

**AN INDEPENDENT DECLARATION ON THE RIGHT OF REFUGEES AND OTHERS
EXPERIENCING DISPLACEMENT OR STATELESSNESS TO PARTICIPATE IN
DECISIONS THAT AFFECT THEM**

(WITH COMMENTARY)

PUBLIC CONSULTATION DRAFT

20 June 2025

We Welcome Your Feedback

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Preamble

Recognising the countless contributions refugees and others experiencing forced displacement or statelessness have made to protection, often with little or no external support,

Expressing concern that refugees and other persons experiencing forced displacement or statelessness too often have been excluded from decisions that affect their lives,

Acknowledging that where participation has occurred, it has frequently been tokenistic, superficial or symbolic, and implemented in a way that does not lead to real influence or impact on the decision-making process,

Reaffirming the United Nations Global Compact on Refugees ([A/73/12 \(Part II\)](#)), which recognises that '[r]esponses are most effective when they actively and meaningfully engage those they are intended to protect and assist',

Affirming the fundamental principles that underpin the international protection of refugees and those experiencing forced displacement and statelessness,

Responding to calls from refugees, forcibly displaced and stateless persons across the world for a rightful place in decision-making processes that impact them,

We jointly declare:

Article 1 – The right to participate

All refugees and others experiencing forced displacement or statelessness have the right to participate in all decisions that directly or indirectly affect them.

Commentary

Why is this article important?

1. The autonomy of every individual under international human rights law demands that everyone has the right to participate in decisions that affect them. This article is important to fully enable the rights of refugees and others experiencing displacement or statelessness and to support States and other decision-making authorities with effective and sustainable decision-making on issues relating to displacement.
2. Participation of displaced and stateless persons in decisions that affect them can produce both extrinsic and intrinsic benefits. Extrinsically, meaningful participation can help improve the effectiveness and efficiency of responses. This is because displaced and stateless communities often have intimate and direct knowledge of how communities function, what services are needed and where coping measures are already in place.¹ Drawing upon this knowledge and expertise can help ensure responses to protection are culturally appropriate, sustainable and reflective of displaced and stateless communities' own priorities and aspirations.
3. Intrinsically, meaningful participation can preserve and/or restore the dignity of displaced and stateless communities and promote their individual and collective agency. This can foster positive psychological attitudes and wellbeing and improve connections to community. It can also build trust and legitimacy in decisions and institutions and improve relationships and address power imbalances between stakeholders. As refugees and others experiencing forced displacement or statelessness are often denied the right to vote or to be involved in formal politics, promotion of their agency is particularly important for them.
4. Governments around the world have emphasised the value of participation of displaced and stateless communities when they recognised in the Global Compact on Refugees that '[r]esponses are most effective when they actively and meaningfully engage those they are intended to protect and assist'.² The United Nations High Commissioner for Refugees (UNHCR) has also highlighted how including displaced and stateless persons as part of policy and decision-making is not only 'the smart thing to do', but also a 'moral imperative'.³

The right to participate in international refugee and human rights law

5. Article 1 of this Independent Declaration seeks to strengthen international refugee and human rights law by articulating an express right of refugees and others experiencing forced displacement or statelessness to participate in decisions that directly or indirectly affect them. Under the current international law framework, displaced persons can assert a right to participate in some decisions,

¹ See Will Jones, 'Refugee Voices' (2019) World Refugee Council Research Paper No 8, 3; also, The Brookings Institution – University of Bern Project on Internal Displacement, *Moving Beyond Rhetoric: Consultation and Participation with Populations Displaced by Conflict or Natural Disasters* (Overseas Development Institute, October 2008).

² Report of the United Nations High Commissioner for Refugees Part II Global Compact on Refugees, GA Res 73/12(Part II), UN GAOR, 73rd sess, Supp No 12, UN Doc A/73/12 (Part II) (17 December 2018) (Global Compact on Refugees).

³ Dr Gillian Triggs, 'Statement by Assistant High Commissioner for Protection Dr Gillian Triggs' (Second Global Refugee Forum, 14 December 2023)

<<https://www.youtube.com/watch?v=wA735GXW0O0&list=PLbU4M6CcbzTtguQCw3dIgiMx0e6jEeX70>>.

such as the right to determine whether they wish to voluntarily return to their country of origin⁴ or a right to participate in decisions relating to their socio-economic rights.⁵ Certain groups of displaced and stateless communities also benefit from alternative participatory rights frameworks by virtue of their intersectional identities and belonging to other rights regimes.⁶ However, the international law framework currently does not offer comprehensive and explicit coverage for the participation of refugees and others experiencing forced displacement or statelessness in decisions that affect them.⁷

6. This gap in the international law framework creates both ambiguities and inconsistencies in practice. The Convention on the Rights of the Child, for example, provides that all children who are capable of forming their own views have the right to express those views freely in all matters affecting them (art 12.1). This right to be heard encompasses refugee and displaced children, as the article applies to ‘every human being below the age of eighteen years’ (art 1). These views are to be given due weight in accordance with the age and maturity of the child, with the idea that these views will increasingly be considered as they age and mature. However, once a displaced child turns eighteen, this right appears to extinguish rather than grow, as there is no corresponding express right for displaced adults to be heard in international refugee and human rights law.⁸
7. Likewise, article 4.3 of the Convention on the Rights of Persons with Disabilities requires States Parties to ‘closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations’ in the development and implementation of legislation and policies. These obligations apply to all displaced persons with disabilities, in accordance with the requirements of equality and non-discrimination (art 5). Yet, there is similarly no corresponding express obligation to consult with displaced persons *without* disabilities.
8. Inconsistencies such as these potentially could be explained by the logic that children and persons with disabilities experience particular vulnerabilities and are therefore entitled to special protection and assistance under international human rights law. However, it is not the intention of these treaties

⁴ See Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention) art 1C; Statute of the Office of the United Nations High Commissioner for Refugees, (14 December 1950) UN Doc A/RES/428(V) ch 1, [1], ch 2, [8(c)]; The Guiding Principles on Internal Displacement (11 February 1998) UN Doc E/CN.4/1998/53/Add.2 (The Guiding Principles on Internal Displacement) Principle 28.2. For further analysis of this participatory right with respect to refugees, see Tristan Harley, *Beyond Storytelling: Refugee Participation in Decision-making Processes* (DPhil thesis, University of NSW 2022) 112-119 <<https://doi.org/10.26190/unsworks/24210>>.

⁵ See, for examples, CESCR, ‘General Comment No. 14: The right to the highest attainable standard of health’ (2000) UN Doc. E/C.12/2000/4 [43(f)]; ‘General Comment No. 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights’ (2006) UN Doc. E/C.12/GC/18 para. 31(c); ‘General Comment No. 21: Right of everyone to take part in cultural life’ (2009) UN Doc. E/C.12/GC/21 para. 55(e); ‘General Comment No. 22 on the right to sexual and reproductive health’ (2016) UN Doc. E/C.12/GC/22, para 49(b).

⁶ These frameworks include (inter alia) the Declaration on the Right to Development (adopted 4 December 1986) UNGA Res 41/128; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (Convention on the Rights of the Child); Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (adopted 9 December 1998) UNGA Res 53/144 (Declaration on Human Rights Defenders); Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNGA Res 61/106, UN Doc A/RES/61/106 (Convention on the Rights of Persons with Disabilities); United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 (UN Declaration on the Rights of Indigenous Peoples).

⁷ For more detailed analysis, see Tristan Harley and Harry Hobbs, ‘The Meaningful Participation of Refugees in Decision-Making Processes: Questions of Law and Policy’ (2020) 32(2) *International Journal of Refugee Law* 200.

⁸ See Nicholas McMurtry, *Participation and Democratic Innovation under International Human Rights Law* (Routledge, 2023) 83.

to create human rights that others do not have.⁹ Further, it is well accepted that refugees and others experiencing forced displacement experience significant vulnerabilities themselves by virtue of their displacement. Once they enter a foreign state, displaced persons frequently lose access to the political franchise in the communities they are based.¹⁰ Even internally displaced persons often cannot exercise their civil and political rights and have a say in decisions that affect them within their country of origin or place of habitual residence.

