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Perspectivas
Teóricas,
Metodológicas
e de
Investigação

Luis Fernando González-Beltrán
(organizador)

VOL V



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PRÓLOGO

Todos hemos oído la expresión popular “si algo sale bien, hazlo de nuevo”. Y aquí estamos presentando el quinto volumen de “Humanidades e Ciências Sociais: Perspectivas Teóricas, Metodológicas e de Investigaçao”. En esta ocasión, como lo dice uno de nuestros autores, abordamos los diferentes niveles de análisis, micro o individual, meso o local, y macro o global.

En esta obra, en la que incluimos 21 autores, de procedencias diversas, tanto teóricas, como metodológicas, y hasta disciplinarias, agrupamos los trabajos en cuatro apartados. Iniciamos con 7 capítulos bajo el rubro “Interacción, amor y desviación sexual”.

En primer lugar encontramos las creencias sobre el amor romántico, las relaciones tóxicas, la dominación masculina y la violencia de género. Enseguida encontramos el análisis de la infidelidad y su relación, o falta de ella, con el género y la inteligencia sexual. Tercero, podemos ver como esta infidelidad, que aparece en casi la mitad de los encuestados, genera daño emocional y violencia. A continuación se revisan los factores de riesgo de la violencia en parejas, una “preocupante realidad de millones de adolescentes y adultos jóvenes”. También cómo la autoestima, y su interacción con los padres, les permite tomar decisiones sobre el inicio de su vida sexual. Incluimos también como se cuestionan las músicas populares, los discursos textuales y corporalidades que se entrelazan en ciertas composiciones performativas, para deconstruir aspectos sociales de las masculinidades hegemónicas. Finalizando este apartado con una mirada clínica que intenta, como muchas otras miradas, dar una explicación de los conflictos internos, y la pérdida de contacto con la realidad, que llevan a la violencia y la desviación sexual.

En el segundo apartado nombrado “Cómo nos forjó la historia: Esclavitud, Guerra y Justicia”, tenemos 5 trabajos. Ahí podemos encontrar parte de la historia virreinal, analizando el arte religioso como “agentes con presencia, potencia y acción en la interacción social entre culturas”. Siguiendo con un trabajo que usa la hermenéutica jurídica, para evaluar la justicia y la esclavitud en los afrodescendientes. En los últimos tres capítulos de la sección, se busca resignificar el pasado: primero, interpretando la batalla del Ebro en la memoria colectiva; segundo, analizando la politización de una canción, ejemplo de los diálogos en contra de la dictadura militar y, en el último estudio, se aborda una vanguardia artística vinculada al Modernismo en América Latina, que se reflejó en la figura del indio Caraíba, y la llamamos aquí la jungla identitaria.

La sección “Salud y Sociedad” inicia con un trabajo que muestra que los determinantes sociales de la salud juegan un papel crucial en la aparición y evolución de las enfermedades crónicas. Algo necesario para contraponer con los determinantes comportamentales, el estilo de vida sedentario y la mala alimentación. Así la hipertensión, la osteoporosis y otras enfermedades empeoraron “con el desbalance que generó el

Covid”. Sigue un trabajo en la misma línea, que pretende conocer estos determinantes tanto biológicos como psicológicos y hasta sociales, con el fin de poder guiar a los adultos mayores a adaptar y mejorar su estilo de vida. El apartado finaliza con un estudio que considera a los cuidadores de los enfermos, particularmente de Alzheimer, quienes también sufren el cambio en sus rutinas y estilos de vida, para dedicar a sus familiares una labor de 24 horas.

El último apartado “Derecho y Movimientos Sociales”, comprende 6 capítulos sobre problemáticas que se analizan en distintos países, Argentina, Perú, Colombia, México, Ecuador, pero que se presentan en toda América Latina. Inicia con la convicción de que los movimientos sociales están en crisis, pero porque la propia sociedad en su conjunto está en crisis. Los gobiernos neoliberales se alternan, mientras se da un paso atrás, al alinearse al Fondo Monetario Internacional y la OCDE. Sigue el análisis del sindicalismo latinoamericano, que transita bajo la paradoja de que a mayores prestaciones a los trabajadores, menor desarrollo económico. A continuación se analizan las políticas públicas del deporte tanto de aficionados como profesionales, que se dictan entre agudas contradicciones en aspectos sociales, económicos y legislativos. Luego se analiza la política fiscal, con la adopción de las nuevas tecnologías, llegando a la conclusión que debe haber colaboración entre los organismos internacionales, los estados y los particulares, en aspectos de seguridad y privacidad, pero siempre a “favor de la dignidad humana antes que a la tecnología”. Le sigue una propuesta sobre acuerdos bilaterales, que propone también negociaciones equilibradas que logre integraciones económicas para el desarrollo, tanto en cuestiones ambientales como de infraestructura y en contra del cáncer de la corrupción. El apartado finaliza con los derechos legales e internacionales de los refugiados, y lo mejor, propone recomendaciones prácticas para la protección de estos derechos.

