

THE RIGHT TO DIGNITY OF REFUGEES: A RESPONSE TO FLEUR JOHNS

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[Fleur Johns](#)' thesis about the increasing role of data in the verification of the condition of the world and how this impacts on international law is stimulating and bears reflection.¹ This is an extremely interesting and innovative approach to the issue of data and its role in state engagement with mass migration. From the perspective of a scholar on international refugee law, a number of issues arise as a result of the analysis. One of the contested aspects of mass migration and refugee protection is the inherent inconsistency between two ways of thinking about human rights—the first is the duty of (some) international organizations to protect human rights in a manner which elides human rights and humanitarian law, and the second is the right of the individual to dignity, the basis of all human rights according to the UN's Universal Declaration of Human Rights of 1949. The first enhances the claims of states to sovereign right to control their borders (mediated through some international organizations), while the second recognizes the international human rights duties of states and international organizations to respect the dignity of people as individuals (including refugees). Fleur is completely correct that human rights abuses are at the core of refugee movements. While there are always many people in a country who will stay and fight human rights abuses even when this results in their sacrifice, others will flee danger trying to get themselves and their families to places of safety; we are not all heroes. Yet, when people flee in more than very small numbers, state authorities have a tendency to begin the language of mass migration. The right to be a refugee becomes buried under the threat of mass migration to the detriment of international obligations. Insofar as mass migration is a matter for management, the right of a refugee is an individual right to international protection which states have bound themselves to offer.

The Language of Mass: What is Mass Migration?

It is extraordinary how quickly European states, for instance, are willing to deploy the language of mass migration. The arrival of only a few hundred or thousand more refugees than in the preceding year can trigger the language of mass and the mixing of refugee rights with migration abuses. The matter is not simply one of counting—how many people have moved and where; it is also a matter of perception by state officials regarding the numbers. Instead of the international law right to have one's circumstances considered individually, the language of mass means that people cease to be individuals with specific needs, entitlements, and demands—including an individual assessment of the merits of their claims—and instead become a group, irrespective of how varied they feel from one another. Often the individuals may be parts of very different ethnic groups, or political opponents to one another, but for the official watching “them,” they are mass migration.

In the face of this construction of mass migration (including of course both refugees and people who are not necessarily entitled to refugee protection in international law) from the individuals who one by one seek to escape the circumstances of their home state, authorities consider themselves entitled to take ever more invasive actions

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¹ Fleur Johns, [Data, Detection, and the Redistribution of the Sensible in International Law](#), 111 AJIL 57 (2017).

to count and know this mass. The mass does not enjoy privacy or even a right to data protection. Its component parts lose their individual rights to privacy both in the physical and biometric sense. They are often housed collectively with scant regard for their preferences or even their family units. Their bodies become subjects on which officials, even officials of international institutions, exercise their power: their biometric data is collected, in some cases even their DNA. It is stored in databases about asylum seekers and used for a wide range of purposes far beyond the formal consent of the individual and certainly without his or her knowledge. With so much biometric data about a class of persons who have been categorized as mass migration, the temptation to use the data is extreme. Making it available to law enforcement is one of the most banal examples. The right to privacy evaporates and state authorities claim exclusion of foreigners from constitutional rights to justify their actions.

International organizations use the language of good administration and protection of their subjects to justify interferences with their privacy. The language of protection always gives the advantage to the guarantor to the detriment of the person who is subject to the protection. The autonomy of the individual is lost as the protector makes decisions about the protectee. But human agency is hard to extinguish. As the refugee becomes ever more controlled by the protector, so a dynamic of conflict comes into being. As refugees try to take decisions for themselves that do not suit those who consider themselves entitled to protect them, so those in power find their refugees less and less credible. The trust inherent in the relationship at the start breaks down, and the guardians start mistrusting their subjects, a classic problem of relationships of dependence. However, the acquisition of personal data about the individual provides a powerful tool for the guardians to “catch out” their subjects and to prove to themselves (and anyone else who is interested) that their subjects are genuinely untrustworthy. Instead of a discussion about the needs of the people, a discourse of institutionalized disbelief sets in. The dehumanization of the refugees as bits of ambulatory biometric information can all too easily become the norm.

