

## HUMAN SECURITY AND NON-CITIZENS

The past decades have seen enormous changes in our perceptions of 'security', the causes of insecurity and the measures adopted to address them. Threats of terrorism and the impacts of globalisation and mass migration have shaped our identities, politics and world views.

This volume of essays analyses these shifts in thinking and, in particular, critically engages with the concept of 'human security' from legal, international relations and human rights perspectives. Contributors consider the special circumstances of non-citizens, such as refugees, migrants, and displaced and stateless persons, and assess whether, conceptually and practically, 'human security' helps to address the multiple challenges they face.

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# HUMAN SECURITY AND NON-CITIZENS

Law, Policy and International Affairs

Edited by

ALICE EDWARDS

CARLA FERSTMAN



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## PREFACE

In 1994, the United Nations Development Programme (UNDP) stated that the concept of security had been too narrowly construed for too long as security of territory from external aggression, as protection of national interest in foreign policy, or as global security from the threat of a nuclear holocaust.<sup>1</sup> Arguing that it is time to move beyond the narrow concept of national security to ‘an all-encompassing concept’<sup>2</sup> of ‘human security’, the UNDP identified two main components of this new approach:

It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life.<sup>3</sup>

In 2003, the UN Commission on Human Security issued its final report in which it concluded that:

Human security means protecting vital freedoms. It means protecting people from critical and pervasive threats and situations, building on their strengths and aspirations. It also means creating systems that give people the building blocks of survival, dignity and livelihood. Human security connects different types of freedoms – freedom from want, freedom from fear and freedom to take action on one’s own behalf. To achieve human security, it offers two general strategies: protection and empowerment.<sup>4</sup>

The framework aims to treat human security, human rights and human development as mutually reinforcing goals. The new framework centres directly and specifically on *people*, allowing them to live in safety and

<sup>1</sup> UNDP, *Human Development Report: New Dimensions of Human Security*, 1994, ch. 2, 22.

<sup>2</sup> *Ibid.*, 24.

<sup>3</sup> *Ibid.*, 25.

<sup>4</sup> UN Commission on Human Security, *Human Security Now*, New York, 2003, available at: [www.humansecurity-chs.org/finalreport/English/FinalReport.pdf](http://www.humansecurity-chs.org/finalreport/English/FinalReport.pdf) (last accessed 10 Jan. 2009).

dignity and to earn a livelihood, rather than on the state and its security or sovereignty. The 2004 report of the UN Secretary-General's High Level Panel on Threats, Challenges and Change focused largely on traditional ideas of security, although it too acknowledged that global security is about state as well as human security.<sup>5</sup>

This new framework of human security causes one to consider the safety and security of individuals irrespective of their attachment to, or status within, a state. However, the prevailing emphasis in international law and affairs on state sovereignty and the promotion of state interests remains, bolstered by the state-centric security initiatives in the post-September 11, 2001 (9/11) security environment.

The lack of attachment to and citizenship of an adopted or asylum state often places non-citizens in a situation different to that of nationals. The experience of non-citizens is frequently characterised by discrimination, xenophobia, criminalisation, poverty, humanitarian fatigue, lack of empowerment, dependency and uncertainty. Non-citizens face particular threats to their human security and they do not always benefit from national security initiatives because of their immigration status (or lack of status).

The international refugee protection regime, with few exceptions, grants rights according to status within the territory. In fact, in the context of mass influx, refugees and asylum-seekers have been seen as threats to national security, or even to international peace and security.<sup>6</sup> International human rights law contains some key exceptions for non-nationals, especially in relation to political participation and economic rights; and there remains no global international migration legal framework, although there is a human rights treaty regime for protecting migrant workers and their families.

States are increasingly adopting restrictive migration policies that aim to prevent entry to their territories, which impact on long-established asylum obligations. Suffering from humanitarian fatigue, the refugee protection regime has been undermined by state action aimed at circumventing legal obligations through the introduction of policies such as 'safe third country', off-shore or extraterritorial processing, and interception measures. These measures are often made in the name of sovereignty and security. The ancient rescue at sea regime has been

<sup>5</sup> UN, Report of the Secretary-General High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, 2004.