Hemos intentado balancear los temas, las aproximaciones y los diferentes puntos de vista sobre la conjunción de las Humanidades y Ciencias Sociales, para el disfrute del lector que busca estar al día en estas apasionantes materias.

Dr. Luis Fernando González Beltrán
Universidad Nacional Autónoma de México (UNAM)

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MECHANISM FOR ENSURING THE RIGHTS OF REFUGEES: CHALLENGES AND PERSPECTIVES

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ABSTRACT: The article is devoted to covering the topic of mechanisms for ensuring the rights of refugees. In particular, the issues of refugee problems are studied in the historical and legal aspects. The main focus of the study is on the analysis of the definition of the concept of “refugee” and the history of the formation of the term “refugee”, the international legal system for the development of refugee protection, and practical recommendations for protecting the rights of refugees. The article aims to conduct a historiographical analysis of modern international standards of activity to provide effective international protection to refugees and the principles on which they are based. In addition, an important objective of the study is to analyze the problems of refugee status in the international arena and to identify aspects that require further investigation. In addition, this study analyzes the provisions of regulatory legal acts defining

the status of refugees and internally displaced persons, adopted under the auspices of the UN. The corresponding conclusions and recommendations for improving the provisions of existing international legal acts in this area of legal relations have been made.

KEYWORDS: Refugee. Human rights. Forced migration. Asylum.

Population migration has existed for thousands of years and, due to globalization processes on the planet, it is only increasing and expanding in scale and quantity. Forced migrants constitute one of the most vulnerable categories of the population, which certainly requires attention and effective protection of the rights and freedoms of this category of people. Millions of people are forced to leave their homes every year in search of a new place to live, fleeing various forms of persecution.

The global problem of refugees and internally displaced persons is one of the most complex issues facing the global human rights community today. Various international human rights institutions, in particular the UN, constantly include issues on their agenda with the aim of finding an effective mechanism for ensuring the rights of refugees.

The international community has taken certain steps to ensure international protection of forced migrants, but the current system of legal norms does not cover all categories of persons in need of ensuring their rights. Currently, the system of international protection of the rights of refugees and asylum seekers is heterogeneous in nature and is regulated by universal international legal norms, regional and national law. Accordingly, this work aims to analyze the mechanism for ensuring the rights of refugees and study the problems faced by refugees, as well as the effective improvement of existing norms and procedures in order to comply with the international protection of the rights and freedoms of forced migrants.

The purpose of the article is to conduct a historiographical analysis of modern international standards of activity to provide effective international protection to refugees and the principles on which they are based. In addition, an important objective of the study is to analyze the problems of refugee status in the international arena and to identify aspects that require further study.

Official statistics show that every year hundreds of thousands of people leave their homes and countries of residence to save themselves and their families from problems associated with religious persecution, armed conflicts and various types of discrimination. Every year the number of migrants increases all over the world. The World Migration Report 2022 notes that in 2020, a total of 281 million people were living in countries other than their country of birth, 128 million more than in 1990 and three times more than in 1970.¹ And we are not only talking about migrants who move to other countries of their own free will, but also about refugees. In addition, since 2022, a new crisis in Eastern Europe has generated a large wave of migrants to Western Europe and America. Thus, according to the UN, the number of refugees who have left Ukraine since the beginning of the full-scale Russian invasion exceeds 6.5 million.

The global situation with refugees is quite complex. Thus, according to UNHCR statistics, “at the end of 2023, an estimated 117.3 million people worldwide were forcibly displaced due to persecution, conflict, violence, human rights violations and events seriously disturbing the public order”. Moreover, UNHCR predicts that “forced displacement has continued to increase in the first four months of 2024 and by the end of April 2024 is likely to have exceeded 120 million”.

Historically, refugees have existed throughout the development of civilization. Thus, it is possible to identify the main milestones (stages) in the development of the history of world migration. The Cambridge study identifies the following stages and developments in the history of world migration over the past five hundred years:

¹ *World Migration Report 2022* / International Organization for Migration. URL: <https://publications.iom.int/books/world-migration-report-2022>.

- migration associated with the European colonization of America (from the early 1500s to the 19th century);
- migration due to the slave trade from 1550 to the beginning of the 19th century;
- migration within Europe, Africa and Asia in the 17th-18th centuries;
- migration of hired workers in the British colonies mainly from India and China in 1834-1917;
- migration to the New World in the 1800s–1930s;
- migration after World War II to the 1960s;
- migration after the 1970s and up to the present day.

