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English Edition

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## PRESENTATION



As in recent issues of our Journal, in this tenth edition we highlight one theme, to which we dedicate five of nine total articles. This theme refers to the plight of the millions of migrants and refugees who find themselves in dire situations in many countries around the world. The article by Katharine Derderian and Liesbeth Schockaert of *Médecins sans Frontières* realistically portrays the terrible human tragedy of refugees and, from the point of view of human rights, discusses the concept of refugee, according to the criteria of the United Nations High Commissioner for Refugees (UNHCR), under whose guidance and with whose generous support we were able to organize this edition. The UNHCR criteria and the foundations of the protection system for refugees are explained in the article by Juan Carlos Murillo.

In addition to the articles mentioned above that address general problems, we published the following contributions, which focus on specific problems relating to the human rights of refugees and migrants:

**International Cooperation and Internal Displacement in Colombia**, by Manuela Trindade Viana, focuses on problems related to internal displacement in Colombia, a country that contains 25% of the world's internally displaced population (11.5 million).

**Access to antiretroviral treatment for migrant populations in the Global South**, by Joseph Amon and Katherine Todrys, of the *Human Rights Watch*, denounces the violation of laws that guarantee access to health resources for non-permanent populations of migrants and refugees.

**European Migration Control on African Territory**, by Pablo Ceriani Cernadas, analyses the inhuman immigration control policies adopted by European governments and EU organizations on the coast and in the waters of North African countries.

Our tenth edition is completed with the contributions by Anuj Bhuwania ("**Indian torture**" and the **Madras Torture Commission Report of 1855**), Daniela De Vito, Aisha Gill and Damien Short (**Rape Characterised as Genocide**), Christian Courtis (**Notes on the implementation by Latin American courts of the ILO Convention 169 on indigenous peoples**) and Benyam E. Mezmur (**Intercountry Adoption as a Measure of Last Resort in Africa**). Bhuwania argues that police torture in India is a legacy of colonialism, as illustrated by the "Madras Torture Commission Report of 1855". De Vito, Gill and Short discuss the theoretical consequences of defining rape as a

particular kind of genocide. Courtis presents emblematic cases of the application of the ILO 169 Convention on Indian and tribal populations in Latin America. Finally, Mezmur focuses on the problems associated with the policies for adoption of African children by families from other continents.

We hope that the articles presented in this edition will help to enrich the debate surrounding the growing number of problems associated with the displacement of vast human contingents, who were forced to leave their homes, not only due to wars, persecutions and political totalitarianism, but also due to various economic causes, whose detrimental consequences to the human rights of their victims are equally dramatic.

We would like to thank the following professors and partners for their help with the selection of articles for this edition: Carina du Toit, Carlos Ivan Pacheco Sánchez, Florian Hoffmann, Gaim Kibreab, Glenda Mezarobba, Guilherme da Cunha, Iniyana Ilango, Jeremy Sarkin, José Francisco Sieber Luz Filho, Juan Amaya Castro, Laura Pautassi, Malak Poppovic, Paula Miraglia, Rajat Khosla Renata Reis, Roberto Garretón and Upendra Baxi.

As mentioned on our website, beginning with this edition, we have adopted new rules for citations and bibliographical references in order to facilitate the reader's experience. Because this is a recent change, we count on our readers' understanding in the case of any mistakes caused by such change. In this matter, we would like to thank the following individuals who contributed to the formatting of the articles: Clara Parra, Elaini Silva, Mila Dezan, Rebecca Dumas and Thiago Amparo.

We conclude by stressing once again the importance of the guidance and support provided to us by the UNHCR for the publication of this edition, which originated as a doctrinal investigation and development of the "Mexican Action Plan for the Strengthening of International Protection of Refugees in Latin America", geared towards cooperation with academic institutions that are dedicated to the research, promotion and instruction of international law related to refugees.

In particular, we would like to thank the offices of UNHCR in Argentina and Brazil, and the Legal Regional Unit for the Americas.

**The editors**



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in this document are the author's and do not necessarily reflect those of the UNHCR or those of the United Nations.

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ABSTRACT

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After the tragic events of September 11, 2001, there has been a strong interest amongst States in matters relating to national security. While every State has a right to ensure security and control borders, it is also necessary to ensure that the legitimate security interests of States are consistent with their international human rights obligations and that immigration controls do not indiscriminately affect those refugees in need of international protection, so as not to undermine the international regime for protection of refugees. This article explores the links between the security of States and the international protection of refugees, focusing on the compatibility of both themes. Security is both a right of refugees and a legitimate interest of States. It is therefore important to understand that the security of States and the protection of refugees are complementary and mutually reinforcing. In this sense, legislation regarding refugees and fair and effective operational procedures for the determination of refugee status can be utilized by States as useful tools to solidify and strengthen their security.

