


Digital Refugee Lawyering: Risk, Legal Knowledge, and Accountability

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ABSTRACT

This article explores how the digital transformation of humanitarianism, and the refugee regime reshapes refugee lawyering. Much refugee lawyering is based on a traditional understanding of legal protection – and a focus on legal aid, law reform advocacy, and specific protection procedures (such as refugee status determination). Refugee lawyering must now grapple with the challenges offered by the digital transformation of international protection. This entails identifying emergent protection issues and how they relate to the law and legal claims. To that end, the article puts forward suggestions regarding the risks of the digital transformation as it pertains to the humanitarian space, the refugee management infrastructure, and refugee lawyering. The article also considers its implications for legal knowledge and the possibility that law may be “displaced” by technology. The article concludes by discussing what it means for refugee lawyering and for being accountable to the norms and values of rule of law standards, international protection, and to individual clients.

KEYWORDS: data protection, digital transformation, humanitarian accountability, legal aid, legal technology, refugee law, refugee lawyering

1. INTRODUCTION

The digital transformation of the international refugee regime reshapes the dynamics of international legal protection and its attendant governance and justice effects in ways that need attention.¹ This article explores its implications for

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1 This article is dedicated to the memory of Barbara Harrell-Bond who crashed my fieldwork and opened my eyes. I am grateful to anonymous reviewers and the editors of the special issue for providing excellent comments on content and structure. I am indebted to Mirjam Twigt for inviting me to contribute to initial discussions around the concept of digital refugee lawyering. See also M. Twigt, *Mediated Lives: Waiting and Hope among Iraqi Refugees in Jordan*, Berghahn, 2022.

digital refugee lawyering in the Global South.² Legal protection, seen by international refugee law as an end in itself, entails using legal tools, including treaties and national laws to protect refugees against penalisation, expulsion, and refoulement and to ensure their enjoyment of rights conferred by international refugee and human rights law.³ This view of legal protection has been criticised for making refugee law so remote from refugees and asylum-seekers and politics, that it has “lost its relevance and utility.”⁴ An empirical criticism is that “there is no single, uniform response that can be labelled ‘protection’,”⁵ which makes protection a fluid concept determined by temporal and spatial factors.⁶

In the face of digital transformation, the article accepts the view that international protection cannot be reduced to applying international refugee law and implementing United Nations High Commissioner for Refugees (UNHCR) programmes. Instead, the way law interacts with technology needs to be explored. On the other hand, it does not accept the normative dismissal of law: in situations of forced displacement, professional legal assistance matters enormously.⁷ Global migration politics are characterised by nationalism, xenophobia, tech capitalism, and new forms of data colonialism.⁸ The rule of law and legal protection and the values underpinning them are the backbone of critical inquiry.⁹ The article takes the view that the legal accountability of those involved in protection efforts – and the relational aspects of this accountability – is central to how we understand the digital transformation of international protection.¹⁰

- 2 The term is problematic but used to denote jurisdictions receiving large numbers of refugees despite significant capacity problems in the refugee bureaucracy and the legal sectors. For a description of legal protection constraints, see for example, G. Riach & Z. James, “Strengthening the Rule of Law on the Margins: Experiences from Za’atari Refugee Camp, Jordan”, *The International Journal of Human Rights*, 20(4), 2016, 549–566. For an argument on the need to focus on refugee lawyers beyond the Global North, see M. Jones, “Expanding the Frontiers of Refugee Law: Developing a Broader Law of Asylum in the Middle East and Europe”, *Journal of Human Rights Practice*, 9(2), 2017, 212–215.
- 3 G.S. Goodwin-Gill, “The International Law of Refugee Protection”, in E. Fiddian-Qasmieh, G. Loescher, K. Long, & N. Sigona (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, OUP, 2014.
- 4 H. Adelman 1995:148 cited in B.S. Chimni, “The Geopolitics of Refugee Studies: A View from the South”, *Journal of Refugee Studies*, 11(4), 1998, 350–374.
- 5 D. Stevens, “Rights, Needs or Assistance? The Role of the UNHCR in Refugee Protection in the Middle East”, *The International Journal of Human Rights*, 20(2), 2016, 264–283.
- 6 H. Storey, “The Meaning of “Protection” within the Refugee Definition”, *Refugee Survey Quarterly*, 35(3), 2016, 1–34.
- 7 L. Smith-Khan, “I Try Not to Be Dominant, but I’m a Lawyer!': Advisor Resources, Context, and Refugee Credibility”, *Journal of Refugee Studies*, feaa102, 2021. <https://doi.org/10.1093/jrs/feaa102>
- 8 M. Madianou, “Technocolonialism: Digital Innovation and Data Practices in the Humanitarian Response to Refugee Crises”, *Social Media + Society*, 5(3), 2019, 1–13.
- 9 The rule of law is a principle of governance whereby persons, institutions, and entities are accountable to law; and a set of mechanisms, processes, institutions, practices, and norms supporting equality before the law, and security against arbitrary government and use of power. The article employs a broad notion of refugee law, including the 1951 Refugee Convention and the 1967 Protocol, regional instruments (such as the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, or the 1984 Cartagena Declaration on Refugees) and soft law instruments relating to durable solutions (resettlement, local integration, return).
- 10 As regards the requirement that agents abide by formal rules and are prepared to justify their actions in those terms, in courts or quasi-judicial arenas, see R.W. Grant & R.O. Keohane, “Accountability and Abuses of Power in World Politics”, *American Political Science Review*, 99(1), 2005, 29–43; see also K.B.

Essentially, this transformation involves the adoption by aid organisations of information communication technologies (ICTs), which change how they operate, fulfil their mandates, and achieve impact. It includes the process of digitisation – the conversion, articulation, and management of previously analogue information, processes, and actions – and the large-scale datafication of aid, through the conversion of information, concepts, processes, and systems into mathematical and machine-readable formats.¹¹ It also entails the rapid growth of a sprawling digital infrastructure and the proliferation of digital humanitarian goods. Digital innovations can indeed make international legal protection more effective and accountable. Once evaluations of project pilots, best practice standards, and contextualised qualitative case studies have become widely available, the potential benefits of the digital transformation of refugee lawyering will be better understood. Humanitarian situations, however, are inherently unstable – and insecure, which means that digital innovations may bring new risks and vulnerabilities for refugees and asylum-seekers attempting to access international protection. They can also generate risks for refugee lawyers, including that of becoming de facto threats to their clients.¹²

This article focuses on refugee lawyering as a civil society and legal sector activity (legal aid can be commercial, pro bono, or non-profit). It does not include the work done by government refugee lawyers or UNHCR's legal protection officers. Refugee lawyering has traditionally focused on legal aid, law reform advocacy, and litigation of specific protection procedures (such as refugee status determination (RSD) or asylum claims).¹³ From this perspective, refugee lawyers are accountable to their clients, the ethics of their Bar, and the basic values of the rule of law. However, the digital transformation is changing international protection – and what can be considered refugee law. It entails an expansion that brings in new legal areas and formats, such as data protection policies and algorithmic code, that pay less attention to due process and rule of law. These profound changes suggest that the everyday practices of refugee law are changing and require different skills and approaches. Therefore, the study of everyday digital refugee lawyering practices is emerging as an important field of socio-legal research.¹⁴ At the same time, on a more conceptual level, these

Sandvik, "On the Social Life of International Organisations. Framing Accountability in Refugee Resettlement", in J. Wouters, E. Brems, S. Smis and P. Schmitt (eds.) *Accountability for Human Rights Violations of International Organizations*, Cambridge, Intersentia, 2010, 287–310.