9. In recent years, there has been increasing recognition of the centrality of voice within the context of international human rights law. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, suggested in 2023 that:

Voice is a fundamental attribute of the right to freedom of expression and, combined with access to information, gives individuals and communities the agency to shape the conditions affecting their lives and to demand accountability. Voice in that context is the right to share information and ideas, express diverse views, participate in decision-making processes, criticize government and corporate policies and practices, and expose wrongdoing without fear.¹¹

This interpretation highlights how participatory rights can be derived from, and are consistent with, interconnected civil and political rights. However, it does not necessarily ensure that States and other decision-making authorities will listen or engage in meaningful dialogue.¹²

‘All refugees and others experiencing forced displacement or statelessness’

10. When interpreting article 1 of this Independent Declaration, an important component is clarifying and crystallising who benefits from the right. In the context of forced displacement and statelessness, this has particular challenges due to the existence of multiple categories of claimants, numerous international frameworks and distinct approaches across international and regional human rights regimes.
11. As a pragmatic approach within this diverse legal landscape, this Independent Declaration considers *refugees and others experiencing forced displacement or statelessness* as persons or groups of persons who have been displaced from their homes or places of habitual residence, either across an international border or internally, in particular as a result of or in order to avoid the effects of persecution, armed conflict or generalised violence, violations of human rights, situations of generalised violence or the adverse consequences of climate change or disasters. It also includes all persons who are stateless under the law (*de jure*) or in practice (*de facto*), whether or not they are in the country where they usually reside.
12. This definition is intended to be inclusive and broadly covers persons or groups of persons protected by existing legal frameworks, such as refugees as defined under the 1951 Refugee Convention and its 1967 Protocol, as well as others entitled to international protection under international and regional legal frameworks, including custom and general principles of law.¹³ It also covers, but is

⁹ Ibid.

¹⁰ For more on this, see Ruvi Ziegler, *Voting Rights of Refugees* (Cambridge University Press, 2017); also, Geoff Gilbert, ‘Political Participation of Refugees in their Country of Nationality’ (2018) UNHCR Research Paper Series No. 38 < <https://www.unhcr.org/sites/default/files/legacy-pdf/5beb28964.pdf> >.

¹¹ UNHRC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Sustainable development and freedom of expression: why voice matters, Irene Khan UN Doc A/HRC/53/25 (19 April 2023) [51].

¹² See United Nations Human Rights Committee, Views: Communication No 69, UN Doc CCPR/C/78/D/693/1996 (29 August 2003) (‘Nam v Korea’).

¹³ 1951 Refugee Convention (n 4); Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 Art

not limited to, those persons experiencing internal displacement, statelessness and trafficking, in accordance with the definitions found in the Guiding Principles on Internal Displacement,¹⁴ the 1954 Convention relating to the Status of Stateless Persons¹⁵ and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.¹⁶ Individuals who fall within any such category, whether or not it has been officially recognised as yet, should also benefit from the rights contained within this Independent Declaration.

13. Reference to ‘*all* refugees ...’ in article 1 of this Independent Declaration highlights that States and other decision-making authorities cannot be selective or partial in their engagement with refugees and others experiencing forced displacement. This is consistent with the principle of non-discrimination found in international refugee and human rights law. This principle is further elaborated in articles 2 and 4 of this Independent Declaration.
14. Further, article 1 places emphasis on enabling participation for those *experiencing* forced displacement and statelessness in the present. This approach highlights that States and decision-makers cannot simply resort to engaging with displaced communities who were directly or indirectly affected in the past. The inclusion of these perspectives may be complementary and important to decision-making, but they should not replace nor act as a substitute for those experiencing displacement in the present.
15. When considering whether and when someone is no longer *experiencing* forced displacement, this Independent Declaration recognises that the lived experiences of displaced and stateless communities are individual and unique. The impacts of displacement and statelessness do not always come to an end simply with the resolution of a particular legal status, such as the provision of permanent residence or citizenship. Indeed, in many cases the experiences and impacts of forced displacement and statelessness extend beyond this time, as affected communities continue to experience ruptures from families, communities and cultures and ongoing impacts to their wellbeing and livelihoods.
16. Accordingly, this Independent Declaration proposes that approaches to inclusion should be interpreted and applied broadly. It is for States and other decision-making authorities to show with compelling reasons why a person should not be granted the right to participate.

‘All decisions that directly or indirectly affect them’

17. A second important consideration when determining the scope of article 1 is identifying the decisions that specifically activate the right to participate. This Independent Declaration suggests that the relevant threshold should be ‘all decisions that directly or indirectly affect them’. This

1(2); Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984) in ‘Annual Report of the Inter-American Commission on Human Rights’ (1984-85) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190–3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (Convention on the Elimination of All Forms of Discrimination against Women); See also UNHCR ‘Guideline on International Protection No.12 on Armed Conflict and Violence’ HCR/GIP/12 (6 December 2016); and UNHCR, Legal Considerations regarding Claims for International Protection made in the context of the Adverse Effects of Climate Change and Disasters (1 October 2020)

¹⁴ The Guiding Principles on Internal Displacement (n 4).

¹⁵ Convention relating to the Status of Stateless Persons (opened for signature 28 September 1954, entered into force 6 June 1960) 360 UNTS 117 (Convention relating to the Status of Stateless Persons).

¹⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (opened for signature 12 December 2000, entered into force 25 December 2003) 2237 UNTS 319.

threshold seeks to balance the significance of the decisions for refugees and others experiencing forced displacement or statelessness with the resourcing burdens placed on States and other decision-making authorities for guaranteeing the right to participate.

18. To assist with the interpretation of this threshold, this Independent Declaration suggests that ‘decisions that directly or indirectly affect’ displaced or stateless persons could be either:

- a) Decisions specifically directed to apply to refugees and/or others experiencing forced displacement or statelessness, or
- b) Decisions of a general application which differently affect refugees and/or others experiencing forced displacement or statelessness.

19. While this Independent Declaration does not aim to be prescriptive about the types of decisions that will activate the right to participate, in practice it is likely that the right to participate will be engaged in all decisions affecting the human rights of refugees and others experiencing forced displacement or statelessness. This could involve, for example, any decision related to services and programmes for displaced and stateless communities, or any decision related to the movement of displaced and stateless persons across borders, whether through repatriation, resettlement or other pathways. Additionally, it could include any decisions relating to the end of protection status or general policy or legislative decisions such as on health policy, housing policy or justice.

The importance of individual and collective participation

20. Participation in decision-making processes can be realised through both individual and collective forms. Individual participation is important to allow persons to express their own views, preferences and needs in relation to decisions that affect them as individuals and families. This approach is closely tethered to core philosophical grounds for human rights, which lie in the enhancement of individual autonomy, and is especially critical in decisions which directly or indirectly affect persons as individuals. For example, in the context of decisions relating to the return of refugees to their country of origin, the ExCom Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees highlights ‘the voluntary character of refugee repatriation, which involves the individual making a free and informed choice’ about whether to repatriate.¹⁷ Likewise, in the context of refugee status determination procedures, the right of the applicant to be heard in the process is considered a core principle of procedural fairness.

21. Collective (or group-based) participation is needed when decisions affect groups of refugees and/or others experiencing forced displacement or statelessness. In decisions affecting groups, collective participation can help facilitate transparency and consensus-building and ameliorate some of the power imbalances between decision-makers and participants through strength in numbers. It also plays a role in addressing practical resource restraints in decision-making processes. In other words, when more people are affected by a decision, the less likely it is that participants can directly participate in decision-making processes and the more likely it is that they must delegate to others and rely on collective forms of participation.¹⁸

¹⁷ UNGA ‘Report of the Fifty-Fifth Session of the Executive Committee of the High Commissioner’s Programme, Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees’ UN Doc A/AC.96/1003 (12 October 2004) [23].

¹⁸ Robert A Dahl, *On Democracy* (Yale University Press, 1998) 105-110.