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# THE LEGITIMATE SECURITY INTERESTS OF THE STATE AND INTERNATIONAL REFUGEE PROTECTION

Juan Carlos Murillo

## I. Introduction

In recent years, particularly after the tragic events of September 11, 2001, there has been a strong interest amongst States in matters relating to national security. The United Nations High Commissioner for Refugees (UNHCR) recognizes the right of States to ensure security and control borders. However, it is necessary to ensure that the legitimate security interests of States are consistent with their international human rights obligations and that immigration controls do not indiscriminately affect those refugees in need of international protection.

Indeed, the growing security concerns of States have affected refugees and could undermine the international regime for protection. Security concerns and the fight against terrorism have exacerbated restrictive asylum policies, which have been implemented by many countries in different parts of the world. Similarly, in some cases refugees have been perceived as threats to the security of states and even as potential terrorists based on their nationality, religion or country of origin. Some mass media have presented to the public a picture in which the issues of security and the fight against terrorism are seen as incompatible with international obligations of States on human rights and the international protection of refugees. All this explains why security is seen today as one of the major challenges for the international protection of refugees, on par with the challenges of mixed migration, racism, intolerance and xenophobia<sup>1</sup>.

Security is certainly a legitimate interest of States. The State has a right to protect itself and to adopt policies and measures to protect its population, including all residents under its jurisdiction, whether nationals or non-nationals. States, in good faith, have also undertaken international obligations in human rights, including the international protection of refugees. The Universal Declaration of

*Notes to this text start on page 130.*

Human Rights of 1948 states that every person has the right to seek and enjoy asylum protection in cases of persecution. On the American continent, this basic human right is enshrined in most generous terms, in both the American Declaration of the Rights and Duties of Man of 1948 and the American Convention on Human Rights 1969, which state that **every person has the right to seek and receive asylum abroad in case of persecution**, in accordance with international agreements and national legislation.

However, it is important to note that the legitimate interest of security is compatible with the international protection of refugees, and must be executed with respect for human rights. Indeed, security and the fight against terrorism are human rights issues equal to the international protection of refugees, and should not be viewed as antithetical or in conflict with one another. Refugees are often the first victims of a lack of security and terrorism. It is therefore important to discuss how the two rights complement each other and how the adoption of public policies, regulatory and institutional frameworks for the international protection of refugees can reaffirm and strengthen the security of States.

This article explores the links between the security of States and the international protection of refugees, focusing on the compatibility of both themes.

As outlined below, when adopting the Convention Relating to the Status of Refugees of 1951, States balanced their legitimate security concerns with the humanitarian needs of refugees who require and deserve international protection. Legitimate interests in security were also safeguarded by States in Latin America when they adopted regional instruments concerning the protection of refugees, such as the Cartagena Declaration on Refugees of 1984, the San José Declaration on Refugees and Displaced Persons of 1994, and the Declaration and Plan of Action of Mexico to Strengthen International Protection of Refugees in Latin America of 2004.

The humanitarian needs of those requiring international protection, who continue to suffer from persecution, intolerance, massive human rights violations, widespread violence and internal conflicts, are not unrelated to the legitimate national and regional security concerns of States. However, it is important to raise awareness of the fact that refugees are victims of insecurity and terrorism, not their causes<sup>2</sup>, and that States can count on an international regime of refugee protection that takes into account their legitimate security concerns.

## II. Security as a Fundamental Right for Refugees and States

To begin, it must be said that security is vital both for the respect and enjoyment of other human rights and for strengthening the rule of law. Security is an individual right as well of a right of the State itself. Security makes it possible to preserve the human right to seek asylum and protects the very integrity of institutions that protect victims of persecution. Indeed, refugees seek the security and protection that is not present or cannot be accessed in their countries of nationality or habitual residence. The State has an obligation to protect its citizens and all persons under its jurisdiction.

Security as a fundamental right of asylum seekers and refugees influences and is



present throughout the **cycle of forced displacement**. In this regard, it is important to emphasize how the enjoyment of this right may be a factor in the **prevention** of forced displacement, while its absence is one of the root causes of refugee flows. Accordingly, in certain situations, there may be a **causal link** between the absence or lack of security as a fundamental right of all individuals, and the subsequent threat to or actual persecution of such individuals, and the need for international protection. Thus, impunity and insecurity are factors destabilizing the Rule of Law, and can contribute to forced displacement.