- 11 K.B. Sandvik, K.L. Jacobsen, & S.M. McDonald, "Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation", *International Review of the Red Cross*, 99(904), 2017, 319–344.
- 12 In the humanitarian domain, there is frequent use of terms like "victims," "survivors," "beneficiaries," "recipients," "communities in crisis," "individual cases" (ICs), "users" and – with the turn to private sector collaboration – "customers." While this article takes the lawyer–client relationship as its key focus critical reflection is needed on how far the relationships and privileges such terms imply (like "lawyer – client") can be maintained in precarious legal environments, and how far they remain meaningful. I am indebted to Mirjam Twtg for this observation.
- 13 M. Kagan, "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination", *Georgetown Immigration Law Journal*, 17(3), 2003, 367–416; M. Kagan, "Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt", *Journal of Refugee Studies*, 19(1), 2006, 45–68; Jones, "Expanding the Frontiers of Refugee Law".
- 14 In tandem with this, the literature on legal empowerment should be connected to insights from critical data studies and data justice activism. The issue of techno-legal literacy is beyond the scope of this article, but see K.B. Sandvik & K. Lohne, "The Struggle Against Sexual Violence in Conflict: Investigating the Digital Turn", *International Review of the Red Cross*, 913, 2021, 1–21.

changes also oblige refugee lawyers – and socio-legal scholars – to engage with the challenges offered by the digital transformation of international protection and how this transformation affects notions of accountability. This includes the types of humanitarian and legal accountability refugee lawyers should seek to obtain on behalf of their clients – and their own accountability vis-à-vis those clients. These conceptual challenges are the theme of this article.¹⁵

The analysis proceeds in four parts. So far, little scholarly attention has been given to this topic. To begin to articulate a research agenda, the digital transformation of refugee lawyering needs to be placed in its institutional context. Parts 1 and 2 situate refugee lawyering and shifting notions of accountability in the digital transformation of the humanitarian space itself. Part 3 offers suggestions on the risks of the digital transformation as it pertains to the digitisation of the humanitarian space, to refugee management infrastructure, and to refugee lawyering. Part 4 considers the implications of this for legal knowledge and the risk that law may be “displaced” by technology. In conclusion, the article discusses the consequences for refugee lawyering – and what it means to be accountable.¹⁶

2. HUMANITARIANISM, LEGALISATION, AND ACCOUNTABILITY

To provide a context for gauging these effects on dynamics and governance, we will first situate international protection *within* the humanitarian space. Seeing the digital transformation of international protection as a stand-alone development gives an incomplete view: the problems of the digital humanitarian space also affect refugee lawyering. Thus, to gain a better contextual understanding of the digital transformation, the article sees international protection as part of the humanitarian space. The digital transformation of this space is operationalised by the humanitarian sector as a series of piecemeal projects – variously labelled “humanitarian innovation” or “humanitarian experimentation,” which are directed at “fixing” the system, making it better, faster, stronger, and more secure. While such initiatives are fragmentary and often disjointed, the fact that humanitarian action is connected to new partners (the World Bank, start-ups, big tech), new projects (proxy-means welfare testing or social innovation), and new activities (banking), means that humanitarianism itself is transformed. This is particularly visible in the ways the digital transformation of aid changes the sites of production of knowledge (i.e. algorithms and data) and expertise, as well as their content and characteristics. This shift in the meaning of

15 The article draws on a survey of the academic literature (including the author’s own work), analysis of current debates on the digital transformation of refugee protection and the author’s experiential insights. The author has previously fundraised for NRC’s ICLA project in Kosovo (2000); been a part of Harvard Law School’s human rights clinic, with a focus on lawyering for the Inter-American Commission; worked with UNHCR legal protection on resettlement in Uganda and undertaken empirical field-based studies of feminist and indigenous rights lawyering for IDP rights in Colombia.

16 The growing criminalisation of those offering support to migrants, refugees, and asylum-seekers on land and at sea, and the equation of such assistance with human smuggling falls outside the scope of this article. That said, the digital transformation is clearly taking place within a broader context of shrinking civic and humanitarian spaces. At the same time, a recent Report of the Special Rapporteur on the Situation of Defenders of Human Rights (A/HRC/37/51 2018) highlights the challenges faced by those defending people on the move, without ever discussing the digital transformation of threats and risk. I am grateful to an anonymous reviewer for alerting me to these issues.

humanitarianism also affects international refugee protection. For refugee lawyering, this is highly significant, as it changes the types of legal problems that arise, and ultimately, notions of accountability to refugees and asylum-seekers.

Furthermore, there is a need to clarify what the relationship between law and humanitarianism means for the digital transformation of protection. It may seem paradoxical that the refugee regime should be incorporated into humanitarian space. As noted above, international protection is all about law, lawyering, legal procedure, and access to legal process. However, while humanitarian action is closely bound up with international humanitarian law, the sector is in fact characterised by a remarkable lack of law: to put it bluntly, humanitarians don't seem to like law, legal processes, or lawyers very much.¹⁷ Humanitarian governance is premised on short-term and ad hoc interventions designed to preserve life and reduce human suffering.¹⁸ Longstanding cross-sectoral engagement with accountability initiatives has translated into scarcely any form of legal accountability. However, the sector is legalising – albeit unevenly and in fits and starts – and the law, legal discourse, lawyers, and legal institutions are becoming increasingly important to humanitarian governance.¹⁹ In response to calls for greater accountability and effectiveness, and because of the field's rapid expansion and integration into global markets, what was once a largely unregulated area is now emerging as a transnational humanitarian space where authority, governance, legitimacy, and power are increasingly invoked via the law.²⁰ This (belated) legalisation is intertwined with the digital transformation of the sector. There is an emphasis on combining law, technology, and markets to address crises and solve the humanitarian sector's perennial problems of effectiveness and efficiency.²¹ It is through this messy, ambivalent, and still evolving approach to law and regulation – and in the face of sector-wide underinvestment and lack of interest in humanitarian lawyering – that the humanitarian field, including international protection, grapples with the digital transformation.

17 For a discussion, see the analysis of the Norwegian Refugee Council's resistance to legal claims, litigation, and legal responsibility in the Steve Dennis court-case, in K.B. Sandvik, "Humanitarians in Court: How Duty of Care Travelled from Human Resources to Legal Liability", *The Journal of Legal Pluralism and Unofficial Law*, 50(3), 2019, 358–374. For a broader perspective, see A. Zwitter, et al. "International Law of Humanitarian Action: From the Global to the Local", in A. Zwitter, C. Lamont, HJ Heintze, J. Herman (eds.) *Humanitarian Action: Global, Regional and Domestic Legal Responses*, Cambridge, Cambridge University Press, 2014, 9–11.

18 D. Fassin, *Humanitarian Reason: A Moral History of the Present*, Berkeley, University of California Press, 2011.

19 D. Dijkzeul & K.B. Sandvik, "A World in Turmoil: Governing Risk, Establishing Order in Humanitarian Crises", *Disasters*, 43(2), 2019, S85–S108.

20 The law of humanitarian action is an amalgam of international human rights law, international humanitarian law, refugee law, soft law on internal displacement, international disaster response law and other soft law and technical legal frameworks that regulate humanitarian access and service delivery. See K. Lohne & K.B. Sandvik, "Bringing Law into the Political Sociology of Humanitarianism", *Oslo Law Review*, 4(01), 2017, 4–27; R. Sutton, *The Humanitarian Civilian: How the Idea of Distinction Circulates Within and Beyond International Humanitarian Law*, Oxford, Oxford University Press, 2021.