Types of collective participation

22. In comparison with other approaches in international human rights law, which have placed emphasis on collective participation through chosen representatives and representative institutions,¹⁹ this Independent Declaration deliberately avoids prescribing the types or modes of collective participation needed to give effect to the right of refugees and others experiencing displacement to participate collectively.
23. This approach has been taken to enable flexibility in practice and because not all forms of collective participation – such as surveys, e-voting processes and popular assemblies - require representatives to be selected. These forms of collective participation may be particularly suitable in emerging conflict situations where there is a need for decisions to be made urgently and representative communities are not yet fully established. Additionally, new technologies and new proposals for participatory processes are also increasingly available to overcome barriers that have previously existed in relation to large-scale, collective participation of groups of refugees and others experiencing forced displacement or statelessness. These technologies may also facilitate distinct modes of collective participation.
24. Notwithstanding this approach, this Independent Declaration recognises that representative participation is a common and important form of collective participation. In recent years, there has been significant growth in the number of representative bodies of refugees and displaced people in all levels of governance. This growth has included the formation of numerous refugee-led networks and organisations across the world, as well as the establishment of many advisory boards consisting of refugees and displaced persons.²⁰ There has also been increasing recognition of the importance of refugee-led organisations in the design and delivery of protection responses.²¹
25. In contexts where representative approaches to participation are utilised, refugees and others experiencing forced displacement should have the autonomy to determine their own representatives in accordance with their own procedures. This is consistent with freedom of association, and other approaches that have been taken in international human rights law, such as those that have been developed with respect to Indigenous communities and persons with disabilities.²²

Balancing individual and collective participation

26. It is often the case that decision-making processes work effectively when they combine both individual and collective forms of participation. For instance, refugees and others experiencing displacement or statelessness should have the opportunity to participate collectively in the design of status determination procedures to ensure that they are accessible and appropriate for their purposes. However, procedural fairness requires that it is individual directly affected by a specific decision who should have the opportunity to present their individual claim within these procedures.
27. Likewise, in the contexts of resettlement, complementary pathways and service delivery, individuals should have a say in whether they accept these opportunities for themselves, but there should also be opportunities for collective participation to assist in the design and implementation of these opportunities and determining how resources should be allocated.

¹⁹ See UN Declaration on the Rights of Indigenous Peoples (n 6) arts 18-19.

²⁰ See James Milner, Mustafa Alio and Rez Gardi, 'Meaningful Refugee Participation: An emerging norm in the global refugee regime' (2022) 41(2) Refugee Survey Quarterly 565.

²¹ See UNHCR, Definition: Refugee-led Organization (RLO) (UNHCR, January 2023) <<https://www.refworld.org/policy/legalguidance/unhcr/2023/en/89475>>; also, Kate Pincock, Alexander Betts and Evan Easton-Calabria, *The Global Governed? Refugees as Providers of Protection and Assistance* (Cambridge University Press, 2020).

²² UN Declaration on the Rights of Indigenous Peoples (n 6) art 18; Convention on the Rights of Persons with Disabilities (n 6) art 4(3).

28. While the combination of individual and collective forms of participation can often produce synergistic effects, they can also produce divergences or disagreements between the views of individuals and groups of displaced persons. This is entirely anticipated and appropriate given that true democratic processes will produce a plurality of views.
29. In situations where there is divergence or disagreement between the views of individuals and groups of displaced or stateless persons, States and other decision-making authorities should consider whether these divergent views can all be addressed within the decision, and if not, which views should be given greater weight in the context of the decision in accordance with other relevant legal requirements. It is important that non-discrimination and vulnerability be considered in assigning weight to different views. The decision-maker should also document how these differing views were each considered in accordance with article 2.2 of this Independent Declaration.

Article 2 – Good-faith and non-discrimination

States and other decision-making authorities guarantee that the right to participate set out in Article 1 is implemented in good faith and without discrimination, involving,

- a) Establishing clear and accessible mechanisms and procedures**
- b) Engaging refugees and others experiencing forced displacement or statelessness from the outset, including accepting and responding to communications from them**
- c) Ensuring that decisions take into account the expertise, experience, and information that refugees and others experiencing forced displacement or statelessness contribute through their participation**
- d) Providing reasons for the decision/s made and demonstrating and documenting how the contributions of refugees and others experiencing forced displacement or statelessness were considered.**

Commentary

Why is this article important?

30. Whereas article 1 of this Independent Declaration aims to enhance international refugee and human rights law by elaborating the right to participate for refugees and others experiencing forced displacement or statelessness, article 2 aims to create a corresponding obligation on States and other decision-making authorities to guarantee the effectiveness of that right. This is important as it ensures that participation is meaningful and not simply a ‘tick box’ exercise or a tool used to suppress dissent, or to justify decisions made without consideration of the views of refugees and others experiencing forced displacement or statelessness.

‘States and other decision-making authorities’

31. International refugee and human rights law recognises that while States retain primary responsibility for providing protection to displaced and stateless communities, effective responses to displacement or statelessness require actions to be taken from a diverse number of stakeholders. This is often considered as either ‘a multi-stakeholder and partnership approach’ to displacement or statelessness or as a ‘whole-of-society approach’.²³
32. In accordance with this recognition, this Independent Declaration applies to States at every level of State governance, and to all branches of government.²⁴ It also applies to other decision-making authorities in relation to decisions impacting refugees and others experiencing forced displacement or statelessness. For the purpose of this Independent Declaration, other decision-making authorities include:
- a) international and intergovernmental organisations
 - b) civil society organisations with mandates to address or respond to forced displacement or statelessness
 - c) donors, private sector and philanthropic institutions in their relations with refugees and others experiencing forced displacement or statelessness, and

²³ Global Compact on Refugees (n 2) [33]; Global Compact for Safe, Orderly and Regular Migration, GA Res 73/195, UN Doc A/RES/73/195 (11 January 2019, adopted 19 December 2018) [14].

²⁴ This approach is consistent with other approaches taken in international human rights law. See UNHRC ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add. 13 [4].

- d) all other authorities responsible for decisions relating to refugees and others experiencing forced displacement or statelessness.

Good faith

33. Article 2 of this Independent Declaration articulates that the obligation on States and other decision-making authorities to guarantee the right to participate for refugees and others experiencing displacement or statelessness must be implemented in accordance with the principles of good faith. Paragraphs a–d clarify this obligation by establishing a non-exhaustive series of minimum standards required to ensure and respect this right.
34. The principle of good faith is well-established in international law. This principle requires, among other things, that all stakeholders act honestly and refrain from taking unfair advantage of other parties.²⁵ It also requires that consultative mechanisms ‘embrace transparency, mutual respect, meaningful dialogue and a sincere desire to reach consensus’.²⁶ There is a strong correlation between the implementation of the legal principle of good faith and the more common proposition in responses to displacement or statelessness that participation be ‘meaningful’.²⁷

Non-discrimination

35. Alongside the principle of good faith, this Independent Declaration requires that States and other decision-making authorities ensure that the right to participate for refugees and others experiencing displacement or statelessness is implemented without discrimination. This approach is consistent with calls from refugee leaders across the world, who emphasise the need to consider the unique identities, needs and diverse backgrounds of forcibly displaced and stateless persons in decision-making processes that affect them.²⁸
36. This approach is also coherent with the architecture of international refugee and human rights law, where rights are commonly applied in accordance with the principle of non-discrimination. Article 2.1 of the International Covenant on Civil Political Rights, for instance, provides that each State Party must respect and ensure all rights recognised in the Covenant ‘to all individuals within its territory and subject to its jurisdiction’ and ‘without distinction of any kind’. This includes many rights that are interconnected with participation in decision-making, such as the rights of all persons to privacy, freedom of opinion, expression, association and peaceful assembly.
37. Articles imposing non-discrimination obligations can also be found in the International Covenant on Economic, Social and Cultural Rights (art. 2.2), the 1951 Refugee Convention (art. 3), the Convention Relating to the Status of Stateless Persons (art. 3), the Convention on the Rights of the Child (art. 2), and the Convention of the Rights of Persons with Disabilities (art. 4), among others. The Guiding Principles on Internal Displacement also provide that internally displaced persons ‘shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced’ (Principle 1).
38. Under the Independent Declaration, participatory processes must be conducted in a way that do not discriminate against refugees and others facing displacement or statelessness on the basis of their migration status, but also on the basis of ‘race, colour, sex, language, religion, political or other

²⁵ See Markus Kotzur, ‘Good Faith (Bona Fide)’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2009) [20].