Furthermore, asylum seekers and refugees, as human beings under the jurisdiction of a State, are entitled to enjoy security, as it is a human right of every individual. Refugees are also **holders** of fundamental rights, and hence have access to the basic rights established in the Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol, as well as to the human rights enshrined by other international instruments, both universal and regional. In this sense, it can be argued that security as an inherent right of human beings directly affects the **quality of asylum** granted to refugees. Certainly, if they do not enjoy security in the country of asylum, it is questionable to speak of effective protection of refugees, and these refugees may need to seek protection in another country.

Finally, security plays a role in the search for **lasting solutions** for refugees. The restoration and strengthening of this right may encourage voluntary repatriation<sup>3</sup>. Similarly, the validity of this right allows and promotes respect for local integration, giving refugees the opportunity to start a new life in host communities in countries of asylum. In the alternative, the lack of security for refugees in countries of asylum can give rise to a need to be relocated or to seek protection in a third country.

In a world in which security, as an expression of the legitimate interests of States, influences the definition and adoption of public policies, it is necessary for States to fairly balance their legitimate national security interests and their international obligations for the protection of human rights<sup>4</sup>. Presently, States invoke national security interests in adopting restrictive policies on asylum, giving precedence to immigration controls, without establishing sufficient safeguards to identify and ensure protection to asylum seekers and refugees.

Personal safety is a fundamental right of individuals, recognized by the various human rights instruments, but in certain circumstances, the State may validly suspend the exercise of certain rights and guarantees in the interests of national security.

The American Declaration of the Rights and Duties of Man provides in Article XXVIII that individual rights are limited by the rights of others, **by the security of all**, and by the just demands of general welfare and democratic development. Consequently, personal security is subject to the safety of other individuals.

The American Convention on Human Rights also allows the suspension of rights in the event of war, public danger or other emergency that threatens the independence or **security** of the State, provided that the extent and length of time that rights are suspended are strictly tailored to the exigencies of the situation. The Convention also requires that the suspension of rights in this context be consistent with other obligations under international law, and that there be no discrimination in its application (Article 27, American Convention on Human Rights, 1969 and Inter-American Court of

Human Rights, 1987). However, the American Convention sets out a series of rights that are not subject to derogation (Article 27.2), including the judicial guarantees for the protection of these rights.

In this respect, the Inter-American Court has stated that:

*a State “has the right and duty to ensure its own safety” (footnote omitted), but this right must be exercised within the limits and under the procedures which preserve both public safety and the fundamental rights of the individual (Inter-American Court of Human Rights, 1999).*

Finally, it is important to note that the American Convention on Human Rights also establishes the possibility of restricting the enjoyment and exercise of rights and liberties recognized therein, provided that said restrictions are based on laws that address the common good, and that the restrictions are based on the same (Article 30, Inter-American Court of Human Rights, 1986).

While it is possible to suspend or restrict the enjoyment and exercise of certain rights and freedoms, such measures are limited by human rights instruments. In the same vein, the Inter-American Court has indicated that it is a sovereign right of States to make their own immigration policies, but that such policies should be compatible with the standards of human rights protection in the American Convention (Inter-American Court of Human Rights, 2000). According to the UNHCR, these limits on the sovereign power of States to adopt immigration policies are also present in other human rights instruments, among them the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol.

### III. Security Implications in the International Protection of Refugees

The growing concern amongst States concerning security issues and the fight against terrorism has exacerbated restrictive policies on asylum and refugee protection. Such policies had already been implemented in many countries, including many in the years before the tragic events of September 11, 2001. The perverse act of equating refugees to terrorists arises from a lack of knowledge concerning the criteria used to determine refugee status, as well as from ignorance to the fact that terrorism and violence create refugee outflows. Refugees do not cause terrorism, but they are its victims.

Security concerns amongst states have affected the protection of refugees<sup>5</sup>, particularly in three specific areas:

1. Access to national territory,
2. The process for determining refugee status,
3. The exercise of rights and the search for durable solutions.

With respect to access to national territory, people in need of protection are now subject to the indiscriminate application of stricter immigration controls, which are increasingly applied in countries of origin, transit countries, and on the high seas. Persons are subject

to scrutiny based on their nationality, religion, or country or region of origin. These situations represent additional limitations on a refugee's ability to enter a territory in search of protection.