21 Emerging soft law is of particular interest here. A non-exhaustive inventory of soft law items includes instruments such as declarations, recommendations, codes of conduct, action plans, expert opinions, handbooks, and CSR (Corporate Social Responsibility) practice. Lohne & Sandvik, "Bringing Law into the Political Sociology of Humanitarianism".

What are the consequences of this for how refugee lawyering construes the nexus between legal and humanitarian accountability? To answer this question, we need to bring together this incarnation of the digital transformation of international protection with ongoing discussions about the meaning and nature of accountability.²² Following decades of criticism of UNHCR's lack of accountability and its struggle to fulfil its mandate to protect refugees,²³ the introduction of new accountability mechanisms to strengthen "accountability to affected populations" – defined as a commitment "to use power responsibly by taking account of, giving account to and being held to account by the people they seek to assist"²⁴ – has become an institutional feature of international refugee management.²⁵ Yet, for UNHCR, "affected populations" are not the only ones to whom it seeks to be accountable; it also holds itself accountable to donors, to the broader international community, and to its overall mandate, which is to provide international protection to refugees. This increased attention to accountability has been criticised for delivering more upward than downward accountability, by focusing, for example, on how effectively, efficiently, or strategically UNHCR spends donor funding – or how it produces better domestic security in donor countries.²⁶ Importantly, the multiple purposes of accountability efforts are not only facilitated but also changed by technology.²⁷ Legal accountability, in this context, refers to the adjudication of violations (of human rights obligations) by judicial or quasi-judicial bodies accessible to asylum-seekers and refugees.²⁸ For refugee lawyers, this includes combining their work for their clients in the humanitarian protection system (adhering to professional standards and to the material and procedural requirements of the law) with their duty of care for their own operations. This entails minimising the chances of risk and harm, together with a duty of technological competence (see below on legal technology).

3. FROM REFUGEE LAW TO LAWYERING IN THE DIGITAL HUMANITARIAN SPACE: A KNOWLEDGE GAP

While the emergence of a "law of humanitarian action" is changing the role and activities of lawyers, so is the digital transformation. Struggles over data protection and privacy, surveillance, and data justice issues are developing. While there has been some attention to digital humanitarians and the politics and ethics of their expertise, less has been paid to the objectives and tasks of digital refugee lawyering. The

- 22 I here draw on K.L. Jacobsen & K.B. Sandvik, "Introduction: The Quest for an Accountability Cure", in K.L. Jacobsen & K.B. Sandvik (eds.), *UNHCR and the Struggle for Accountability: Technology, Law and Results-based Management*, Abingdon, Oxon, Routledge, 2016, 1–25.
- 23 G. Loescher, "UNHCR and the Erosion of Refugee Protection", *Forced Migration Review*, 10, 2001, 28–30.
- 24 United Nations High Commissioner for Refugees (UNHCR), *Emergency Handbook*, Geneva, UNHCR, 2015, 1.
- 25 Sandvik & Jacobsen (eds.), *UNHCR and the Struggle for Accountability*.
- 26 See, for example, M. Madianou, J.C. Ong, L. Longboan, & J.S. Cornelio, "The Appearance of Accountability: Communication Technologies and Power Asymmetries in Humanitarian Aid and Disaster Recovery", *Journal of Communication*, 66(6), 2016, 960–981.
- 27 K.L. Jacobsen & K.B. Sandvik, "UNHCR and the Pursuit of International Protection: Accountability Through Technology?", *Third World Quarterly*, 39(8), 2018, 1508–1524.
- 28 N.F. Tan & T. Gammeltoft-Hansen, "A Topographical Approach to Accountability for Human Rights Violations in Migration Control", *German Law Journal*, 21(3), 2020, 335–354.

following scoping exercise identifies gaps in knowledge to help clarify the nature of the problems and tasks outlined in the next sections.

Lawyering for social change is conceptualised by leading socio-legal scholars as “a form of advocacy that consciously [strives] to alter structural and societal impediments to equity and decency”; the term describes the activities of those “lawyers whose work is directed at altering some aspect of the social, economic and/or political status quo” and who believe that current societal conditions obstruct the full participation of and sufficient benefits to subordinated people.²⁹ As noted in the literature, lawyering for refugees includes a plethora of approaches beyond litigation on RSDs and asylum procedures: it includes lawyering for community development, grassroots lawyering, poverty lawyering, and human rights lawyering.³⁰ However, while the professionalisation of the humanitarian sector has been examined,³¹ no attention has been given to important changes in the nature and scope of the work carried out by lawyers, one of the oldest professional groups involved in the humanitarian sector. The literature on lawyers specialising in international humanitarian law focuses on the “humanitarian lawyer as colonialist,”³² on the role of lawyers in the war on terror,³³ and on how lawyers contribute to the ideological production of international and transnational justice.³⁴ Humanitarian lawyering, let alone the implications of “digital humanitarian lawyering,” remain little discussed.

For problems arising from digitisation and digital technologies to become an area for refugee lawyers, whether regarding manufacturing, malfunctioning, design, training, human error, or responsibility for cyber due diligence, they must be recognised and described as a legal injury. Somebody or something must be blamed, i.e. held responsible and something – redress, compensation, the right to appeal – must be claimed.³⁵ This suggests that problem definitions are important for how legal problems are identified, represented, and litigated. The burgeoning scholarship on the use of digital tools in aid (humanitarian technology and innovation) therefore provides useful pointers to what digital refugee lawyering involves. Much of this scholarly work has focused on the perils of digital tools and their capacity to cause new

29 L.G. Trubek, “Embedded Practices: Lawyers, Clients, and Social Change”, *Harvard Civil Rights-Civil Liberties Law Review*, 31(2), 1996, 412.

30 See, for example, G. Verdirame, B.E. Harrell-Bond, Z. Lomo, H. Garry, & A. Sachs, *Rights in Exile: Janus-faced Humanitarianism*, vol. 17, New York; Oxford, Berghahn Books, 2005; the activities of the NRC ICLA legal aid project, Digital Future for Legal Assistance; the Refugee Law Project in Kampala, Uganda; or the activities of AMERA International.

31 E. James, “The Professional Humanitarian and the Downsides of Professionalisation”, *Disasters*, 40(2), 2016, 185–206.

32 F. Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’”, in A. Orford (ed.), *International Law and Its ‘Others’*, Cambridge, Cambridge University Press, 2005, 265–317.

33 N.K. Modirzadeh, “Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance”, *Harvard National Security Journal*, 5(1), 2014, 225.

34 R. Levi & J. Hagan, “Lawyers, Humanitarian Emergencies and the Politics of Large Numbers”, in Y. Dezalay & B. Garth (eds.), *Lawyers and the Construction of Transnational Justice*, Abingdon, Oxon, Routledge, 2011, 13–47.

35 W.L.F. Felstiner, R. L. Abel, & A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .”, *Law and Society Review*, 15(3/4), 1980, 631–654.

risks, harms, and vulnerabilities; it has also assessed how digital “solutions in need of problems” shape grant-making and staff allocations as well as thematic and process-oriented trajectories. It includes a substantial literature on paradigm changes (the dangers of “humanitarian technology,”³⁶ “digital humanitarianism,”³⁷ and “humanitarian innovation”³⁸); work on specific hardware and software (big data,³⁹ blockchain,⁴⁰ biometrics,⁴¹ smartphones⁴²); and the role of data in decision-making and resource allocation.⁴³ In sum: there is an increasing tendency of the humanitarian system to frame protection issues according to their amenability to technological solutions. Accordingly, refugee lawyers must figure out how the digital transformation shapes the problems they work on – as well as how they should deal with these problems and, while doing so, how they should relate to and communicate with their clients.