²⁶ UNHRC, Report of the Special Rapporteur on the rights of persons with disabilities UN Doc A/HRC/31/62 (12 January 2016) [79].

²⁷ See Refugees Seeking Equal Access at the Table, ‘We Were Seen, but Were we Heard?’ – Meaningful Refugee Participation at the Global Refugee Forum 2023: An Assessment By R-Seat (R-SEAT, July 2024) 3.

²⁸ UNHCR Advisory Board of Organizations led by forcibly displaced and stateless persons, *Joint Refugee Statement at the Global Refugee Forum 2023* (UNHCR, December 2023) <<https://www.unhcr.org/media/joint-refugee-statement-grf2023>>.

opinion, national or social origin, property, birth or other status’.²⁹ The principle of non-discrimination applies to every element of the participatory process, including those listed in paragraphs a–d of this article.

39. For the purposes of interpretation and implementation, the requirement of non-discrimination imposes both a negative duty on States and decision-making authorities to refrain from discriminatory conduct, and also a positive duty to take steps to proactively remove barriers that participants may experience in engaging in decision-making processes about them. The Human Rights Committee holds that non-discrimination ‘sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination’.³⁰ This positive duty is elaborated in article 4 of this Independent Declaration.

Establishing clear and accessible mechanisms and procedures

40. The State and other decision-making bodies have a positive obligation to establish mechanisms and procedures to realise meaningful participation. There are numerous forms of participatory process that can be established, including consultations, summits, appointing representatives to boards, participatory research and assemblies. The Independent Declaration does not mandate the form of participation, but it must be clear and accessible and must abide by the principles outlined in this Independent Declaration, including, in particular, the principles of good faith and non-discrimination.

Engaging refugees and others experiencing forced displacement or statelessness

41. The obligations of the State or decision-making authority deriving from this Independent Declaration commence from the outset. This means that the State or decision-making authority must commence the participatory process before decisions have been made, and as soon as it becomes clear that a decision will be made that could affect refugees and others experiencing forced displacement or statelessness.
42. Furthermore, the State or other decision-making authority must consider that the principles listed in this Independent Declaration apply to any communication from a person or group who has a right to participate. This is important to ensure that participation may be initiated not only by decision-makers, but also by refugees and others facing displacement or statelessness. It would often be appropriate, if it has not already been done, to establish a participatory process in response to communication such as this.

Ensuring that decisions take into account contributions

43. In accordance with good faith and meaningful participation, articles 2(c)-(d) of this Independent Declaration emphasise that it is insufficient for States and other decision-making authorities to simply listen to the views of refugees and others experiencing displacement or statelessness. Rather, the State or other decision-making authority must consider the contributions of participants in making their decisions. In doing so, it is important that the contributions of participants are not viewed merely as opinions that may be ignored. The expertise, experience and information provided by the participants, including their preferences with regard to strategy, available resources, short- and long-term goals, and priority, constitutes information that may have an impact on the subsequent legal obligations of the State or other decision-making authority. For a decision-making process to be genuinely developed in good faith, there needs to be the possibility that the decision-making authority reaches an outcome that powerholders may not initially favour.³¹

²⁹ ICCPR (n 13) art 2.1.

³⁰ UNHRC, ‘General Comment No. 18: Non-discrimination’ (1994) UN Doc. HRI/GEN/1/Rev.1 26 [10].

³¹ Tristan Harley, Suyeon Lee and Najeeba Wazefadost, ‘Not just a seat at the table: refugee participation and the importance of listening’ (2022) 70 Forced Migration Review 20, 28.

44. The consideration of the contributions of participants must abide by the principle of non-discrimination and ensure that the contributions of marginalised groups amongst the participants are not being ignored. Moreover, it should be recognised that the ‘expertise, experience, and information’ brought by refugees and others experiencing forced displacement or statelessness are distinct from the expertise, experience and information that can be contributed by other actors. These contributions cannot effectively or rightfully be brought to decision-making processes by third-party actors, as experience has shown that proxy participation results in the presentation of these perspectives through the interests or priorities of third-party actors.

Providing reasons

45. States and decision-making authorities must demonstrate that they have properly considered the contributions of displaced and stateless persons and communicate the extent to which these have influenced the outcome of the decision/s. This contributes to the principle of accountability, elaborated in article 5 of this Independent Declaration. The State or decision-making authority must provide a clear account of the contributions made, how these were considered in making the decision, bearing in mind their impact on legal obligations and the principle of non-discrimination.
46. This information should be provided in a manner in keeping with the principle of non-discrimination and access to information as outlined in article 3. The information must be in a form that can be understood by the refugees and others experiencing displacement or statelessness that are affected by the decision in question, bearing in mind the diverse needs of participants.

Article 3 – Access to information

- 1. All refugees and others experiencing forced displacement or statelessness have the right to seek, receive, and impart information that facilitates their right to participate.**
- 2. States and other decision-making authorities shall provide this information in a timely and comprehensive manner and through accessible formats, languages and technologies.**

Commentary

The right to seek, receive and impart information

47. International human rights law already recognises that all persons, including those experiencing displacement, have the right to seek, receive and impart information ‘of all kinds’. This right is considered an essential component of the right to freedom of expression under article 19(2) of the International Covenant on Civil Political Rights.³² It is also considered a right which enables rights to participate in decision-making processes and ‘a right in and of itself’.³³ Article 3 of this Independent Declaration therefore is consistent with existing international refugee and human rights law as it applies to refugees and others experiencing forced displacement and statelessness.
48. At a practical level, the right to seek, receive and impart information is a necessary element of participatory processes because access to information is crucial for considered judgement, accountability and informed consent. Informed consent is an ethical and legal obligation that involves prospective participants having access to sufficient, accurate and relevant information to be able to voluntarily agree to participate in a decision-making process, whether individually, collectively or both.
49. In the design of participatory processes, it is critical that States and other decision-making authorities provide prospective participants with accurate information that addresses the following:
 - a) The decision/s under consideration
 - b) The authority or authorities responsible for making the decision/s, as well as any other authorities involved
 - c) The procedure foreseen or in place for making the decision/s, including dates, locations and timeframes, including how affected persons can participate
 - d) The support available to participants
 - e) Any foreseen risks to participants and the steps taken to address those risks, and any alternative forms of participation
 - f) Whether any information has been withheld and the justification/s for withholding that information
 - g) Information as to how participation can affect the decision/s; and
 - h) Any other information relevant to making the decision/s.
50. It is important to recognise that participants may agree to something from fear, pressure, threat, fraud, deception, coercion, manipulation, undue influence, exploitation of a position of

³² ICCPR (n 13) art 19(2); UNGA ‘Promotion and protection of the right to freedom of opinion and expression: Note by the Secretary-General’ (2013) UN Doc A/68/362 [18].

³³ UNECOSOC, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36 (18 January 2000) UN Doc E/CN.4/2000/63 [42].

vulnerability, the giving of payments/benefits, or because of the actual use of force or abuse of power. Consent cannot be considered informed when any of the above means are used to secure consent.

Information in a ‘timely and comprehensive manner’

51. As article 3(2) of this Independent Declaration details, States and other decision-making authorities should provide this information in a ‘timely and comprehensive manner’. This requires informing refugees and others experiencing displacement or statelessness from the outset of the decision-making process and providing reasonable timeframes for all participants to provide input into that process. In decisions that directly or indirectly affect groups of persons, these timeframes need to be sufficient to address the additional resourcing burdens of collective participation, which can involve, *inter alia*, the time and resourcing necessary to select representatives, undertake democratic deliberation within groups and prepare joint submissions. It is also necessary that States and other decision-making authorities provide information on an ongoing basis throughout the decision-making process.
52. It is an unfortunate reality that States and other decision-making authorities have often fallen short in ensuring the timely provision of information necessary to enable the meaningful participation of displaced communities in decision-making processes. During the development of this Independent Declaration, contributors repeatedly recalled experiences where refugees and others experiencing forced displacement or statelessness had been given insufficient time to arrange travel for in-person events or to facilitate consultation with hard-to-reach persons or groups, such as those who may be held in detention or experiencing ongoing protection risks in host communities. Contributors also noted experiences where they had been provided with partial access to information or as a one-time occurrence, without sustained flow of information throughout the decision-making processes. These shortcomings have undermined trust in these decision-making processes and have impacted the quality of these processes.