Additionally, administrative detention is used with increasing frequency with those seeking asylum, including, in some countries, the application of automatic detention provisions based on the nationality, origin, or religion of the applicant, which violates the requirement that detention be exceptional in nature, the principle of non-discrimination (Article 3, Convention Relating to the Status of Refugees of 1951), and the requirement that no sanction be applied for illegal entry (Article 31 of the Convention Relating to the Status of Refugees of 1951).

Security considerations are also negatively impacting the interpretation and the definition of refugee status through the use of increasingly restrictive criteria of Inclusion Clauses. Refugees have not been defined by virtue of their nationality since the adoption of the Refugee Convention of 1951, which defines the key element to justify a person seeking refugee status as a "well-founded fear of persecution", in connection with one of the "protected grounds"<sup>6</sup>. However, some countries now take the refugee's manner of entry into the country, nationality, ethnic origin, and region of origin into account when determining refugee status.

The Refugee Convention of 1951 establishes that some refugees may not benefit from international protection, because they either do not need it or do not deserve it (Exclusion Clauses). However, the UNHCR has observed that, in some countries, Inclusion Clauses have been applied in a manner so restrictive so as to render the application of Exclusion Clauses unnecessary.

It is troubling that, in the interest of security, Exclusion Clauses are actually being applied before determining whether applicants meet the definitional requirements set forth in the Convention Relating to the Status of Refugees of 1951. Accordingly, UNHCR reiterates that, in order to safeguard the right of asylum and the international protection regime for refugees, it is necessary to apply the Inclusion Clauses first and only afterwards analyze the possible application of the Exclusion Clauses. It is first necessary to establish whether a person meets all the elements set forth in the refugee definition, then to analyze **whether the person needs or deserves international protection**.

Notwithstanding the limited and restrictive nature of the Exclusion Clauses in the refugee definition, some countries have introduced lax terms and new motivations for their implementation. Thus, it is a cause for concern that some countries intend to use the concept of "national security" as if it were a new exclusion clause and a new cause for denying refugee status, in contravention of Article 1.F of the Convention Relating to the Status of Refugees of 1951.

The legitimate security concerns of States were not alien to the framers of the Convention Relating to the Status of Refugees of 1951, which is precisely why they established that, in certain circumstances, some people **do not need or deserve international protection**. While the Exclusion Clauses are absolute and restrictive in their interpretation, States that invoke "national security" to deny refugee status, as if it were a new "Exclusion Clause," are in fact violating the spirit and the provisions of the 1951 Convention.

In the same vein, the UNHCR reiterates that the security exception to the prohibition of expulsion or return (principle of *non-refoulement*), set forth in the second paragraph of Article 33 of the Convention Relating to the Status of Refugees of 1951, is not an additional ground for exclusion, but rather an exception only to be invoked by the State in exceptional circumstances.

Finally, it is clear that security considerations may affect the exercise of fundamental rights of refugees, such as the search for lasting solutions to their problems. Indeed, an uninformed public opinion, or manipulation of information for populist ends, can generate xenophobia and discrimination against refugees from a certain nationality, a particular ethnicity or a specific religion. Security considerations also affect the local integration of refugees and the quotas established by States that regulate the number of resettled refugees they will accept.

#### IV. Legitimate Security Interests and the Convention Relating to the Status of Refugees of 1951

Since security is a right of both the State and the refugees seeking protection therein, it is important to consider how this mutual linkage is reflected in the Convention Relating to the Status of Refugees of 1951.

As outlined above, the legitimate security concerns of States are not inconsistent with the international protection of refugees, but are adequately covered in several specific provisions of the Convention Relating to the Status of Refugees of 1951<sup>7</sup>, namely:

*The definition of a refugee  
(art. 1 of the Convention Relating to the Status of refugees).*

The Convention Relating to the Status of Refugees of 1951 establishes the definition of a refugee, the rights and obligations of refugees, and the general framework for their treatment and protection. By identifying the elements or criteria of the refugee definition, Article 1 of the 1951 Convention reminds us that refugees **must not only be in need of international protection, but must also be deserving of it**. Article 1.F. safeguards the legitimate security concerns of the State by establishing who, despite having met the definitional requirements for refugee status, nevertheless does not deserve international protection. In this regard, Article 1.f. of the Convention Relating to the Status of Refugees of 1951, states:

*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that<sup>8</sup>:*

- (a) He/she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
- (b) He/she has committed a serious non-political crime outside the country of refuge prior to his/her admission to that country as a refugee;*
- (c) He/she has been guilty of acts contrary to the purposes and principles of the United Nations.*