4. UNDERSTANDING NEW CHALLENGES: CLUSTERS OF RISK

What types of digital risks are there, and what is the role of law and lawyers in dealing with them? Digitisation and the integration of new technology create risks – and harms – which can not only compromise existing legal rights and procedural guarantees but also threaten the integrity of refugee protection in new ways. This article suggests that refugee lawyering must deal with three clusters of risks: general risks;

- 36 K.B. Sandvik, et al. “Humanitarian Technology: A Critical Research Agenda”, *International Review of the Red Cross*, 96(893), 2014, 219–242; K.L. Jacobsen, *The Politics of Humanitarian Technology: Good Intentions, Unintended Consequences and Insecurity*, Abingdon, Oxon, Routledge, 2015; R. Read, B. Taithe, & R.M. Ginty, “Data Hubris? Humanitarian Information Systems and the Mirage of Technology”, *Third World Quarterly*, 37(8), 2016, 1314–1331.
- 37 P. Meier, *Digital Humanitarians: How Big Data Is Changing the Face of Humanitarian Response*, Abingdon, Oxon, Routledge, 2015; R. Burns, “Moments of Closure in the Knowledge Politics of Digital Humanitarianism”, *Geoforum*, 53, 2014, 51–62; M. Duffield, “The Resilience of the Ruins: Towards a Critique of Digital Humanitarianism”, *Resilience* 4(3), 2016, 147–165.
- 38 T. Scott-Smith, “Humanitarian Neophilia: The ‘Innovation Turn’ and Its Implications”, *Third World Quarterly*, 37(12), 2016, 2229–2251; K.B. Sandvik, “Now Is the Time to Deliver: Looking for Humanitarian Innovation’s Theory of Change”, *Journal of International Humanitarian Action*, 2(1), 2017, 1–11.
- 39 R. Burns, “Rethinking Big Data in Digital Humanitarianism: Practices, Epistemologies, and Social Relations”, *GeoJournal*, 80(4), 2015, 477–490; F. Mulder, et al. “Questioning Big Data: Crowdsourcing Crisis Data Towards an Inclusive Humanitarian Response”, *Big Data & Society*, 3(2), 2016, 1–13.
- 40 G. Coppi & L. Fast, *Blockchain and Distributed Ledger Technologies in the Humanitarian Sector*, HPG Commissioned Report, 2019, available at: <https://odi.org/en/publications/blockchain-and-distributed-ledger-technologies-in-the-humanitarian-sector/> (last visited 9 Apr. 2021); M.F.N. Franke, “Refugees’ Loss of Self-Determination in UNHCR Operations Through the Gaining of Identity in Blockchain Technology”, *Politics, Groups, and Identities*, 2020, 1–20, available at: <https://doi.org/10.1080/21565503.2020.1748069>.
- 41 K.L. Jacobsen, “Experimentation in Humanitarian Locations: UNHCR and Biometric Registration of Afghan Refugees”, *Security Dialogue*, 46(2), 2015, 144–164; G. Hosein & C. Nyst, “Aiding Surveillance: an Exploration of How Development and Humanitarian Aid Initiatives are Enabling Surveillance in Developing Countries”, 2013, available at: SSRN 2326229.
- 42 K. Crawford & M. Finn, “The Limits of Crisis Data: Analytical and Ethical Challenges of Using Social and Mobile Data to Understand Disasters”, *GeoJournal*, 80(4), 2015, 491–502; L. Taylor, “No Place to Hide? The Ethics and Analytics of Tracking Mobility Using Mobile Phone Data”, *Environment and Planning D: Society and Space*, 34(2), 2016, 319–336.
- 43 L. Fast, “Diverging Data: Exploring the Epistemologies of Data Collection and Use among Those Working on and in Conflict”, *International Peacekeeping*, 24(5), 2017, 706–732.

risks that compromise the protection of individuals, protection infrastructure and protection processes in themselves; and the risk created by refugee lawyering. This means refugee lawyers must not only address risks posed to their clients but also recognise how technology makes lawyers themselves sources of risk.

4.1. General risks and risks specific to humanitarian action

On a conceptual level, this type of risk analysis has implications for how we think about the client as a protected subject. The digital transformation of international protection also means that of being visible and consenting to become a data subject – a refugee must physically come forward to register and agree to have a great deal of personal and sensitive data recorded, stored, and shared – have become requirements for being registered as a refugee, receiving aid (for example biometric banking), and having one's claim for a durable solution processed. The use of digital technologies creates corresponding “digital bodies” – images, information, biometrics, and other data stored in digital space – that represent the physical bodies of populations affected by conflict and natural hazards, but over which they have little control. Refugee lawyers need to understand this double risk – to the physical body as well as to the digital body, and the interplay between the two – if they are to identify injury and properly articulate a claim for remedy and protection.⁴⁴

Humanitarians, including refugee lawyers, get hacked and are targets for cybercriminals. The general risks arising from technological innovation and digitisation affect the refugee management system, along with everyone else in the international community: they include the potential for data misuse and cyber/information data security breaches leading to identity theft, or theft, destruction, or manipulation of data.⁴⁵ In addition, given the fraught nature of forced displacement, they also have a political component. Cyberspace has always been a site for national interest politics and is associated with an ever-growing military and civil capacity for mass surveillance.⁴⁶ Because of the properties of humanitarian cyberspace, humanitarians have been enrolled – voluntarily, knowingly, or unwittingly – in digital conflicts. As actors such as UNHCR and the World Food Programme (WFP) become data hoarders through their new social protection and digital payment programmes, data and cybersecurity challenges affecting the individual digital bodies of beneficiaries will become more frequent. With respect to cyber-attacks against the UNHCR for example, once databases are created, they invariably become targets for criminal, State, and armed

44 For the concept of the digital body, see K.B. Sandvik, “Digital Dead Body Management (DDBM): Time to Think It Through”, *Journal of Human Rights Practice* 12.2 (2020), 428–443.

45 K.B. Sandvik, “Insecurity in the Humanitarian Cyberspace: A Call for Innovation”, *ALNAP Blog*, 3 May 2016, available at: <https://www.alnap.org/blogs/insecurity-in-the-humanitarian-cyberspace-a-call-for-innovation> (last visited 9 Apr. 2021).

46 There is a vast literature on surveillance capitalism, and also on surveillance humanitarianism, for example, recent discussions on cash, see P. Currión, “The Case Against Cash”, *The New Humanitarian*, 22 Feb. 2021, available at: <https://www.thenewhumanitarian.org/opinion/2021/2/22/the-case-against-humanitarian-cash> (last visited 9 Apr. 2021); P. Devidal, “Cashless Cash: Financial Inclusion or Surveillance Humanitarianism?”, *Humanitarian Law & Policy*, 2 Mar. 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/03/02/cashless-cash/> (last visited 9 Apr. 2021).

actors.⁴⁷ On a much smaller scale, the same is potentially true for the operating systems and client files of refugee lawyers.