‘Accessible formats, languages and technologies’

53. Alongside the timely provision of information, this Independent Declaration also emphasises the need for information to be provided in ‘accessible formats, languages and technologies’. This is critical to ensure that participatory processes are implemented inclusively and without discrimination. For refugees and others experiencing forced displacement, this requirement is particularly important given the significant linguistic and cultural diversity of displaced communities, as well as the frequent barriers these communities experience engaging in participatory processes.
54. At a practical level, States and other decision-making authorities may need to adjust their regular approaches to public engagement in decision-making to address these considerations. These adjustments could involve using a variety of communication formats, such as print, digital, audio and visual, to accommodate varying degrees of literacy. They could also entail providing translations of written content, using interpreters and bi-lingual facilitators, writing in plain language, completing readability testing, and using infographics, icons and illustrations.³⁴

³⁴ For a good practice example that highlights a range of adaptations that can be applied, see NSW Government, ‘NSW Settlement Strategy: Refugee Lived Experience Framework’ (November 2024). <https://multicultural.nsw.gov.au/wp-content/uploads/2025/01/Refugee-Lived-Experience-Framework-November-2024.pdf> 17; See also, COVID-19 Global Evaluation Coalition, ‘Joint Evaluation of the Protection

55. These requirements are consistent with existing international human rights law standards, which already recognise the need for rights holders to receive information through accessible means. article 19(2) of the International Covenant on Civil Political Rights provides that everyone has the right to seek, receive and impart information ‘either orally, in writing or in print, in the form of art, or through any other media of his choice’. This language is mirrored with respect to children in article 13(1) of the Convention on the Rights of the Child.
56. The Convention on the Rights of Persons with Disabilities also provides greater detail with regard to the application of this right for persons with disabilities, adding that States parties shall provide ‘information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost’ (art. 21(a)). It goes on to add that States shall facilitate ‘the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions’ (art. 21(b)).
57. In accordance with the principle of non-discrimination, these adjustments should be facilitated without additional cost to participants. Further, any cost involved in accessing information generally ‘should not be so high as to deter potential applicants and negate the intent of the law itself’.³⁵ In participatory processes involving refugees and others experiencing forced displacement or statelessness, it is likely that a no-cost approach will be most suitable to providing access to information.

Restrictions on the right to seek and receive information

58. International human rights law provides for specific restrictions on the right to seek and receive information. The classic exposition is set out in article 19(3) of the International Covenant on Civil and Political Rights and article 13(2) of the Convention on the Rights of the Child. While not including this text in article 3 of the Independent Declaration, States and other decision-makers can draw from the substantive guidance on those existing restrictions. This approach also recognises that it would be neither desirable nor practical to establish distinct legal thresholds exclusively for refugees and others experiencing forced displacement or statelessness.
59. The United Nations Human Rights Committee, along with the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, have previously considered in some detail the application of limitations on the right to access information.³⁶ These authorities emphasise that ‘[r]estrictions must be defined by law that is accessible, concrete, clear and unambiguous, and compatible with the State’s international human rights obligations. They must also strictly conform to tests of necessity and proportionality’.³⁷ Additionally:

For a restriction to be necessary, it must be based on one of the grounds for limitations recognized by the International Covenant on Civil and Political Rights and address a pressing

of the Rights of Refugees during the Pandemic’ (July 2022) <<https://www.unhcr.org/media/es-2022-06-joint-evaluation-protection-rights-refugees-during-covid-19-pandemic>> .

³⁵ UNECOSOC (n 33) [44].

³⁶ See United Nations Human Rights Committee, ‘General Comment No. 34: Article 19: Freedoms of opinion and expression’ (12 September 2011) UN Doc CCPR/C/GC/34; UNGA, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue UN Doc A/68/362 (4 September 2013) (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression) [48]-[69].

³⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (n 36) [51].

public or social need. Any restriction must also be proportionate to the aim invoked and must not be more restrictive than is required for the achievement of the desired purpose or protected right.³⁸

60. *The Global Principles on National Security and the Right to Information* (known as the Tshwane Principles) also highlight that ‘[t]he burden of demonstrating the legitimacy of any restriction rests with the public authority seeking to withhold information’ and that ‘[t]he right to information should be interpreted and applied broadly, and any restrictions should be interpreted narrowly’.³⁹
61. For instance, while the protection of national security is listed as a permissible reason to limit the right to access information under international human rights law, States and other decision-making authorities need to provide specific information on the precise nature of the risk of harm to national security, and the necessity for and proportionality of such a restriction on access to information.⁴⁰ Any restriction on the ground of national security can only be applied where ‘the whole nation is at stake, which would thereby exclude restrictions in the sole interest of a Government, regime or power group’.⁴¹ Further, there must be a real connection between those affected by the decision and the risk to national security,⁴² and any restriction applied ‘must be the least intrusive among the measures that might achieve the relevant protective function’.⁴³ States and other decision-makers cannot simply seek to protect the decision-maker from exposure of wrongdoing,⁴⁴ nor can they broadly or vaguely claim that any issues involving refugees and others experiencing forced displacement or statelessness are a matter of national security.

³⁸ Ibid [52].

³⁹ Open Society Justice Initiative, *The Global Principles on National Security and the Right to Information (known as the Tshwane Principles)* (Open Society Foundations, 12 June 2013) 16 <<https://www.justiceinitiative.org/uploads/bd50b729-d427-4fbb-8da2-1943ef2a3423/global-principles-national-security-10232013.pdf>>. These principles were developed through a two-year process that involved consulting more than 500 experts from over 70 countries around the world.

⁴⁰ UNGA (n 36) [61].

⁴¹ UNGA, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. David Kaye UN Doc A/71/373 (6 September 2016) [18]. See also ‘Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’ (1985) 7 *HRQ* 3, 6.

⁴² For examples of domestic jurisprudence relating to the interpretation of national security, see *Refugee Consortium of Kenya et al. v AG Kenya et al.* [2015] eKLR [71]-[72], citing *Kituo Cha Sheria et al. v Attorney-General Kenya* [2013] eKLR, Petition Nos. 19 and 115 of 2013; also, *Home Secretary v Rehman* [2003] 1 AC 153 [16].

⁴³ UNHRC, Communication No. 2622/2015, *Dobrotvor v Belarus*, UN Doc CCPR/C/131/D/2622/2015 (24 February 2002) [7.5] <<https://juris.ohchr.org/casedetails/3233/en-US>>.

⁴⁴ UNECOSOC (n 33) [44].

Article 4 – Supporting and Resourcing Participation

1. **States and other decision-making authorities have a duty to support and resource participatory procedures and mechanisms to enable all refugees and others experiencing forced displacement or statelessness the full enjoyment of their right to participate.**
2. **This involves:**
 - a. **Ensuring support to individual participants and participant groups;**
 - b. **Taking proactive steps to facilitate the participation of individuals and groups who face discrimination, considering the diverse, dynamic and intersectional experiences and identities of participants; and**
 - c. **Implementing all available measures to prevent threats and risks to the personal and digital security of individual participants and participant groups.**

Commentary

Why is this article important?