Accordingly, a State has every right to ensure that those who meet the Inclusion Elements of the refugee definition are not involved in any of the grounds for exclusion. Stated differently, States can ensure that those with the profile of a refugee also deserve international protection. It is precisely for this reason that, to ensure State security and full respect for the right of asylum, **it is in a State's best interest to utilize fair and efficient refugee status determination mechanisms to identify those who need and deserve international protection.**

In order to safeguard the integrity of asylum and the peaceful, apolitical and humanitarian character of this institution for international protection, States may, under certain circumstances, **cancel or revoke refugee status.** It may be that the States erred or were misled when making the refugee status determination. Similarly, a refugee may commit certain acts in the country of asylum, or in a third country, whose gravity could give States good reasons to withdraw his or her refugee status, even if said status was validly issued. Legitimate **cancellation** of refugee status arises when the State is satisfied that the refugee committed fraud or lied when presenting the facts on which his or her application was based, or when an Exclusion Clause would have been applied had all the relevant facts of his case been known. Similarly, a State may validly **revoke** refugee status in cases where the person, having received said status, commits a crime against peace, a war crime or a crime against humanity, or when he or she is guilty of acts contrary to the purposes and principles of the United Nations<sup>9</sup>.

Also, the State has every right to punish a refugee who commits a crime on its territory. **Refugee status does not imply immunity, nor can it encourage impunity.** If a refugee does not respect or violates the laws in the country of asylum, he or she is subject to the application of the same measures and sanctions as nationals or any other foreigner living under the jurisdiction of the State.

Consequently, a coherent and consistent interpretation of the refugee definition allows a balance between the legitimate security interests and the humanitarian needs of those who require and deserve international protection. The rigorous application of inclusion and exclusion clauses of the refugee definition safeguards the legitimate interests of States and allows them to identify those who need and deserve international protection and those who do not. Accordingly, it is in the best interest of States to have domestic legislation concerning refugees, as well as operational procedures for the fair and efficient determination of refugee status.

### *Provisional Measures*

*(art. 9 of the Convention Relating to the Status of Refugees of 1951).*

Article 9 of the 1951 Convention Relating to the Status of Refugees allows States, in times of war or other **grave and exceptional circumstances**, to apply those provisional measures they deem essential for national security in the process of determining refugee status. States may continue to apply such measures even to a previously recognized refugee, when necessary for national security.

Administrative detention of an asylum seeker or refugee should always be

the exception, not the rule. The exceptional character of detention is reaffirmed in Article 9, noted above. However, the legitimate interests of States have been properly safeguarded in times of war or grave and exceptional circumstances, in the interests of national security, since this article permits the arrest and detention of a person when determining his or her refugee status, or even after having given that status, provided that the measures taken are necessary for national security.

Accordingly, in valid circumstances, the State may invoke reasons of national security with respect to an asylum seeker or refugee and effectuate his or her arrest and detention. It bears repeating that this is an exceptional measure and should not be used as an excuse or legal justification for the detention of asylum seekers and refugees<sup>10</sup>.

### *Travel Documents*

*(art. 28 of the Convention Relating to the Status of Refugees of 1951).*

Article 28 of the Convention Relating to the Status of Refugees of 1951, allows State parties to deny issuance of travel documents to refugees wishing to move outside their territory for compelling reasons of national security or public order.

Again, it bears repeating that this is an exceptional measure, as it is clear that the issuance of personal documentation, including the refugee travel document, is in the self-interest of the State and promotes its security by allowing it to know and clearly identify those who have said status within its territory.

### *Expulsion of Refugees*

*(art. 32 of the Convention Relating to the Status of Refugees of 1951).*

In accordance with the 1951 Convention Relating to the Status of Refugees and the International Covenant on Civil and Political Rights (art. 13), a State may lawfully expel a refugee from his or her territory in the interests of national security, when the decision conforms with due process requirements. The same Article 32 of the 1951 Convention, as well as the International Covenant on Civil and Political Rights (art. 13), provide for exceptions to the guarantees of due process in deportation proceedings where compelling reasons of national security exist<sup>11</sup>. However, the refugee should be guaranteed a reasonable opportunity to arrange for legal entry to a third country.

In contrast, the American Convention on Human Rights does not establish national security as grounds for the deportation of aliens who are lawfully within the territory of a State, nor does it provide exceptions to the guarantees of due process in deportation proceedings<sup>12</sup>.