Risks also arise from the type of moral economy humanitarian aid trades in, giving licence to entrepreneurs, start-ups, and tech companies who want to “do good” by testing their products in humanitarian contexts. Together with Sean Martin McDonald and Katja Lindskov Jacobsen, I have argued that experimental innovation in the testing and application of new technologies in humanitarian contexts can contribute to unethical, illegal, and ineffective practices that result in increased harm and vulnerability for the humanitarian subjects involved, and potentially for the humanitarian actors too. These consequences can be direct or indirect. Risk can result from both the failure and the success of such experiments. Risk can result from individual harms, which are exacerbated by their relationship to larger underlying trends in humanitarian aid. Risk can involve, for example, the violation of privacy through the collection of identifiable personal information, commercial gains obtained from suspending restrictions on testing technological products on people, or from the distribution of resources.⁴⁸ From the perspective of refugee law, mistakes, malfunctions, or abuse of a biometric registration process or biometric data can result in the rejection of a claim for refugee status, for example, because of mistaken identity.

To sum up, for refugee lawyers, the challenge is not only to protect clients against digital harms by international actors, but also to protect them from themselves, by making sure that breaches and cyberattacks against the legal practice do not compromise clients’ security or their chances of success vis-à-vis UNHCR and the host State.

4.2. Risks arising from digital protection infrastructures: the rise of PRIMES

Because of the demand for legibility and the need to provide financial and political accountability to donors and host States (through statistics and profiles of Individual Cases), international humanitarian organisations, including UNHCR, are building large databases containing enormous amounts of beneficiary data.⁴⁹ While the platforms are iterations of previous databases and results-based management frameworks, much remains unclear about how they will work, how data will travel, who will be able to access it, how it will be stored and protected, how individuals can access their own data, and what purposes these systems will ultimately serve.⁵⁰

47 B. Parker, “EXCLUSIVE: The Cyber-Attack the UN Tried to Keep under Wraps”, *The New Humanitarian*, 29 Jan. 2020, available at: <https://www.thenewhumanitarian.org/investigation/2020/01/29/united-nations-cyber-attack> (last visited 9 Apr. 2021).

48 K.B. Sandvik, K.L. Jacobsen, and S.M. McDonald, “Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation”. See also P. Molnar, “Technology on the Margins: AI and Global Migration Management from a Human Rights Perspective”, *Cambridge International Law Journal*, 8(2), 2019, 305–330.

49 This section draws on discussions of PRIMES in K.B. Sandvik, “The Digital Transformation of Refugee Governance”, in C. Costello, M. Foster, and J. McAdam (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, OUP, 2021, 1007–1025.

50 B. Parker, “EXCLUSIVE: Audit Exposes UN Food Agency’s Poor Data-Handling”, *The New Humanitarian*, 18 Jan. 2018, available at: <https://www.thenewhumanitarian.org/news/2018/01/18/exclusive-audit-exposes-un-food-agency-s-poor-data-handling> (last visited 9 Apr. 2021).

In 2018, UNHCR introduced the Population Registration and Identity Management EcoSystem (PRIMES), which encompasses all interoperable UNHCR registration, identity management, and caseload management tools and applications. The scope of PRIMES is immense: it incorporates existing UNHCR tools such as the Profile Global Registration System (proGres, a case management software application), the Biometric Identity Management System (BIMS), the Global Distribution Tool (GDT), the Rapid Application (RApp), IrisGuard and Refugee Assistance Information System (RAIS), and will contain tools developed in the future. PRIMES is designed to work in offline, online, and Global System for Mobile Communication (GSM) environments and will be interoperable with IT systems used by governments and partner organisations such as the World Food Programme's SCOPE and the United Nations Children's Fund's (UNICEF's) PRIMERO. PRIMES will also move data from local databases worldwide and collect all UNHCR data in a single database that can be accessed via the web.⁵¹

As a framework influencing how phenomena are captured and represented as data, the database is a key site for the production and materialisation of social meaning. It reflects the values, norms, epistemologies, social relations, and power that influence how people interact with the world and each other.⁵² How can responsibility be assigned if something goes wrong – how can attributions for lack of capacity, wrongful conduct, or technological or manufacturing error be made, for example – and how should refugee lawyering go about formulating legal claims? A further consideration is that, when protection procedures are contained in digital structures, refugee populations will suffer if there is unstable or inadequate electricity supply, internet connectivity, or mobile networks, or little digital literacy and access.

So far, these databases and the type of knowledge management and control they enable have received little scrutiny from refugee law scholars, as have questions related to the contractual agreements and legal frameworks governing the development and operation of these platforms and the extent of the duty of care. For example, an important issue is how individual refugees can ask for corrections of flawed information or updates reflecting changes in their personal circumstances, and how such requests can be vetted to prevent fraudulent claims. The management of one's digital identity and digitised life story is crucial,⁵³ yet this is a right that is hard to claim or monitor.⁵⁴ Relationships between commercial actors and the humanitarian sector are often invisible, making accountability difficult to demand.⁵⁵

51 Sandvik, "The Digital Transformation of Refugee Governance".

52 R. Burns & G. Wark, "Where's the Database in Digital Ethnography? Exploring Database Ethnography for Open Data Research", *Qualitative Research*, 20(5), 2019, 598–616.

53 For example, as UNHCR transfers data of prospective resettlement candidates.

54 If the database is closed, the risk is that databases will be *de facto* abandoned with data not fully destroyed and what remains being inadequately protected. New systems also interact with non-humanitarian systems in ways that can lead to humanitarian mission creep and function creep. A further risk is "vendor-lock in": the risk UNHCR will become dependent on a particular provider, including as regards the control of personal data processed by proprietary systems. Sandvik, "The Digital Transformation of Refugee Governance".

55 As observed by Lemberg-Pedersen and Haioty, while the extraction of data from displaced quasi-State-citizens may be problematic in terms of organisations' downward accountability, the same practices are also a highly profitable market for the ICT and biometrics sector. M. Lemberg-Pedersen & E. Haioty,

These developments require refugee lawyers and refugee law scholars to rethink how and where one looks for problems, which stakeholders are put under critical and how one can assess the linkages between due diligence defaults, deficiency, and malfunctions at the corporate end – and protection failures at the humanitarian end.⁵⁶

4.3. Operational and strategic risks to lawyering posed by legal tech

A third type of risk results from the rise of “legal tech” in the domain of refugee law, that is, the use of technology, software, and computer analytics to provide legal services and justice. Legal tech produces important changes in legal practice, legal institutions, and the legal profession. While the database is an external source of problems and concerns material and procedural aspects of refugee lawyering, legal tech is a potential internal source of problems.⁵⁷

Digitisation processes change our understanding of legal problems and what can be considered appropriate legal responses. In the context of legal tech, digitisation refers to the collection, conversion, storage, and sharing of data and the use of digital technologies (e.g. mobiles, tablets, drones, biometric devices, computational applications in artificial intelligence, bespoke digital platforms, and blockchain technology) to collect, analyse and disseminate information about claimants and plaintiffs, the decision patterns of judges, case law and emergent legal problems. In situations of forced displacement, this information would likely also involve the political and cultural context and historical violence and patterns of displacement. The collection of this type of data is particularly significant for how lawyers think about their accountability to refugee clients. As sensitive data passes from clients to lawyers, and as more data (statistical, geospatial, or concerning telecommunications or digital forensics) is enrolled to bolster clients’ claims, for example, of political activism or gender-based violence – or of a “safe” risk profile, the lawyers managing this stored information are becoming targets for attack, and thus pose further threats to their clients.