<sup>6</sup> See, e.g. UN Security Council resolutions 688 (1991) on Iraq; 841 (1993) on Haiti; 1199 (1998) on Kosovo.

threatened by the refusal of states to allow the disembarkation of rescued individuals on their territories for fear that they may apply for asylum or the state might be otherwise unable to return them. The failure to resolve armed conflicts in many parts of the world maintains long-term and protracted refugee camps, in which several generations live as refugees with indefinite futures. Such camps can provide fertile recruitment grounds for rebel groups and, with limited hope, many refugees, especially young men, take off on migratory journeys that may last many years, passing through several countries in search of better protection. Meanwhile, other countries, yet to ratify the 1951 Convention relating to the Status of Refugees,<sup>7</sup> as amended by its 1967 Protocol,<sup>8</sup> or an equivalent regional instrument, keep such persons outside protection space and at risk of *refoulement* or expulsion.

Many states continue to maintain constitutional or other legal frameworks that leave individuals in situations of statelessness. Non-citizens have yet to benefit fully from the Millennium Development Goals and other development initiatives. Environmental degradation is set to increase the numbers of non-citizens crossing international borders, whether permanently or temporarily, who typically fall outside of existing legal agreements. Irregular migration has tested the commitment of states to respect human rights standards, and it has been listed by some governments alongside terrorism as one of the current key threats to national security. Moreover, the post-9/11 security environment has provided a platform for governments to reassert the discourse on national borders and state sovereignty as a way to undermine human rights guarantees, usually with a disproportionate impact on non-citizens.

The human security framework has not been fully integrated within the international system, nor have its implications for non-citizens or existing protection regimes been comprehensively studied. International lawyers have also been on the sidelines of what has largely been an international relations' discourse. This book aims to explore the impact and dimensions of a range of aspects of human security, as understood in its broadest sense, on non-citizens. With its particular emphasis on citizenship and the state, this book does not look at other areas of forced displacement or voluntary or involuntary migration occurring

<sup>7</sup> Convention relating to the Status of Refugees 1951, 28 Jul. 1951, 189 UNTS 150; entered into force 22 Apr. 1954.

<sup>8</sup> Protocol relating to the Status of Refugees 1967, GA res. 2198 (XXI), 16 Dec. 1966, 606 UNTS 267; entered into force 4 Oct. 1967.

within the boundaries of states, except in so far as that dialogue is complementary to or interlinked with non-citizens. We are particularly interested in what the lack of citizenship or status means for the human security of individuals outside their country of nationality or origin, or those who remain in their state of origin or habitual residence but who do not enjoy the citizenship of that state. Such an analysis has not been undertaken in this way elsewhere.

Other books that have attempted to tackle security issues affecting non-citizens have concentrated on refugees and internal displacement, without making the link to issues of attachment and citizenship and therefore to a wider group of non-citizens. They have also tended to consider security through its traditional lens without a specific focus on human security. This book also challenges international lawyers to think about the effects of a new conceptual framework derived from and set within a policy agenda, rather than within a legal one. This has been a challenge in and of itself, with some legal commentators in this volume concerned that an emphasis on international relations theories and state and security interests will detract from binding international legal obligations. Certainly, none of the existing edited collections or books on refugees or migrants tackle directly the concept of human security or make it their primary focus; nor do they canvass the question of lack of citizenship in its broadest sense, rather than in relation to specific groups, and then it has been mostly limited to refugees.

In addition, this book purposefully combines the expertise of contributors from both academia and practice, with the latter drawn from experienced practitioners working on policy and advocacy in non-government organisations, international organisations (the United Nations High Commissioner for Refugees) and specialised agencies (the International Organization for Migration). In this way, the book is not limited to a theoretical analysis, but attempts to combine theory with a practical examination of the impact of laws and policies on the lives and security of those affected. It aims to develop a fruitful interchange between theory and practice.

The book is especially interested in certain groups of non-citizens that face particular security or protection challenges, namely asylum-seekers, refugees, stateless persons, trafficked individuals, dual nationals<sup>9</sup> and

<sup>9</sup> Though dual nationals are not non-citizens, they have faced similar challenges to non-citizens, particularly in the post-9/11 security environment and are considered in this book in this context.

irregular migrants, although it is noted that long-term and regular migrants can be particularly affected by counter-terrorism measures. Adopting a broad view of human security, we combine both traditional security issues and their impact/intersection with non-citizens (e.g. terrorism and armed conflict) with issues that have not been traditionally seen within a security framework (e.g. development, poverty, and the environment). This book canvasses both what this new human security framework offers non-citizens in terms of human rights, human development, and human dignity; as well as how existing protection regimes fit within or respond to human security issues and their capacity to tackle the human security of (or current threats or challenges facing) non-citizens.