### *Prohibition on Expulsion or Return*

*(art. 33 of the Convention Relating to the Status of Refugees of 1951).*

The principle of *non-refoulement* is the cornerstone of international refugee law

and is based on the idea that a State should always refrain from placing a refugee, by expulsion or return, at the frontiers of a territory where his or her life or freedom would be at risk because of his or her race, religion, nationality, membership of a particular social group or political opinion.

However, the principle of *non-refoulement* allows for exceptions under the Convention Regarding the Status of Refugees of 1951 where there are reasonable grounds to believe that the refugee in question may be regarded as a danger to the security of the host country.

It is important to reiterate that this is an exceptional measure applied only in grave situations, and is never to be considered as an additional Exclusion Clause. Even if the State can validly apply the exception to the principle of *non-refoulement* contemplated in the second paragraph of Article 33 of the Convention Relating to the Status of Refugees of 1951, provisions of other human rights instruments could also be relevant and applicable<sup>13</sup>.

The Convention Relating to the Status of Refugees of 1951 fairly balances the legitimate security interests of states and the humanitarian considerations relating to refugee protection. As we strengthen the effective implementation of this instrument through the adoption of national legislation on refugees and the establishment of just, fair, and efficient operational mechanisms for the determination of refugee status, States will have better tools to ensure their safety while maintaining full compliance with their international obligations regarding the protection of refugees.

## V. Security and Regional Instruments

Security issues and refugee protection are not mutually exclusive; rather, they are complementary and mutually reinforcing. The links between the legitimate security interests of States and humanitarian needs of refugee protection have been reinforced through the various resolutions of the General Assembly and Security Council of the United Nations concerning the fight against terrorism. In effect, these decisions highlight the fact that the fight against terrorism must take place within the framework of international law, and in particular, international refugee law, international humanitarian law and international human rights law. The same happens at the regional level, and, consequently, the OAS General Assembly has highlighted in its resolutions the need for the fight against terrorism to be effectuated with respect for international law and human rights.

In this sense, it is important to note that the Inter-American Convention against Terrorism provides important safeguards for the international protection of refugees. Article 12 provides:

*Each State party shall take appropriate measures, consistent with the relevant provisions of national and international law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offense established in the international instruments listed in Article 2 of this Convention (emphasis added).*

Article 15 also states that:

1. *The measures carried out by the States parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms.*
2. *Nothing in this Convention shall be interpreted as affecting other rights and obligations of States and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law.*
3. *Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and **applicable provisions of international law.** (emphasis added).*

Regional instruments for the protection of refugees in Latin America have also safeguarded the legitimate security interests of States. In this regard, it is interesting to note that the Cartagena Declaration on Refugees of 1984, based on specific provisions of the American Convention on Human Rights, constitutes a practical and flexible tool that articulates the **legitimate concerns of national security and regional stability, and humanitarian needs of individual protection. Its focus is the protection and search for lasting solutions, recognizing that there are people who need and deserve international protection.**

It is precisely those legitimate concerns for national security and regional stability, in a context where there were various peace efforts leading to the need to provide protection for a growing number of refugees with new characteristics, that spurred dialogue, political will, consultation, and support of the international community towards the adoption of the Cartagena Declaration on Refugees of 1984.

The Cartagena Declaration reaffirms the civilian, non-political and strictly humanitarian grant of asylum and the recognition of refugee status, which should not be considered an unfriendly act between States. It also stresses the importance of respect for the principle of *non-refoulement* and the principle of *jus cogens*. It also includes a regional refugee definition, which incorporates the element of security as a protected right. In this regard, it recommends that

*[...] the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order<sup>14</sup>.*

The San Jose Declaration on Refugees and Displaced Persons of 1994, adopted to commemorate the tenth anniversary of the Cartagena Declaration on Refugees of



1984, reiterates the importance of security to enable refugees to enjoy and exercise their fundamental rights, as well as the importance of the **issues relating to refugees being discussed in regional fora on security**. It recommends that issues of international refugee protection be on the agenda of regional security fora, like the other issues related to forced displacement and migration<sup>15</sup>.

Finally, the legitimate security concerns of States were contemplated in the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees of 2004, adopted to commemorate the twentieth anniversary of the Cartagena Declaration on Refugees of 1984.

In this sense, the Mexico Declaration and Plan of 2004 reiterated the importance of security as a fundamental right of those who need and deserve international protection as refugees, also reaffirming that “national security policies and the fight against terrorism should be framed by respect for domestic law and international instruments for the protection of refugees and for human rights in general”<sup>16</sup>.