Legal tech represents a disruptive innovation because it changes the time required for knowledge production and its cost, scope, and management in law.⁵⁸ In a resource-poor and time-constrained field such as refugee law, legal technology can bring down costs, enhance effectiveness and provide better services. Current transnational refugee litigation depends on digital tools. However, we should recognise

“Re-Assembling the Surveillable Refugee Body in the Era of Data-Craving”, *Citizenship Studies*, 24(5), 2020, 607–624.

56 Sandvik, “The Digital Transformation of Refugee Governance”.

57 As shrewdly observed by an anonymous reviewer, legal aid providers and refugee lawyers may be even more vulnerable to the issues faced by UNHCR with respect to PRIMES, than is UNHCR itself. For example, they are more likely to lack resources, expertise, and the scale needed to implement solutions. More contextualised analysis of how this relationship operates is needed.

58 The academic literature on legal technology is heavily U.S.-centric and focused on progress narratives about technology, ways legal tech can improve lawyering and how innovative legal tech may be the answer to many access to justice challenges. D. Orozco, “The Use of Legal Crowdsourcing (Lawsourcing) to Achieve Legal, Regulatory, and Policy Objectives”, *American Business Law Journal*, 53(1), 2016, 145–192; J. Sobowale, “How Artificial Intelligence Is Transforming the Legal Profession”, *ABA Journal*, 1 Apr. 2016, available at: https://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession (last visited 9 Apr. 2021); C. Johnson, “Leveraging Technology to Deliver Legal Services”, *Harvard Journal of Law & Technology*, 23(1), 2009, 259–282.

that the general risks associated with legal tech proliferate in situations of forced displacement and humanitarian crisis. Legal technology is neither neutral nor apolitical: much of it has been developed and trained on U.S. data and reflects the rationalities, processes, and values of common law systems. Minor technical decisions in its design and implementation can create ripple effects in the direct and distributive effects (on domestic legal cultures) of legal technology, given the likelihood of rapid and unreflective uptake in legal systems lacking capacity and resources. This means that we need a much better understanding of the costs and trade-offs involved in the transplantation of legal tech.⁵⁹

As observed in studies of legal technology and access to justice, social stratification and bias also matter enormously.⁶⁰ We have already discussed the implications of the digital wrapping of protection procedures. Along with these, *access* to legal assistance is increasingly impacted by the digital divides between nations, regions, and demographics (class, gender, ethnicity) which arise from limited access to ICT, because of lack of connectivity, inability to afford gadgets or the data power, software and cybersecurity protections required for using legal tech safely and effectively – or because of heavily controlled/censored access to the internet or specific software. There are consequent gaps in digital literacy that leave swathes of the population, civil society, or legal profession at a disadvantage regarding the ability to critically engage with, optimise or resist the use of legal technology to access refugee law and protection mechanisms. The developing legal design community emphasises the need for user-centred innovation.⁶¹ While this is undeniable, better innovation will not resolve what are essentially political conflicts over participation, distribution, and social justice. The main stakeholders seeking to globalise legal technology are market actors, not governments. It should be recognised that this way of framing access to justice problems prioritises solutions focusing on technological innovation and legal design, as well as the interests of technology stakeholders.

5. IMPLICATIONS FOR LEGAL KNOWLEDGE PRODUCTION

Law is generally seen as a structured, hierarchical system of knowledge separate from value-laden social and political life.⁶² As noted in the introduction, the “legalese” (or principled) approach adopted by refugee lawyers has been criticised for being distant from the lifeworld of refugees and political realities, and lacking awareness how

59 This is a general question of social justice which includes focusing on agenda shaping in the legal tech context, how research on legal tech and the ethics of legal tech is funded, how expertise is constituted and who gets a seat around the table, and the politics of the interests of expertise and the motivations of academics and practitioners involved in this debate. See, for example, recent debates around legal tech and empowerment. T. Walker, “Technology and Legal Empowerment around the World”, *The Engine Room*, 28 Jan. 2019, available at: <https://www.theengineroom.org/tech-and-legal-empowerment-around-the-world/> (last visited 9 Apr. 2021).

60 The Law Society, “Technology, Access to Justice and the Rule of Law: Is Technology the Key to Unlocking Access to Justice Innovation?”, *The Law Society*, 16 Sep. 2019, available at: <https://www.lawsociety.org.uk/topics/research/technology-access-to-justice-and-the-rule-of-law-report> (last visited 9 Apr. 2021).

61 M. Hagan, *Law by Design*, available at: <https://www.lawbydesign.co/> (last visited 9 Apr. 2021).

62 A. White, “Geographies of Asylum, Legal Knowledge and Legal Practices”, *Political Geography*, 21(8), 2002, 1055–1073.

power shapes legal interpretations and the meaning of principles – or even the definition of refugees.⁶³ However, at present, the construction and production of knowledge about law, and its use in refugee management are rapidly changing – with implications for individuals’ rights and refugee lawyering.

On one level, little is new. Responding to changing views of accountability, effectiveness, economic efficiency, and national security, humanitarian knowledge production practices are constantly in flux. New Public Management brought a host of results-based approaches, such as log frames and indicators. “Quantification culture” focusing on “quantified truths” drove a demand for measurements (how many refugees in what categories, how many vulnerable dependents, how many people in need of shelter or extra nutrition) which defined social life as something that could be counted⁶⁴ and classified. Classification – what Ian Hacking calls “making up people”⁶⁵ is a matter of life and death in the humanitarian space: in medical triage, the assignment of urgency decides how patients are treated. Recognition and differentiation are also key tools for distributing limited legal resources.⁶⁶

The digital transformation changes the sites of production of legal knowledge and expertise. From the perspective of refugee lawyering, we must scrutinise the circulation of power and expertise in emergent digital infrastructures and the socio-technical work necessary to acquire, process, store and use data, as well as to study the power relations embedded in these processes.⁶⁷ In critical data studies, there has recently been condemnation of the analytical fatalism surrounding datafied knowledge and the fetishisation of the “black box.”⁶⁸ Many scholars in the field of refugee and migration studies have responded to the call to demystify datafied knowledge.⁶⁹ Our challenge is now to link these analytical contributions to the analysis of refugee law.

5.1. The rise of social protection: what and where is the law?

Social protection systems are “increasingly considered a medium- and long-term policy mechanism” in emergency situations, including displacement. Information sharing, standardised data collection, common database, and data sharing agreements are needed for the successful delivery and management of services. While the humanitarian actors’ engagement is based on needs and impartiality, it involves collaboration

63 Chimni, “The Geopolitics of Refugee Studies: A View from the South”.

64 S.E. Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking*, Chicago, IL, University of Chicago Press, 2016.

65 I. Hacking, *The Social Construction of What?*, Cambridge, MA, Harvard University Press, 1999.

66 For example, the international legal protection of internally displaced people, victims of rape, and climate refugees continues to be contested. In third country resettlement, cases are classified as normal, urgent, or emergency.

67 A. Schwittay & P. Braund, “Participation 2.0? Crowdsourcing Participatory Development @ DFID”, *Information Technologies & International Development*, 15, 2018, 1–15.

68 N. Bonde Thylstrup, M. Flyverbom, & R. Helles, “Datafied Knowledge Production: Introduction to the Special Theme”, *Big Data & Society*, 6(2), 2019, 1–5.

