GCR at para 34 on inclusivity of refugees in processes leading to voluntary repatriation, above note 4.

<sup>110</sup> See the 2017 Note on International Protection, EC/68/SC/CRP.12, paragraphs 51-54.

52. Returning home in safety and dignity to one’s country or area of origin remains the preferred solution for most displaced persons. In 2016, UNHCR facilitated voluntary repatriation to some 40 countries, including for refugees from Myanmar in Thailand, as well as for Ivorian, Rwandan and Sri Lankan refugees. In other locations, security and protection challenges meant that conditions were not yet conducive to return. *In such circumstances, UNHCR worked to encourage a safe return environment, such as by supporting State and civil society institutions responsible for ensuring the rights of returning populations.* (Emphasis added).

<sup>111</sup> See also, Paragraph 12 of the 2016 CRRF, above note 7, calls for the UN and partners to “(e)Facilitate the participation of refugees, including women, in peace and reconciliation processes, and ensure that the outcomes of such processes duly support their return in safety and dignity” so as to ensure sustainable return.

<sup>112</sup> Above, note 26.

refugees directly in the process, it is for UNHCR to represent them and present their views, which necessitates prior consultation.<sup>113</sup>

As for voting, the position is complex.<sup>114</sup> General Comment 25 calls for the establishment of “an independent electoral authority”.<sup>115</sup> It goes on to set out procedures to ensure compatibility with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process.

For refugees, who retain their nationality, there are still practical complications. Where does the refugee register to vote? Will it be possible in those states where registration is tied to an electoral district where the individual resides, to register where the refugee lived prior to displacement? Is it possible or even desirable to hold a ballot in IDP camps where they exist and where the returning refugee presently resides?<sup>116</sup> Does the country of nationality permit out of country voting (OCV)? Is the embassy of the country of nationality in the country of asylum an appropriate location for refugees to vote or is the threat of intimidation too great? Does there need to be a separate virtual constituency for refugees outside the country of nationality given that OCV is permitted? Do the laws of the country of asylum permit ballots for elections in other countries to be held? What are the security implications for the country of asylum of allowing ballots for the refugee’s country of nationality to be held on its territory?<sup>117</sup> All these processes need to be read in the context of a group of people who fled their country of nationality because they were unable or unwilling to avail themselves of its protection. DPA and UNDP need to take steps to guarantee the inclusion of refugees in the political process without compromising their on-going international protection.

Moreover, while the possibilities opened up by the internet should not be ignored, there are issues of equal accessibility to networks and the necessary technology. Nevertheless, greater accessibility for those based overseas to the

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<sup>113</sup> Such functions can be brought within UNHCR’s activities to promote rule of law within the country of nationality builds its capacity so as to enhance, protect and promote the rights of refugees under international refugee law and international human rights law. See GCR, para 84, above note 4.

<sup>114</sup> Even more complex is the position of refugees wishing to stand for election from outside the country of nationality – HRC GC 25, above note 55, paragraph 8.

<sup>115</sup> Above, note 55.

<sup>116</sup> On establishing polling stations in IDP camps, see <https://reliefweb.int/sites/reliefweb.int/files/resources/20180517%20UNHCR%20Iraq%20Flash%20Update.pdf>. I am Grateful to Madeline Garlick for discussions on this topic and this reference.

<sup>117</sup> The ‘Note for File’ relating to Darfurian refugees in Chad, above note 26, 7.

electorate in the country of nationality has led to even greater informal, but therefore less regulated, participation, even if refugees in this case have no direct influence on the outcome. None of this can be sorted out with any absolute clarity since the electoral laws of any given state are specific thereto. Nevertheless, a checklist for UNHCR country teams could be devised that is cross-referenced to all the relevant international and regional treaties and documents with examples of best practice that allows for discussion with all relevant actors.

The final implementation issue concerns working with other UN agencies, which returns to the requirement that UNHCR be “entirely non-political”, since that demand is not placed on other UN actors.<sup>118</sup> On the other hand, their expertise can facilitate refugee participation and states do not necessarily recognise that the United Nations is not one monolithic enterprise marching to the beat of a single drum, so issues of ‘diaspora’ participation may be directed elsewhere. One initial problem that can readily be remedied is to adopt an agreement with DPA. DPA works directly with governments in a way that might compromise UNHCR’s mandate, but within the rule of law framework for the UN as an international institution,<sup>119</sup> a framework for collaboration should be established so as to promote the political participation of refugees given DPA’s central role in elections. That agreement will be based on liaison with DPA under the umbrella of Paragraphs 17 and 18 of the Statute,<sup>120</sup> sharing of information to facilitate participation while guaranteeing the protection of refugees. While the agreement would promote participation and inter-agency co-operation to that end, it cannot require UNHCR to facilitate DPA’s general operations in the election because of Paragraph 2 of the Statute.

Working with UNDP – a non-political development agency - whose main mandate in relation to elections is to provide technical and capacity development support to national institutions to implement the necessary electoral reforms and procedures, is less problematic than DPA. UNDP has published studies pertinent to voting for refugees: see, for example, the report of the ‘Round Table on Political Participation in Times of Mass Migration and Refugee Crises’.<sup>121</sup> Given the resources available to UNDP and its much greater experience with elections, it is essential in promoting political participation for

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<sup>118</sup> See UNHCR Colombia’s support for the Office of the High Commissioner for Peace, above note 109.

<sup>119</sup> See 2012 High Level Meeting of the General Assembly, above note 48, paragraph 2. See also, SDG 16.7 and 5.5, above note 8.

<sup>120</sup> Above, note 1:

17. The High Commissioner and the Secretary-General shall make appropriate arrangements for liaison and consultation on matters of mutual interest.

18. The Secretary-General shall provide the High Commissioner with all necessary facilities within budgetary limitations.

<sup>121</sup> Above, note 95, 25-28.

refugees that UNHCR work with UNDP because the issues, as has been noted throughout, are incredibly complex. As UNDP's Lead Electoral Adviser Niall McCann has stated:<sup>122</sup>

"[OCV] voting has been a feature in many post conflict scenarios in the past years – Mali, Central African Republic and Afghanistan. In some of the contexts where refugee voting has been facilitated, however, there have sometimes been discussions regarding in which country the refugees should actually be able to vote, and in these cases, the decisions have been mostly political and the neighboring countries or those where the most number of refugees are seeking refuge, tend to be those where support is provided through voting facilities. That raises the possibility of different refugees having different rights to participation, depending on where they have taken refuge. And that is a complex legal and political reality that we have to face."

It does not breach UNHCR's mandate to work with UNDP on issues of the political participation of refugees: it promotes their international human rights, the rule of law and good governance.

## **5. Conclusion**

The issues pertaining to political participation for refugees in their country of nationality are extremely complex, both from a legal and a practical standpoint, not just for refugees, but for UNHCR as an organization. It may be useful to develop an internal programme of action for engagement with states, with other United Nations agencies, with civil society and with refugees that preserves UNHCR's mandate. It fits well with developments relating to the GCR and can be included in work with governments on the SDGs, but given existing deadlines for the GCR, promoting political participation of refugees as part of enabling sustainable and durable solutions is best thought of as part of the continuing process of enhancing the situation of refugees, of facilitating solutions and ensuring no-one is left behind.

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<sup>122</sup> Above, note 95, 27.