The Declaration also stresses the need to “take into account the legitimate security interests of States” to foster a broad and open dialogue with the States for the regulation of State practice and doctrine regarding the application of the regional refugee definition, and in particular the application of the Exclusion Clauses.

Accordingly, it is clear that regional instruments for the protection of refugees in Latin America have fairly balanced the legitimate security concerns of States with the humanitarian needs of those refugees who require and deserve international protection.

## VI. Final Considerations

The phenomenon of forced displacement in Latin America has changed, but survives as a contemporary phenomenon. Currently in the region, it is estimated that there are more than three million people who need and deserve international protection. New trends in forced displacement reflect new forms of persecution, particularly those resulting from the activities of non-state actors in situations where national protection is unavailable or ineffective. Similarly, as the UNHCR has recognized, the context in which international protection is provided has changed in the face of increasing concerns regarding security and terrorism, the management of migration flows, and racism, racial discrimination, xenophobia and intolerance.

Security is both a right of refugees and a legitimate interest of States. It is therefore important to understand that the security of States and the protection of refugees are complementary and mutually reinforcing. In this sense, legislation regarding refugees and fair and effective operational procedures for the determination of refugee status can be utilized by States as useful tools to solidify and strengthen their own security. Coherent and consistent implementation of the refugee definition allows States to identify those who need and deserve international protection and those who do not. This is precisely why immigration controls should not be applied indiscriminately, but must have specific safeguards to permit the identification of those who need international protection as refugees.

The UNHCR understands the legitimate security concerns of States, supports

the fight against terrorism, and reiterates the importance of preserving the integrity of asylum as an instrument of protection for the persecuted. Terrorists and criminals should not and do not benefit from the recognition of the refugee status, by virtue of application of the Exclusion Clauses. However, preserving the integrity of asylum as an instrument of protection presupposes a correct interpretation of the refugee definition in a procedure that meets all the guarantees of due process and respect for basic human rights.

As outlined above, the legitimate security interests of States and the protection of refugee are not antagonistic or mutually exclusive. The Convention Relating to the Status of Refugees of 1951 includes among its provisions specific measures to safeguard national security and the legitimate interests of States. Similarly, the regional instruments for the protection of refugees have fairly balanced legitimate security concerns of States with the humanitarian needs of those requiring and deserving international protection.

Notwithstanding the above, it is of concern to the UNHCR that security measures and the fight against terrorism could further restrict asylum policies on the continent, as well as the coherent and consistent interpretation of the refugee definition. Therefore, States must be supported in fulfilling their international obligations so that security and refugee protection are complementary and mutually reinforcing.

Finally, let us conclude with the words of our former Secretary General of the United Nations: “No person, no region and no religion should be condemned because of the heinous acts of some individuals” (ANNAN, 2001).

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## NOTES

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1. As stated in recent years by the High Commissioner, Mr. António Guterres, in his inaugural address to the Executive Committee of the UNHCR Program.
2. As High Commissioner, António Guterres stated: "Preserving asylum means changing the notion that refugees and asylum seekers are among the causes of insecurity or terrorism, rather than victims thereof. Unfortunately, at present, there are many situations in which the concept of asylum is misunderstood, even equated to terrorism. It is true that terrorism must be fought with determination, but asylum is, and must remain, a central tenet of democracy" (GUTERRES, 2005).
3. The importance of security as a key element in facilitating and promoting voluntary repatriation has been highlighted by each of the UNHCR Executive Committees in Conclusion No. 18 (XXXI) of 1980 (UNHCR, 1980), and Conclusion No. 40 (XXXVI) of 1985 (UNHCR, 1985).
4. Regarding the balance between: maintaining internal security, fighting terrorism and respecting human rights, including the right of asylum; and the need to establish specific safeguards, see IACHR (2002). Also, the Inter-American Convention against Terrorism, adopted in Barbados in June 2002, provides specific safeguards for human rights and international refugee law.
5. The protection of refugees is not incompatible with the legitimate security interests of States. For more on this, see UNHCR (2001). On how terrorism has affected the international protection of refugees, see the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin (SCHEININ, 2007).
6. The protected grounds enumerated by Article 1 of the Convention Relating to the Status of Refugees of 1951 are: race, religion, nationality, and membership of a particular social group or political opinion.
7. See the following provisions of the Convention Relating to the Status of Refugees of 1951: Article 9 regarding provisional measures, Article 28 regarding the issuance of travel documents, Article 32 on expulsion of refugees and Article 33 relating to the *non-refoulement* principle. (1951).
8. It is important to note that the parameter "reason to believe" in article 1F of the Convention on the Status of Refugees has been included in the Inter-American Convention against Terrorism (Approved

at the plenary session of the General Assembly of the Organization of American States on June 3, 2002, AG/RES. 1840 (XXXII-O/02). The Inter-American Convention Against Terrorism provides specific safeguards for the protection of refugees in Articles 12 and 15.