69 See also A. Masso & T. Kasapoglu, “Understanding Power Positions in a New Digital Landscape: Perceptions of Syrian Refugees and Data Experts on Relocation Algorithm”, *Information, Communication & Society*, 23(8), 2020, 1203–1219; M. Cheesman, “Self-Sovereignty for Refugees? The Contested Horizons of Digital Identity”, *Geopolitics*, 2020, 1–26. doi:10.1080/14650045.2020.1823836.

with national authorities and private entities which may have “different drivers or motivations,” such as the development of national identity or welfare programmes.⁷⁰

This article argues that the turn to social protection and integration into digital protection infrastructures (see above on PRIMES) may cause a shift away from legal protection. An example of this is the Vulnerability Assessment Framework (VAF), which was launched in Jordan in 2014 to develop a “robust model” to map the vulnerabilities of the Syrian non-camp population.⁷¹ VAF was owned by UNHCR, the World Food Programme, and UNICEF. VAF – which had several regional counterparts, such as the Egypt Vulnerability Assessment of Syrian Refugees (Evar) and the Vulnerability Assessment of Syrian Refugees in Lebanon (VaSyr), was a proxy means-testing instrument intended to enable humanitarian organisations to optimise the use of resources. Its designers hoped that VAF would do this by categorising and ranking refugees, thus enabling the most “vulnerable” to be identified and targeted. Data on VAF indicators were to be collected by UNHCR at the registration stage, but vulnerability was to be identified mainly through the “Home Visit Form,” a vulnerability assessment questionnaire to be filled in during household visits by UN agencies and their implementing partners, and then entered into the Refugee Assistance Information System (RAIS), a part of PRIMES. The information gathered includes the estimated ability of a household to cover its monthly expenses, the number of dependents, its housing conditions, and access to healthcare. VAF was promoted as an effective way of identifying and ranking demographic vulnerability through a “vulnerability score,” with one representing low vulnerability, two mild, three moderate, and four high/severe. Quantifiable data were created through home visits and qualitative assessments, which were then processed algorithmically, generating a vulnerability score from one to four. This score was a moving target, dependent on the total vulnerability score of the population, and while not officially stated, a score of three or four was required to receive assistance.

Programmes such as VAF shift the focus from legal protection (including legal language, rights, and legal capacity) to social protection, where the encounter is not face-to-face between individual refugees and protection officers (and interpreters), but between refugee households “performing” vulnerability and one or several UNHCR and NGO employees. Given the miniscule number of refugees who manage to get resettled in a third country, the vulnerability assessment becomes a key factor in the protection received by refugees. RSD determination and resettlement procedures are premised on legal language and legal principles and, at least in theory,

70 According to a United Nations, Food and Agriculture Organization (FAO) and UNICEF conference statement on a social protection event: “The conference also highlighted the opportunity for humanitarian responses to help create or expand existing social protection systems.” Social Protection and Human Rights, “FAO and UNICEF Host International Conference on Social Protection, Fragility and Forced Displacement”, *Social Protection and Human Rights*, available at: <https://socialprotection-humanrights.org/unicef-hosts-international-conference-social-protection-fragility-forced-displacement/> (last visited 9 Apr. 2021). Social protection schemes may also increase surveillance of displaced populations in the interests of national security. C.Q. Carrasco, “Humanitarian Engagement in Social Protection: Implications for Principled Humanitarian Action”, *Humanitarian Law & Policy*, 11 Feb. 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/02/11/humanitarian-engagement-social-protection/> (last visited 9 Apr. 2021).

71 This example is based on Sandvik, “The Digital Transformation of Refugee Governance”.

on human rights and due process values. By contrast, VAF is based on scores fed into a socio-technical system that calculates final scores according to a larger matrix that considers living conditions and the resources available for material support and is adjusted for political pressures exerted on UNHCR by the State, other humanitarian actors, and donors. As critics have pointed out for many years, encounters between refugees and UNHCR protection staff involve enormous power differences and a lack of due process and rights-based approaches.⁷² However, from the rule of law perspective, the de facto replacement of the aspirations of international refugee law by proxy means welfare testing raises many new questions.

5.2. From legality to “cultures of data protection”?

For refugee lawyers, the digital transformation changes not only the meaning and pathways of accountability, but also the legal and policy frameworks through which accountability may be obtained. An important factor is how and where the actors are placed in international law, with regional frameworks becoming increasingly important in refugee protection. In Europe, the General Data Protection Regulation (GDPR) enshrines the key principle of data protection law: the collection and processing of displaced individuals’ data must have a legal basis.⁷³ However, whereas the GDPR applies to UNHCR’s European partners, intergovernmental organisations, such as the UN, claim immunity from the GDPR and other such data regulations. Thus, while UNHCR processes the personal data of millions of refugees and other people of concern, as an international body, it has privileges and immunities. This means it is subject neither to domestic laws nor to such regional frameworks as the GDPR. Instead, its legal basis is UNHCR’s mandate function to protect people of concern and facilitate durable solutions and the 2015 UNHCR Data protection policy (DPP).⁷⁴

A 2019 evaluation notes that UNHCR has “rich and meaningful data collected on persons of concern, their protection risks, services and assistance provided to them, and their access to solutions, socioeconomic improvements in their lives, and the

72 G. Verdירה, B.E. Harrell-Bond, & A. Sachs, *Rights in Exile: Janus-faced Humanitarianism*; K.B. Sandvik, “Blurring Boundaries: Refugee Resettlement in Kampala—Between the Formal, the Informal, and the Illegal”, *PoLAR: Political and Legal Anthropology Review*, 34(1), 2011, 11–32; M. Janmyr, “UNHCR and the Syrian Refugee Response: Negotiating Status and Registration in Lebanon”, *The International Journal of Human Rights*, 22(3), 2018, 393–419.

73 Regulation (EU) 2016/679 of the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/64/ED (General Data Protection Regulation) [2016] OJ L119/1 (GDPR), 27 Apr. 2016.

74 United Nations High Commissioner for Refugees (UNHCR), *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, UNHCR, May 2015, available at: <https://www.refworld.org/docid/55643c1d4.html> (last visited 9 Apr. 2021) (DPP). The basic principles of the DPP are: (1) legitimate and fair processing, (2) purpose specification, (3) necessity and proportionality, (4) accuracy, (5) respect for individual rights, (6) confidentiality, (7) security, and (8) accountability and supervision (through data controllers, data protection focal points and data processors, and a Data Protection Officer (DPO) at UNHCR Headquarters). The policy takes a rights-based approach and emphasises that UNHCR data and information activities will adhere to high international information and cybersecurity standards, including the concept of privacy, by design and by default. See also United Nations High Commissioner for Refugees (UNHCR), *Data Transformation Strategy 2020–2025*, UNHCR, Sep. 2019, available at: <https://www.unhcr.org/5dc2e4734.pdf> (last visited 9 Apr. 2021).

contexts in which they live.”⁷⁵ The 2019 evaluation never considers UNHCR’s data governance in terms of regulation or legality –there is no mention of law, legal norms, or sanctions. Rather, it recommends that UNHCR should improve its data governance by establishing a data management “rule book” that specifies the norms and conventions that should govern and align the organisation’s data, stipulating the parameters for data collection, processing, protection, storage, analysis, and use. The approach is seemingly very light touch: information and data management are a responsibility of all staff, yet it is noted that staff members’ confidence and ability to identify, manage, and analyse operational data varies widely. Similarly, according to UNHCR’s senior Data Protection Officer, there is a need to “establish an all-encompassing culture of data protection. There is a need to withstand internal and external pressure to compromise on data protection principles.”⁷⁶