The power of the guardians is reinforced by the fact that they alone are feeding and housing the refugees. This situation of dependence is created because refugees are excluded from the labor market, refused work permits and thus reduced to beggars. Where refugees are entitled to fend for themselves in a situation of equality and identity documents, they usually do quite well, finding ways into the market and supporting their family members. Yet, those who become stuck in camps descend into the spiral of dependency on international organizations or states which includes a degradation of their privacy rights.

People into Objects: Six Transformations

Fleur uses the concept of tactile dimensions of the sensory economy as a way to understand this transformation of people into objects of international organizations. The alienation which is at the heart of her discussion is most elegantly examined. This is among the most interesting and revealing parts of the work.

Fleur suggests six transformations that are caused by the turn to more automated processing. These are first, the body is transformed into a site of data collection. As a result the agency of the refugee is denied. Secondly, refugees are deprived of physical contact with those who are managing them. Every contact is at a distance and mediated by machines, cameras, screening machines, etc. The emphasis has changed to detecting and monitoring the refugee body through technologies. Thirdly, the personal data that is culled from the body becomes the information that determines categories which become immutable, like the data on which they are based. Instead of the “murkiness and inflexibility” of group relations, the technological transformation provides the illusion of clarity and certainty regarding the establishment of groups. Fourthly, this sensory economy is framed by transactions about data—negotiated deals about data. The individual disappears into the data that UNHCR holds about him or her, which is determined to be more accurate than the body of the individual. The individual becomes subordinate to the data which is held about him or her. Fifthly, knowledge about the individual is created in one fleeting moment of collecting or harvesting of data which then provides the basis for mining of the data with the creation

of associations and relationships of which the individual may have no knowledge or opportunity to confirm or deny. Within the agency the concept of “good sense” use of data takes priority over the individual’s claim to his or her data. Finally, all the uncertainty inherent in the technologies is air brushed out of the equation of certainty of the data, which allows the agency to dismiss any alternative claims and narratives of the individual. The agency uses the terms of optimization and best performance as the common sense grounds for the transformation of the relationships.

What is at stake in the six transformations? I would suggest that the consequences are as follows: 1) the loss of a commitment to participation by the refugee in the process; 2) the loss of touch, the loss of the tactile; 3) the loss of judgments about the collective agency of these “populations”—the data searches not only dehumanize an individual, but as a result the individual is not seen as part of a network or grouping (familial or otherwise); 4) the loss of negotiation, and the focus on definitive and largely unexplained outcomes (automatically generated); 5) the loss of any reliance on good sense, good faith, prior knowledge, as well as the loss of thicker, more meaningful relations, as a result of the orientation around a singular, brief encounter memorized only in digital form; and 6) loss of uncertainty, and the (misplaced) confidence in the flawless performance of these automated processes (“the dazzle of technology”). The consequence for the refugee is a catastrophic dehumanization. The claims of the individual to the genuineness of his or her identity is buried by way of the transformations—there is no space to make a counter claim about a reality outside that provided by the technology; there is no human touch possible to take the sting of the technological allocation. The individual becomes no more than the body to which technical descriptions have been made. These descriptions are sustained because the individual is no longer entitled to the agency to establish his or her own identity based on the multiplicity of his or her experience beyond the technological description of his or her body.

Authority and Automaticity

The argument that Fleur is developing creates a correlation between a common sensorium and the authority of international law. The danger is the destruction of legal personality. The foundation of human rights is the right to dignity of the individual which is realized through the entitlement to legal personality. When individuals are subsumed into a mass in a manner designed to permit their treatment as a group designated by biometric data without acknowledgement of the legal personality of each individual, the authority of human rights law is diminished. Each individual ceases to be a rights holder before the authority of international organizations and states. When the refugee is diminished to a body described exclusively by technology his or her agency is severely impaired and with it his or her human right to legal personality. It has long been a premise of legal doctrine that automated processes endanger the authority of law. [The prohibition of automated decision making](#) is central to European human rights law and the core of the individual’s right to consent to the use of his or her data.² The transformation of the refugee into the sum of technologically extracted information about the body reduces decision making to an automatic process as the technology provides the data and the questions and answers are automatic from that. This is a dangerous framework which excludes fundamental rights, and it is egregious when applied to a vulnerable group such as refugees. When authority is no longer underpinned by human judgment but by automaticity there is no longer a place for legal personality or even more generally human rights law.

² Lee A. Bygrave, *Automated Profiling: Minding the Machine: Article 15 of the EC Data Protection Directive and Automated Profiling*, 17 COMPUTER L. & SEC. REV. 17 (2001).