The book is divided into four parts. Our chapter in Part I provides an overview of the human security framework generally, as it has been developed by the UN, and sets out some of its over-arching themes and critiques, before moving to consider more specifically what it may mean for the rights of non-citizens.

Part II of this book identifies some current challenges to the human security and international protection of refugees, asylum-seekers, and stateless persons, in the particular context of physical and legal security, armed conflict and refuge. This part has chapters on human security and statelessness (Mark Manly and Laura van Waas); human security and the international refugee protection and the former's dual strategies of protection and empowerment (Frances Nicholson); human security and protracted refugee situations in Africa (Edwin Abuya); human security and the militarisation of camps of refugees and internally displaced persons (Robert Muggah); and protection from *refoulement* in the maritime context (Barbara Miltner).

Part III of this book explores issues relevant to the inter-linkages between human security and migration, environment and development, with chapters dedicated to migrants' rights and concepts of empowerment (Pia Oberoi); labour migration management and the rights of migrant workers (Ryszard Cholewinski); survival migration and socio-economic rights, in particular judicial responses to HIV/AIDS (Eve Lester); climate-induced displacement (Jane McAdam and Ben Saul); and trafficking in human beings (Ryszard Piotrowicz).

The final part of this book (Part IV) then turns to the issue of security of non-citizens within the context of the so-called 'war on terror' or under counter-terrorism measures. In light of the fact that national security agendas have not disappeared or (yet) been replaced by the

human security framework, this part tackles some of the pressing security challenges facing states and individuals since 9/11 and is located within the traditional ambit of security discourse. Chapters cover immigration law enforcement measures adopted after 9/11 and the issue of discrimination (Daniel Moeckli); the consequences of non-citizenship in the ‘war on terror’, including the militarisation of anti-terrorism measures, the legal apparatus established by the United States in relation to ‘enemy combatants’, and questions concerning the interrogation of non-nationals (Craig Forcece); human rights protections against *refoulement* and expulsion within the same context (Vesselina Vandova); the legal framework relating to renditions (Carla Ferstman); and legal routes to restoring individual rights at Guantanamo Bay, including through *habeas corpus* applications and appeal to diplomatic protection (Lorna McGregor).

Almost all chapters are challenged by the vague and unwieldy notion of ‘human security’. This is evidenced more in the chapters by international lawyers, than in those by international relations specialists, as the latter appear more comfortable with policy and conceptual frameworks that sit outside the strict confines of law. Concerns range from the human security framework having the potential to undermine or replace existing human rights doctrine and instruments, or to divert attention away from binding obligations to political manoeuvring or abuse, although such concerns have yet to be made out in practice. Rather, states promoting a human security agenda claim a number of human rights successes under its name, including the establishment of the International Criminal Court and the signing of an anti-personnel land mines convention.

Ultimately, it seems to us that there are conceptual benefits for non-citizens in a framework that situates the individual human being at the centre of its discourse, irrespective of their attachment to the state. At a minimum, the framework deserves further exploration and discussion, for which this book is a contribution. Under the national security paradigm in contrast, in which notions of sovereignty, border controls and citizenship are of primary importance, the non-citizen is usually the first to be excluded, neglected or treated with suspicion as threats to the security of the state emerge. Moreover, there remain gaps in the international legal framework for the protection of non-citizens, especially for the regulation of international migration. In exploring whether the human security framework has the potential to fill existing gaps in this legal landscape, we conclude that as long as the international legal and

political system is state-based and national security interests prevail, the notion of human security, although an improvement upon the state-centric national security paradigm, will be at a minimum a rhetorical impetus to joint action. At best, it may plug some of the protection gaps in international law on either an *ad hoc* or temporary basis, offer new ways to think about and to conceptualise protection concerns and solutions, and potentially it may be a step towards recognition of a legal right to human security, the latter satisfying what seems to be an unrelenting need by some international lawyers to pin down the notion of human security into legal language.

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