5.3. A digital disappearance of vulnerability?

In the past, considerable criticism was directed at the lack of standardisation of legal processes. For example, credibility assessments in RSD – particularly with respect to vulnerability – were criticised for being dependent on personal judgment, difficult to review, and likely to vary from one decision-maker to another.⁷⁷ UNHCR has attempted to give credibility assessment a more objective and legalistic basis. The development of gender norms in international refugee law, such as specific categories to protect “women-at-risk” in the application of durable solutions, and specific procedures for dealing with vulnerable refugees, are significant achievements. However, today, there seems to be increasing tension between these achievements and the digital transformation of vulnerability assessments. If you analyse vulnerability based on algorithms that specifically identify and emphasise women’s experiences vulnerable, or, conversely, if your algorithms omit or deprioritise the lifeworld of young men, the outcome will impact the allocation of legal identities and material resources. This invisibility is being made ideologically legible according to a script that sees digitised vulnerability assessments as infallible and where what cannot be read as algorithmic knowledge cannot exist.⁷⁸

Finally, a lasting, transformative consequence of COVID-19 is likely to be the mediation of the production of knowledge through on-screen encounters. During spring 2020, the sudden halt of many aspects of international legal protection procedures meant that remote interviewing became the only way to process RSDs and handle resettlement cases.⁷⁹ This perhaps long-term institutionalisation of remoteness requires us to go beyond previous critiques of remote management to decide its consequences for international refugee protection. The difficult conditions under which

75 S. Ladek, N.A. Zamora, S. Cameron, S. Green, & C. Procter, *Evaluation of UNHCR’s Data Use and Information Management Approaches*, UN doc ES/2019/07, UNHCR, available at: <https://www.unhcr.org/5dd4f7d24.pdf> (last visited 9 Apr. 2021).

76 *ibid.*

77 Kagan, “Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination”.

78 For a discussion see K.B. Sandvik, “Technology, Dead Male Bodies, and Feminist Recognition: Gendering ICT Harm Theory”, *Australian Feminist Law Journal*, 44(1), 2018, 49–69.

79 United Nations High Commissioner for Refugees (UNHCR), *Practical Recommendations and Good Practice to Address Protection Concerns in the Context of the COVID-19 Pandemic*, UNHCR, 15 Apr. 2020, available at: <https://data2.unhcr.org/en/documents/details/75453> (last visited 9 Apr. 2021).

remote interviewing takes place mean that we must rethink “vulnerability” as a protection category: due to the sensitivities involved, UNHCR has cautioned against interviewing vulnerable refugee remotely, because of risks to the interviewee and threats to the integrity of the process. The problem here is policy and politics, not technology. The technical consequence, however, may be the loss of access to protection for the most vulnerable.

6. CONCLUSION

This article has attempted to describe a set of conceptual problems for digital refugee lawyering in the hope of inspiring further discussion and analysis. As such, it is a tentative exercise. The basic assumption is the need for a better understanding of how the *framing of problems* in refugee law leads to problematisations that are amenable to technological innovation and intervention and that further the interests of technology stakeholders.

In future, we need to go beyond issues of risk and the displacement of legal knowledge to develop a better appreciation of what good practice for digital refugee lawyering looks like in the context of the digital transformation.⁸⁰ In the United States, there is a growing normative framework for professional standards, which include a duty of technological competence⁸¹ as well as identifying new forms of malpractice.⁸² Central topics include changes in the lawyer-client relationships,⁸³ particularly in relation to the duty of care and due diligence for the protection of confidentiality⁸⁴ and defence against intrusion⁸⁵; competence in e-discovery⁸⁶ and responsibility for the organisation of services.⁸⁷ This also involves due diligence responsibility for “non-lawyer” assistance,⁸⁸ cyber security protection, and vendor provision of cloud

80 A.L. Purkey, “A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations”, *Journal of Refugee Studies*, 27(2), 2013, 260–281.

81 R. Ambrogio, “This Week in Legal Tech: Ethics and Technology Competence”, *Above the Law*, 11 July 2016, available at: <https://abovethelaw.com/2016/07/this-week-in-legal-tech-ethics-and-technology-competence/> (last visited 9 Apr. 2021).

82 C. Hill, “Wolters Kluwer Faces Social Media Backlash as Malware Incident Sees It Go Offline”, *Legal Technology*, 9 May 2019, available at: <https://legaltechnology.com/wolters-kluwer-faces-social-media-backlash-as-malware-incident-sees-it-go-offline/> (last visited 9 Apr. 2021).

83 S. Blaustein, M.L. McLellan, & J.A. Sherer, “Digital Direction for the Analog Attorney-Date Protection, E-Discovery, and the Ethics of Technological Competence in Today’s World of Tomorrow”, *Richmond Journal of Law & Technology*, 22(4), 2016, 10; P.A. Thomas, “Online Legal Advice: Ethics in the Digital Age [comments]”, *St. Mary’s Journal on Legal Malpractice & Ethics*, 4, 2014, 440–480.

84 M.S. Mulqueen, “ABA Provides Ethical Advice to Protect Electronic Communication”, *American Bar Association*, 1 Aug. 2017, available at: <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2017/aba-provides-ethical-advice-to-protect-electronic-communication/> (last visited 9 Apr. 2021).

85 P. Domnick, “Tip of the Iceberg: Assessing Ethics and Technology”, *Law Technology Today*, 15 Nov. 2018, available at: <https://www.lawtechnologytoday.org/2018/11/assessing-ethics-and-technology/> (last visited 9 Apr. 2021).

86 “Technology Ethics for Attorneys”, *Legal Fuel*, 25 Jan. 2019, available at: <https://legalfuel.com/wp-content/uploads/2019/01/Webinar-on-Technology-Competency-for-Attorneys-w-Tali-Clio.pdf> (last visited 9 Apr. 2021).

87 M.S. Mulqueen, “ABA Provides Ethical Advice to Protect Electronic Communication”.

88 “Due Diligence Considerations for Lawyers Evaluating Cloud Computing Service Providers”, *Legal Fuel*, March 2017, available at: <https://www.legalfuel.com/download/due-diligence-considerations-for-lawyers-evaluating-cloud-computing-service-providers/> (last visited 9 Apr. 2021).

computing services. Also of importance are the developing norms addressing lawyers' and judges' use of social media in court and beyond.^{89,90} With all the caveats that come with legal transplants, this emergent ethical roadmap for legal technology also provides pointers for refugee lawyering.

Finally, at its core, refugee lawyering is a deeply ideological form of lawyering. Accountability to clients involves participation, trust – and some degree of legal empowerment. Traditional refugee legal aid programmes have been based on meeting (legal) needs –and bringing greater participation and legal empowerment into refugee legal aid has been difficult.⁹¹ Nonetheless, we must now consider the need for techno-legal empowerment of refugees to ensure their access to justice. To achieve this, we need a much firmer grasp of how to facilitate and support the creation of techno-legal knowledge, that is, critical digital literacy, and the ability to make use of it.

89 C.B. Preston, "Lawyers' Abuse of Technology", *Cornell Law Review*, 103(4), 2017, 879–976.

90 For an extended version of this argument, please see K. B. Sandvik, "Is Legal Technology a New "Moment" in the Law and Development Trajectory?." *Antipode Online*, 2019. <https://antipodeonline.org/2019/12/04/legal-technology-law-and-development/>

91 M. Jones, "Legal Empowerment and Refugees on the Nile: The Very Short History of Legal Empowerment and Refugee Legal Aid in Egypt", *The International Journal of Human Rights*, 19(3), 2015, 308–318.