Delmi

Policy Brief

2026:3

Artificial Intelligence and Asylum Decision-Making: Any Role for Human Rights Law?

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Artificial intelligence-supported decision-making will play a defining role in the future of migration, asylum, and border policy. There is a common assumption that AI can make decisions more efficient, which already influences the trajectory of asylum law. These developments are part of a new era toward automation and digitalization in public administration. However, asylum and migration are marked by certain specific features. Most notably, they concern vulnerable individuals facing the power of the state, and states traditionally have broad discretion in this field. For this reason, the EU Artificial Intelligence Act (EU AI Act) classifies the use of AI for immigration, asylum and border control as "high-risk".

In light of these developments, the following question arise:

To what extent are technologies of AI supported decision-making used in the context of asylum procedures, compatible with human rights law?

Method

The application of human rights law to new factual scenarios that have arisen or might arise due to the use of AI systems, is very difficult. More specifically, the limited information about the factual empirical reality (i.e., how the technologies are developed, what are their capabilities, which databases are interlinked and how the coding is done, what codes are used), makes an analysis about the application of human rights law difficult. If we have limited information about the empirical reality, it is also difficult to address the question how the law should shape the way this reality should be unfolded in the future (i.e. how human rights law should shape how States choose to develop and apply AI systems in partnership with the private sector).

For these challenges to be comprehensively addressed, empirical studies that lead to the collection of new data are necessary. Empirical studies mean studies that expose, for example, whether national asylum authorities use AI and how, what data has been used for training the algorithms, how the data is coded, whether there been any tests and whether decisions proposed by the algorithms are correct. Such studies would demand the expertise of tech specialists so that they can provide insights as to the details how the algorithms are built and how they operate.

The report that underpins this policy brief has *not* undertaken such empirical studies. The conclusions and the recommendation expressed here are therefore not based on assessment of empirical facts. The report that underpins this policy brief and the recommendations expressed are rather meant to be analytical, where traditional legal analytical method is applied. Yet, the available literature that offers empirical information about available technologies, has been taken into account.

The application of the legal analytical method requires a solid understanding of human rights law standards as developed by relevant authorities, such as the European Court of Human Rights (ECtHR). It involves carefully explaining these standards, as articulated in case law and other authoritative sources, and exploring how they might apply to a new and emerging area.

What harms could AI systems cause?

The research question: *To what extent are technologies of AI supported decision-making used in the context of asylum procedures, compatible with human rights law?* can only be answered by first identifying the harm to fundamental interests that AI systems might pose. A primary concern is harm to asylum seekers' fundamental rights – especially the right not to be subjected to refoulement which means being returned to a country where they face serious harm. If an AI system contributes to an incorrect denial of protection, the individual could be sent back to danger.

The study clarified the difficulties in establishing causation between this harm and the use of AI systems. These difficulties can be however overcome if the harm is conceptualised as a *procedural harm*. This means the focus should be on procedural safeguards or guarantees: the quality of the decision-making process, timeliness, effectiveness, independence, involvement of affected individuals and clear reasoning for decisions. If an AI system is involved in assessing an asylum claim, these guarantees should be complied with, including the opportunity to participate meaningfully in the process and clarity of the decisions that have affected them.

Another concern is privacy. The use of AI often entails processing personal data which interferes with the right to privacy and family life. In relationship to the right to private life, the harm can be conceptualized in the following way – the use of the systems constitutes an interference with private life and therefore a limitation of private life. If this is the case, the interference (i.e. the usage of the AI system in the decision-making process) has to comply with the tests of legality, suitability and proportionality to be in compliance with States' negative human rights obligations.

Are the risks posed by the use of AI systems proportionate to any benefits?

Even if an AI system formally complies with regulatory requirements (for instance, meeting the technical standards of the EU AI Act), it might still conflict with human rights law. The reason is that human rights law demands a context-specific proportionality assessment. This means that regulators and courts must ask: Do the potential benefits of using a potential high-risk AI system in the asylum process outweigh the risks to individuals' rights in that specific context? This assessment implies consideration of the cost of

precaution that the national authorities have to bear: the cost for addressing the risks from the AI systems. In the context of the asylum determination procedures, the cost of precaution might be considered more difficult to justify. This in turn might imply shifting risks to the asylum-seekers. Such a shift might become more and more difficult to substantiate with the increase of the seriousness of the potential harm. The bigger role an AI system has in the decision-making process, the easier it might be to expose the causal link between the system and the harm, which necessarily affects the proportionality analyses. When there is a higher risk that *both* the right to private life *and* the right to *non-refoulement* will be compromised, the proportionality test is more likely to weigh in favour of the individual.