62. Ensuring appropriate support and resourcing is integral to the fulfillment of the right to participate. Too often refugees and others experiencing forced displacement or statelessness are invited to participate in decision-making processes without effective resourcing and support. Further, refugee-led organisations and other organisations led by persons experiencing forced displacement or statelessness are often criticised for not adequately representing their communities but are not supported to properly establish representative mechanisms within their communities.
63. Calls to appropriately support and resource participatory mechanisms are widespread among displaced and stateless communities across the world. The Global Refugee-led Network has highlighted that meaningful participation requires participatory mechanisms to be ‘ethical, sustained, safe, and supported financially’.⁴⁵ It notes that ‘[t]he meaningful work of refugee-led initiatives is acutely underfunded’ and ‘special attention should be paid to providing financing for refugee advocates and refugee-led initiatives to participate in discussions and carry out refugee response work generally’.⁴⁶ Similarly, R-SEAT (Refugees Seeking Equal Access at the Table) has emphasised the importance of providing appropriate support for participants in decision-making mechanisms, noting the importance of compensation in some contexts.⁴⁷
64. Consistent with these proposals, article 4 of this Independent Declaration acknowledges that if participatory mechanisms are to transcend tokenism, they must be appropriately resourced and address the practical barriers that refugees and others experiencing forced displacement or statelessness face in exercising their right to participate. Adequate support and resourcing of both participatory mechanisms and those that seek to access them will bring reciprocal benefits for decision-makers and participants alike. It will also enhance the quality and effectiveness of

⁴⁵ Global Refugee-led Network, ‘Meaningful Refugee Participation as Transformative Leadership: Guidelines for Concrete Action’ (Asylum Access, December 2019) 7
<https://globalcompactrefugees.org/sites/default/files/2021-12/GRN%20Meaningful-Refugee-Participation-Guidelines_Web.pdf>.

⁴⁶ Ibid 21.

⁴⁷ Refugees Seeking Equal Access at the Table (n 27).

decisions made. Conversely, '[p]articipation on the cheap is likely to be of a poor standard and will be detrimental to democratic practice'.⁴⁸

Types and independence of support

65. Article 4 of this Independent Declaration is articulated broadly to facilitate diverse forms of support. It is likely that appropriate support will include the provision of financial, legal, linguistic, logistical and technical support. It may involve capacity development, outreach activities and funding support for organisations led by refugees and others experiencing forced displacement or statelessness. Ultimately however, what type of support, and the level of support required, will be specific to the context of both the decision being made and the needs of participants.
66. When determining the appropriateness of resourcing and support, States and other decision-making authorities should consult with refugees and others experiencing forced displacement or statelessness and consider the scale and diversity of individuals and groups impacted by the decision, the nature of the likely impact on participants, the types of processes envisaged, the speed at which the decision/s need to be made and the resources available.
67. In the provision of resourcing and support, States and other decision-making authorities should also respect and ensure the independence and autonomy of participants and not use the availability of resources as a tool to exert pressure or influence the views of refugees and others experiencing forced displacement or statelessness. Withholding, or threatening to withhold, resources to participants who may express views that differ from those favoured by the decision-making authority would not be acting in accordance with the principle of good faith under this Independent Declaration.

Taking proactive steps to facilitate the participation of individuals and groups who face discrimination

68. As discussed earlier in this commentary, the principle of non-discrimination outlined in article 2 of this Independent Declaration requires States and other decision-making authorities to refrain from discriminatory conduct. This component is crucial to counter exclusionary and prejudicial practices and serves to equalise or level the playing field among participants who are directly or disproportionately impacted by the decision/s at hand.
69. Article 4(2)(b) builds upon article 2 of this Independent Declaration by imposing a duty on States and other decision-making authorities to take positive measures to address the barriers that different participants face, so that they can participate with other refugees and others experiencing forced displacement or statelessness on an 'equal footing'.⁴⁹
70. In drafting this article, contributors have placed emphasis on substantive equality – which acknowledges the need for differential treatment – rather than formal equality, which proposes that everyone is treated identically irrespective of their circumstances. This distinction and its rationale

⁴⁸ Graeme Smith, *Democratic Innovations: Designing Institutions for Citizen Participation* (Cambridge University Press, 2009) 19.

⁴⁹ The language of equal footing has been used in various international human rights law instruments. See for example: International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (International Convention on the Elimination of All Forms of Racial Discrimination) art 1; Convention on the Elimination of All Forms of Discrimination against Women (n 13) art 1; Convention on the Rights of Persons with Disabilities (n 6) art 2.

are captured succinctly in Aristotle's formula: 'treat likes alike, and different things differently to the extent of the inequality'.⁵⁰

71. This approach is also consistent with international human rights law, which recognises the necessity of differential treatment and affirmative action in accordance with the principle of non-discrimination. For instance, the United Nations Committee on the Elimination of all forms of Racial Discrimination has indicated that:

The term "non-discrimination" does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.⁵¹

72. Likewise, the United Nations Committee on the Rights of the Child has noted that 'barriers to participation are faced by particularly marginalized and/or discriminated groups' and '[a]ddressing these barriers is especially relevant for child protection'.⁵²

Types of proactive steps

73. Just like with the types of support offered broadly to participants, this Declaration does not prescribe specific steps that States and other decision-making authorities must take to facilitate the participation of individuals and groups who face discrimination. Instead, the scope of proactive steps envisaged under article 4(2)(b) is broad enough to encompass all required action needed to accommodate the diverse, dynamic and intersectional experiences and identities of participants.
74. This approach requires considerations of intersectionality and how the multiple parts of a person's identity, such as their race, gender, sexuality, residence status, age, education and socioeconomic status, can intersect and produce unique and overlapping barriers for participation. These barriers are often connected to the reasons why displaced and stateless communities are displaced and stateless. However, they also can be compounded by unique challenges experienced in places of refuge, such as a lack of host language proficiency, new forms of discrimination and a limited awareness of local political systems and cultures.
75. In addressing these diverse and dynamic barriers, States and other decision-making authorities should consult with prospective participants and take action as soon as needs are identified (either by decision-makers or participants). It is likely that decision-making authorities will need to facilitate a variety of ways for people to participate. Some types of proactive steps include:
- a) offering flexibility in timings to accommodate work, education and religious requirements
 - b) providing opportunities for online participation
 - c) providing training, resources and safe spaces to accommodate diverse groups

⁵⁰ This distinction, and the reference to Aristotle, are discussed in Kristin Henrard, 'Equality of Individuals' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, May 2008) [1].

⁵¹ United Nations Committee on the Elimination of all forms of Racial Discrimination, 'General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination' UN Doc CERD/G/GC/32 (24 September 2009) [8].

⁵² United Nations Committee on the Rights of the Child, 'General comment No. 13 (2011): The right of the child to freedom from all forms of violence UN Doc CRC/C/GC/13 (18 April 2011) [63].

- d) providing flexibility in the size of group-based engagements
- e) offering flexibility in written and oral forms of engagement, including through the use of translators and other forms of knowledge sharing
- f) utilising intermediaries, such as organisations and networks led by refugees and others experiencing forced displacement or statelessness to reach participants and build trust, and
- g) completing participant needs assessments prior to engagements.⁵³

76. Given that refugees and others experiencing displacement or stateless often face restrictions in terms of movement within and outside a State, States and other decision-making authorities should take proactive steps to remove barriers; enable safe, order, and regular, movement; and/or facilitate alternative means of participation. States should also guarantee that those taking part in participatory mechanisms can travel as needed without affecting their residence status or any of their other entitlements or rights.

Article 4(2)(c): Prevention of threats and risks to personal and digital security

77. The final element listed in article 4 highlights the need for States and other decision-making authorities to ‘implement all available measures to prevent threats and risks to the personal and digital security of individual participants and participant groups’.
78. This duty is important because refugees and others experiencing forced displacement or statelessness can experience significant risks to their personal and digital security when participating in decision-making processes that affect them. These risks range from impacts on their health and wellbeing to forced departure and physical harm.⁵⁴ This duty is also consistent with the humanitarian principle of ‘do no harm’.
79. Without being exhaustive – and in addition to the proactive steps listed above – some of the specific measures States and other decision-making authorities can take to implement to preventative protections measures for participants include:
- a) carrying out risk assessments and developing appropriate risk-mitigation strategies
 - b) ensuring safe spaces for participation through the use of privacy and confidentiality policies and procedures
 - c) implementing robust data protection measures
 - d) providing options for anonymous, small group and de-identified participation, and
 - e) conducting wellbeing check-ins with participants.
80. In implementing measures such as these, it is important to note that when refugees and others experiencing forced displacement or statelessness participate in decision-making processes as a means ‘to promote, protect or strive for the protection and realization of human rights and fundamental freedoms’, they are acting as human rights defenders and should equally be protected under this framework.⁵⁵ Article 4(2)(c) of this Independent Declaration accordingly closely aligns

⁵³ Several of these types of accommodations are modelled in NSW Government (n 34) 17.