9. For more on exclusion, cancellation and revocation, see UNHCR (2003).

10. Regarding the detention of asylum seekers and refugees, see UNHCR (1998).

11. However, the Human Rights Commission has reiterated that the review of the deportation order is an integral part of this right. In this way, it has indicated in its final observations in respect of several countries, including: **Belgium** 08/12/2004 CCPR/CO/81/BEL (paragraphs 23-25), **Lithuania** 05/04/2004 CCPR/CO/80/LTU (paragraph 7), **Yemen** 08/12/2002 CCPR/CO/75/YEM (paragraph 18), and **New Zealand** 08/07/2002 CCPR/CO/75/NZL (paragraph 11). The excerpts of the final observations of the Human Rights Commission are available by theme and in Spanish at the ACNUR website, at the following address: <http://www.acnur.org/secciones/index.php?viewCat=222>.

12. On the basis of Article 22.6 of the American Convention on Human Rights, an alien who is lawfully in the territory of a State may be expelled only pursuant to a decision reached in accordance with the law and in no case can be expelled to a country, regardless of whether or not it is the country of origin, where his or her life or personal liberty is at risk of violation because of race, nationality, religion, social status or political opinion.

13. The provision in Article 22.8 of the American Convention on Human Rights is more broad than the wording of Article 33 of the Convention Relating to the Status of Refugees of 1951 and does not allow for exceptions. For this reason, refugees in the Americas enjoy the right to not be returned. See UNHCR (2001, p. 5).

14. See the third recommendation in the Cartagena Declaration on Refugees, in the UNHCR legal database.

15. See the related recommendation in the San Jose Declaration on Refugees and Displaced People (1994), in the UNCHR legal database.

16. For more, see the Inter-American Commission on Human Rights (2002), which includes a chapter on asylum and the protection of refugees.

## RESUMO

Após os trágicos acontecimentos do 11 de setembro de 2001, observa-se um forte interesse por parte dos Estados por questões relativas à segurança nacional. Mesmo que todo o Estado tenha o direito de garantir sua segurança e de monitorar suas fronteiras, é também necessário garantir que os interesses legítimos do Estado em segurança sejam compatíveis com suas obrigações internacionais em direitos humanos e que o controle migratório não afete indiscriminadamente os refugiados que necessitam de proteção internacional, respeitado, assim, o regime internacional de proteção dos refugiados. Este artigo explora a ligação entre segurança estatal e proteção internacional de refugiados, expondo a compatibilidade entre os dois temas. Segurança é tanto um direito dos refugiados quanto um interesse legítimo do Estado. Consequentemente, é importante ressaltar que a segurança do Estado e a proteção dos refugiados são temas que se complementam e reforçam mutuamente. Nesse sentido, uma legislação concernente a refugiados e medidas justas e efetivas que determinem o status de refugiado podem ser utilizadas como ferramentas a favor do Estado para solidificar e fortalecer sua segurança.

## PALAVRAS-CHAVE

Segurança – Direitos Humanos – Proteção internacional dos refugiados.

## RESUMEN

Tras los trágicos acontecimientos del 11 de septiembre de 2001, se ha generado un gran interés entre los países en materia de seguridad nacional. Mientras que todo Estado tiene derecho a promover su seguridad y el control de sus fronteras, también es necesario asegurarse de que los intereses de seguridad legítimos de los Estados sean consistentes con sus obligaciones de derechos humanos y que los controles de inmigración no afecten indiscriminadamente a los refugiados necesitados de protección internacional, para no perjudicar el régimen internacional de protección de refugiados. Este artículo explora las relaciones entre la seguridad de los Estados y la protección internacional de los refugiados, centrándose en la compatibilidad de ambos temas. La seguridad es tanto un derecho de los refugiados como un interés legítimo de los Estados. Es por lo tanto importante que entendamos que la seguridad de los Estados y la protección de los refugiados son complementarias y se refuerzan mutuamente. En este sentido, la legislación en lo concerniente a los refugiados y unos procedimientos operacionales justos y eficientes para la determinación de estatus de refugiado pueden ser utilizados por los Estados como herramientas útiles para consolidar y reforzar su seguridad.

## PALABRAS CLAVE

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