Human rights law demands context-dependent review of the use of AI systems in the decision-making process. Such a review includes consideration of any benefits that the systems may offer. The risks might be proportionate to the benefits. The proportionality analysis is influenced by the scale of benefits offered by AI systems. The broader and more concretely defined these benefits are, the more likely it is that potential risks will be considered proportionate.

Is the nature of refugee-status determination compatible with how AI systems are built?

The refugee status determination procedure has inherent features that make the usage of AI system problematic. In particular, AI supported decision-making presents distinctive problems for applying the legal standards in the procedure about assessment of protection needs. A major issue is that asylum decision-makers typically lack the means to verify whether their decisions (e.g. granting or rejecting protection) were correct. This absence of feedback means there is no reliable test data to evaluate AI systems during development or after being placed in operation. Moreover, the historical data for the development of the system might not be suitable for predicting future risks in applicants' countries of origin. Developers might train AI on historical asylum decisions, but that only teaches the AI to replicate past patterns and might be irrelevant for future risks.

Can the new technologies change the practice of asylum law itself?

This brings us to the following final insight: if the new technologies themselves can change the practice of asylum law. Such a change seems possible, given the increased importance of data, the selection of data and the role of programmers in the design of the algorithms. This in turn implies a shift away from discretion of individual decision-makers and in favour of the discretion towards those who design the systems.

Policy recommendations

1. *Uphold Procedural Fairness and Transparency*: The use of AI systems in the refugee status determination procedure should comply with basic procedure guarantees (i.e. quality of the decision-making process, timeliness, effectiveness, independence, involvement of affected individuals, clarity of the reasoning behind decisions). The assessment of compliance with these guarantees is context dependent and should be considered holistically. If the guarantees are undermined, this is not conclusive that human rights law has been breached. The various procedural guarantees should be assessed as a whole, where a less stringent application of one guarantee can be balanced by a more rigorous application of another.

2. *Context-Specific Proportionality Assessments*: Human rights law demands context-dependent review of the use of AI systems in the decision-making process. This makes the human rights law obligations difficult to specify. Similarly, the assessment whether the use of a system is proportionate, given the risks of harm that it might cause, is also context dependent. At very general level, however, human rights law demands proportionality review, which in turn prompts an analysis whether any risks – including residual risks – necessarily posed by high-risk AI systems, are proportionate to any benefits. This assessment implies consideration of the cost of precaution: the cost for addressing the risks that the national authorities who use the systems have to bear.

3. *Prioritize Precaution to Protect Rights*: In the context of the asylum determination procedures, the cost of precaution might be considered more difficult to justify. This in turn might imply shifting risks to the asylum-seekers. Such a shift might become more and more difficult to substantiate with the increase of the seriousness of the potential harm. The bigger role an AI system has in the decision-making process, the easier it might be to expose the causal link between the system and the harm, which necessarily affects the proportionality analyses.

4. *Use AI Regulations as a Floor, Not a Ceiling*: When evaluating AI use, consider compliance with dedicated AI regulations such as the EU AI Act and the Council of Europe AI Framework Convention. These regulations are likely to affect the proportionality review and the legal analysis in human rights. However, compliance with the EU AI Act and with the Council of Europe AI Framework Convention does not necessary imply compliance with human rights law.

5. *Ensure Public Oversight and Accountability*: The EU AI Act classifies asylum and migration AI systems, as "high-risk", which in turn triggers a whole set of regulations. The classification, however, is open to various exceptions. Even if the classification is applied, the regulatory standards can be an object of various interpretations and therefore be given different meanings. It is crucial that government authorities – not private developers – take responsibility for interpreting and applying these standards in the asylum context given the risks of harm to fundamental interests. Value judgements should not be left to private actors, such as tech companies.

6. *Recognize the Limits of AI in Refugee Decisions*: AI should not be used in ways that conflict with fundamental legal principles of asylum law. AI supported decision-making poses unique challenges in applying legal standards within procedures for assessing protection needs. Its use in refugee status determination processes may, in some situations, conflict with the principles of legality and/or key procedural guarantees. In particular, the historical data for the development of the system might not be relevant for the assessment of the risk for future harm in the country of origin. In essence, determining refugee status involves forward-looking assessments of risk which is something past data may not capture.

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Delmi Policy Brief 2026:3
Stockholm 2026
ISBN 978-91-89993-58-7

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