⁵⁴ Karen Jacobsen and Loren B Landau, ‘The Dual Imperative in Refugee Research: Some Methodological and Ethical Considerations in Social Science Research on Forced Migration’ (2003) 27(3) *Disasters* 185, 193 cited in *Guidelines for Co-Produced Research with Refugees and Other People with Lived Experience of Displacement* (May 2023, <http://doi.org/10.26190/ghnc-sy80>).

⁵⁵ United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (9 December 1998, adopted 8 March 1999) UN Doc A/RES/53/144; See also Tristan Harley and Harry Hobbs, ‘The Meaningful

with the principles and rights articulated in the human rights defender regime, most specifically in article 12 of the United Nations Declaration on Human Rights Defenders.

81. Further, while it is critical that States and other decision-making authorities take all available measures to prevent threats to personal and digital security, this does not necessarily mean that participation will be risk-free. Refugees and others experiencing forced displacement or statelessness often make free and informed decisions to participate in decision-making processes, even when risks to themselves and their communities persist. It would be contrary to the rights set out in this Independent Declaration for States and other decision-making authorities to deny access to participants on the basis that their participation cannot be secured.

Participation of Refugees in Decision-Making Processes: Questions of Law and Policy' (2020) 32(2) International Journal of Refugee Law 200, 220.

Article 5 – The Right to a Remedy and Accountability

1. **Refugees and other persons experiencing forced displacement or statelessness have a right to a remedy where states and other decision-making authorities fail to meet their obligations set out in this declaration.**
2. **States and other decision-making authorities shall provide for fair, effective and timely accountability mechanisms for addressing breaches and receiving and responding to complaints or feedback relating to the rights set out in this declaration.**

Commentary

Why is this article important?

82. Article 5 of this Independent Declaration emphasises the need for an effective accountability framework that ensures a right to a remedy and fair, effective and timely accountability mechanisms to address situations where States and other decision-making authorities fail to provide for meaningful participation. Accountability requires States and other decision-making authorities to take appropriate measures to uphold the rights and principles set out in this declaration, prevent acts or omissions that fail to respect these rights and principles, and to ensure effective remedies in response to such acts or omissions when they occur including by providing reparation.⁵⁶ States and other decision-making authorities ensure respect for the articles set out in this Independent Declaration by incorporating them into their domestic laws or regulations, and by incorporating them into administrative practice.
83. Accountability is often assumed to be upward/hierarchical or fiscal accountability, meaning that an authority is answerable to a superior authority for the responsibilities assigned to it and for the budget allocated for its work. Accountability, however, also entails ground-up accountability to those subject to its decisions.⁵⁷ This latter form of accountability requires that a decision-making authority's performance meets the needs and expectations of persons affected by its decisions, and that it respects the dignity and rights of such persons in good faith as set out in article 2.⁵⁸
84. Recognition of the value and effectiveness of this ground up accountability is reflected in the Global Compact on Refugees,⁵⁹ the Grand Bargain,⁶⁰ UNHCR policy,⁶¹ and broader international human rights obligations.⁶² The balance of power between displaced or stateless persons and various authorities is not equal and not on the side of the displaced or stateless person. Ground-up accountability can contribute to ameliorating this power imbalance.

⁵⁶ ICCPR (n 13) art 2.

⁵⁷ CHS Alliance, Groupe URD and Sphere Association, 'Core Humanitarian Standard on Quality and Accountability' (2nd Edition, 2024) (Core Humanitarian Standard on Quality and Accountability) <https://www.corehumanitarianstandard.org/_files/ugd/e57c40_f8ca250a7bd04282b4f2e4e810daf5fc.pdf>.

⁵⁸ See United Nations High Commissioner for Refugees, 'Accountability to Affected People (AAP): Emergency Handbook' (19 April 2003) (AAP Handbook) <<https://emergency.unhcr.org/protection/protection-principles/accountability-affected-people-aap>>.

⁵⁹ Global Compact on Refugees (n 2)[34] and [106].

⁶⁰ Inter-Agency Standing Committee, 'The Grand Bargain – A Shared Commitment to Better Serve People in Need, 2016' (21 February 2017) <https://interagencystandingcommittee.org/sites/default/files/migrated/2017-02/grand_bargain_final_22_may_final-2_0.pdf>.

⁶¹ See AAP Handbook (n 58).

⁶² UNHRC 'General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.

85. Accountability takes many forms in practice, and a number of mechanisms and procedures ensure greater accountability to affected persons. For example, an appeal process is the primary mechanism of accountability for adjudication (whether it is conducted by an administrative or judicial body). Other forms of accountability may include ombudsman, complaints or feedback mechanisms and procedures, managerial methods of oversight and supervision, and methods for monitoring and evaluating decision-making bodies as a whole, for example through statistics, assessments of consistency and timeliness. None of these would be sufficient in isolation, but each may contribute to accountability overall.

‘a right to a remedy’

86. Everyone has the right to an effective remedy when actions or omissions fail to fulfill the rights and principles set out in this Independent Declaration. The right to a remedy entails a right to be heard with equal access to accountability mechanisms, notwithstanding that the actions or omissions may have been committed by a person acting in an official capacity.⁶³ It also entails assurances that remedies and reparation are enforceable when granted.⁶⁴ Those affected by the breach are to be treated with compassion and respect.⁶⁵ In ensuring remedies and reparations, ‘the international community... reaffirms the international legal principles of accountability, justice and the rule of law’.⁶⁶

87. It is a general rule across legal systems, and a general principle of international law, that for every breach of a right there must be a remedy.⁶⁷ For example, provisions providing for a right to a remedy are found across many international legal instruments, including:

- Universal Declaration of Human Rights (art 8)⁶⁸
- International Covenant on Civil and Political Rights (art 2)
- International Convention on the Elimination of All Forms of Racial Discrimination (art 6)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art 14)
- Convention on the Rights of the Child (art 39)
- Guiding Principles on Internal Displacement (principle 7(3)(f))
- The Hague Convention respecting the Laws and Customs of War on Land of 1907 (art 3)⁶⁹

⁶³ ICCPR (n 13) art 2(3); African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 7(1).

⁶⁴ ICCPR (n 13) art 2(3)(c); See also: American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José) art 25.

⁶⁵ See for example, UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law UNGA Res 60/147 (2005) (Basic Principles), Principle VI on ‘Treatment of victims’.

⁶⁶ Basic Principles (n 65) Preamble.

⁶⁷ International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: A Practitioners’ Guide* (Practitioners Guide, 2018) < <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf> >.

⁶⁸ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 8.

⁶⁹ Convention (IV) respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) art 3.

- The Protocol Additional to the Geneva Conventions of 1949 (art 91)⁷⁰
- Rome Statute of the International Criminal Court (arts 75 and 93)⁷¹
- The African Charter on Human and Peoples' Rights (art 7)
- The American Convention on Human Rights (art 25)
- The European Convention on Human Rights and Fundamental Freedoms (art 13)⁷²
- The ASEAN Human Rights Declaration (art 5).⁷³

88. In this Independent Declaration, the term remedy is used to refer to *procedures* that recognise a breach and respond to it. Remedies are generally identified in administrative law/practice, identified by courts, set out in legislation, established through organisational accountability mechanisms and/or utilised as a matter of custom or general principles.

89. Although the language and specifics may vary across jurisdictions and among different kinds of stakeholders, attempts have been made to systematise remedies and they often fall into similar categories.⁷⁴ This Independent Declaration intends to capture this diversity and does not intend to bias discussion towards a particular kind of legal system, nor should the discussion be limited to courts and judicial review. Examples are provided in this commentary to provide clarity, but without the intention to suggest an exhaustive list of options.⁷⁵

90. Remedies answer the question: What should happen to the decision procedurally if a right is breached or responsibility is evaded in practice? Common remedies often fall into the following categories:⁷⁶

- a) The decision should be undone. The decision should be quashed/set-aside/cancelled, and that is enough.

⁷⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 art 91.

⁷¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, arts 75 and 93.

⁷² Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 13.

⁷³ ASEAN Human Rights Declaration (adopted 18 November 2012) art 5.

⁷⁴ For example, in the Basic Principles (n 65), States are expected to ensure "...full and effective reparation... which include the following forms: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition". Furthermore, "[r]estitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property... [c]ompensation should be provided for any economically assessable damage... [r]ehabilitation should include medical and psychological care as well as legal and social services... [s]atisfaction should include... cessation of continuing violations, verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm... public apology... [g]uarantees of non-repetition should include... providing, on a priority and continued basis, ...education to all sectors of society and training... strengthening the independence of the judiciary... promoting the observance of codes of conduct and ethical norms..."

⁷⁵ Diverse forms of remedy exist and are set out in both international and domestic law. For example, article 39 of Convention on the Rights of the Child (n 6) requires that "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim... in an environment which fosters the health, self-respect and dignity of the child"; and the Rome Statute of the International Criminal Court in Article 93 provides a non-exhaustive list of "[o]ther forms of cooperation" including: the conduct of investigations or prosecutions, disclosure of documents or evidence, protection of victims or witnesses, issuance of reports and expert opinions.

⁷⁶ In legal terms, the below remedies may be referred to as: certiorari, mandamus, prohibition, injunction, declaration, remand, etc.

- b) The decision should be cancelled, and then re-made, correctly this time.
- c) Where the authority refuses to make a decision that they are required to make, the authority should be ordered to make the decision in accordance with the requirements of law.
- d) The authority should be prevented from making a wrongful decision
- e) The decision-making authority should be prevented from taking an action on the basis of the decision that was wrongfully made.
- f) A body should review the matter and declare that the action or decision was unlawful and issue such a declaration.

91. The concept of reparations is sometimes seen as encompassed within the notion of remedies and sometimes it is considered distinct. The Human Rights Committee has stated that the obligation to provide an effective remedy includes the obligation to make reparation which can include measures like restitution, compensation, rehabilitation, changes in laws and practices, guarantees of non-repetition, etc.⁷⁷ For purposes of this Independent Declaration, the provision of reparations is embedded within the right to a remedy and is used to describe how the consequences/costs suffered by the persons subject to the decision are to be addressed once the damage has been done. Aside from how the decision will be dealt with procedurally, reparations consider how the consequences suffered by those subject to the decision will be compensated.

92. Some common reparations to address the consequences of a breach include:⁷⁸

- a) The State or decision-making authority in breach may be expected to restore things to the way they were before the breach occurred
- b) The State or decision-making authority in breach may be required to accept responsibility, issue a public apology, and/or issue an accurate accounting of what took place
- c) The State or decision-making authority in breach may be required to take steps to provide some guarantee of non-repetition (i.e. through training responsible officials, issuance of regulations/guidelines, etc.)
- d) Financial damages may be given by way of compensation for the consequences suffered as a result of a violation
- e) The parties may be required to undertake a process of resolution and reconciliation.

93. While ‘remedies’ and ‘reparations’ may be thought of as highly formal legal terms, it is important to recognise that remedies and reparations can also describe much more informal and day-to-day practice for administrative agencies or smaller organisations managing complaints or feedback mechanisms and striving to ensure high standards of ethics, quality and accountability to affected persons. Transitional justice approaches to remedies and reparation are not as legalistic, prioritising restorative and community-based processes and focusing on the needs of victims, the broader social context, incorporating local conceptions of justice, addressing differential impact and ensuring broader participation of affected persons.⁷⁹

⁷⁷ UNHRC, ‘General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant’ (26 May 2004) UN Doc. CCPR/C/21/Rev.1/Add.13 [16]-[17]. See also UNHRC, ‘Guidelines on Measures of Reparation under the Optional Protocol to the International Covenant on Civil and Political Rights’ (30 November 2016) UN Doc. CCPR/C/158 (2016) [2].

⁷⁸ In legal terms, the below reparations may be described as: restitution, compensation, rehabilitation, satisfaction, etc.

⁷⁹ Guidance Note of the Secretary General, ‘Transitional Justice: A Strategic Tool for People, Prevention and Peace’ (October 2023) <https://www.ohchr.org/sites/default/files/documents/issues/transitionaljustice/sg-guidance-note/2023_07_guidance_note_transitional_justice_en.pdf>.

'...fair, effective, and timely accountability mechanisms'

94. Ensuring a right to a remedy generally requires access to an independent and impartial body that can assess the violation, cause the violation to cease if it is ongoing, and ensure adequate remedy and reparation. States and other decision-making authorities should establish fair, effective, and timely accountability mechanisms through which they can listen and respond to complaints and feedback from refugees and other forcibly displaced or stateless persons ensuring reparation and redress.
95. There is wide-ranging scepticism among refugees and other persons experiencing forced displacement or statelessness relating to complaints and feedback mechanisms, and the real-world barriers to challenge decisions or processes. When these processes are inaccessible or do not result in listening or meaningful impact, or when participations is not conducted in good faith, it erodes trust, confidence and in the end has a silencing effect.
96. Accountability mechanisms should be developed with the meaningful participation of refugees and other forcibly displaced or stateless persons with consideration of the local context and involvement of all relevant stakeholders across a whole-of-society approach. Once established, States and other decision-making authorities should ensure that mechanisms and procedures are implemented in good faith and should strive to continually learn from experience and improve performance, maintaining high standards of quality and accountability.
97. These mechanisms should have clear objectives, emphasising the right to raise a complaint and receive a response. They should set out clear procedures, with multiple points of access that cater to the needs and situation of affected persons. For example, entry points for verbal complaint or feedback for those who are not literate, or interpretation facilities for those who do not speak or write the local language. Such mechanisms should ensure safety and accessibility, including assurances of confidentiality and non-retaliation towards those who utilise the procedure. Means to notify persons affected by decisions of these mechanisms and procedures also need to be put in place and in multiple formats.
98. States and other decision-making authorities should also ensure appropriate training around principles, standards and rights, and in the use and implementation of accountability mechanisms and procedures. Performance of States and other decision-making authorities is measured next to the principles, standards and rights set out in this Independent Declaration and in their accountability framework.
99. Effective accountability mechanisms share a number of qualities such as accessibility, independence, impartiality, transparency, integrity, efficiency, adaptability, or fairness.⁸⁰ Such qualities are common among the mechanisms of States and other decision-making authorities who generally utilise such standards as institutional or system goals, and they are also used to monitor and evaluate quality in implementation.
100. Accessibility entails physical access, but also the elimination of obstacles and provision of assistance and support as needed.⁸¹ Accountability mechanisms generally must ensure a level of independence in order to ensure that such mechanisms can make objective, good-faith decisions, proactively addressing conflicts of interest, and ensure that they are free from external influences, inducements, pressures, threats, or interference. Impartiality involves the ability to perform duties without favour, bias, or prejudice; and mechanisms with integrity uphold high standards of ethical

⁸⁰ Core Humanitarian Standard on Quality and Accountability (n 57).

⁸¹ See article 4 and its commentary.

and professional conduct and are committed to preventing and addressing corruption and misconduct.

101. While accountability mechanisms generally need to ensure confidentiality and data protection, they also must ensure transparency with regard to their procedures, operating openly and without a hidden agenda. Efficiency and timeliness ensure that remedies and reparations are given adequate priority and that resources are sufficient to ensure that matters are resolved without undue delay. Adaptability ensures that procedures can be context specific and adjusted in response to needs, vulnerabilities, and risks that arise among those who utilize the mechanism. Fairness is generally an umbrella term that encompasses all of the above characteristics, among others.