The reasons for the outflow of refugees are emergency situations related to world and local wars, interethnic and religious conflicts, dictatorial political regimes, which were accompanied by gross violations of basic human rights, which forced people to leave their homeland, often without means of subsistence, fleeing persecution.

In addition, one of the most important factors in the formation of new refugees is human rights violations that underlie the phenomenon of refugees. It has long been clear to the international community that there is an obvious connection between the refugee problem and human rights issues.

Moreover, human rights violations are not only one of the main reasons for the mass exodus, but also preclude the possibility of voluntary repatriation until such violations cease. Therefore, the protection of human rights in the countries of origin of refugees is of utmost importance for the protection of refugee rights and the resolution of refugee problems.

The unprecedentedly large number of forced migrants led the international community in the mid-20th century to recognize the need to create a stable, universal international legal mechanism for protecting the rights of refugees, as well as to develop international and national legal procedures for granting asylum and refugee status.

The first international institutions providing assistance to refugees were created within the framework of the League of Nations. After the Second World War, when the refugee problem remained unresolved and even worsened, the need arose to create a new international instrument defining the legal status of refugees. This new institution was the United Nations, which developed and adopted universal international standards for the protection of refugees and for the protection of human rights in general.

It should be noted that the specificity of the legal status of refugees consists primarily in the fact that refugees have basic human rights that apply to everyone (citizens, foreigners, stateless persons, refugees, asylum seekers, legally or illegally present on the territory of the state) and are of a general nature.

The universal level of legal regulation of migration processes contains a significant number of normative legal acts, among which the basic ones are the fundamental documents on human rights, such as the Universal Declaration of Human Rights (1945), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966). The documents that form the basis for regulating the status of all types of migrants also include: the UN Declaration on the Human Rights of individuals who are not nationals of the country in which they live; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention for the Protection of All Persons from Enforced Disappearance; the Convention on the Rights of the Child; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, etc.

On the other hand, refugees enjoy rights and freedoms inherent only to them and which they possess on the basis of universal and regional international agreements governing the legal status of refugees.

In order to develop an effective mechanism for ensuring the rights of refugees, in the middle of the last century the UN began preparatory work to create a new organization that would replace the International Refugee Organization and a new treaty defining the legal status of refugees. This new institution was the Office of the United Nations High Commissioner for Refugees, and the document that redefined the concept of “refugee” was the Statute of the Office of the United Nations High Commissioner for Refugees of 14 December 1950. The Statute combined elements of the definition of the concept of “refugee” that were present in previous agreements.

According to paragraph 6 of Chapter II of the Statute, the competence of the United Nations High Commissioner for Refugees extends to

“all persons who, as a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, are outside the country of their nationality and are unable or, owing to such fear or for reasons not related to personal convenience, are unwilling to avail themselves of the protection of the Government of that country; or who, having no nationality and being outside the country of their former habitual residence, are unable or, owing to such fear or for reasons not related to personal convenience, are unwilling to return to it”.

The definition of “refugee” contained in the UNHCR Statute is universal in its scope of application, as it does not contain any geographical or temporal limitations. However, even with such a definition, UNHCR has had to apply its mandate with sufficient flexibility in the future, resulting in a significant change in the concept of “refugees” towards its expansion. Thus, in 1959, the UN General Assembly, in its resolution 1388 (XIV) of 20

November, authorized the High Commissioner to provide “good offices” to refugees “not under the protection of the UN”.

Resolution 1959 (XVIII) of 1963 of the UN General Assembly requires the High Commissioner to continue to provide international protection to refugees and to make efforts in favour of refugees under his care, as well as refugees to whom he extends his “good offices”, and to pay special attention to new groups of refugees in accordance with the relevant resolutions of the UN General Assembly and the directives of the Executive Committee. These and subsequent UNGA resolutions indicated that the UN had begun to take a pragmatic approach to defining individuals as refugees. It should be added to this that in the 1960s the growing scale of refugee flows, especially in African countries, forced UNHCR to apply the so-called group approach to defining refugees. Although this was contrary to the provisions of the UNHCR Statute, it was a necessary measure in the event of sudden mass influxes of refugees, when saving people’s lives and their safety justified circumventing legal norms.

Despite protests from some States, the international community has no formal objection to UNHCR exercising its functions in relation to such different categories of persons, since the provision of such assistance does not affect the sovereign right of States to recognize them as refugees with all the consequences that this entails.

In addition to the definition of the concept of “refugee” recorded in the UNHCR Statute, there is a definition of this concept contained in Section A of Article 1 of the Convention relating to the Status of Refugees in 1951. The Convention relating to the Status of Refugees was adopted by the Conference of Plenipotentiaries of the United Nations on 28 July 1951 and entered into force in 1954. The 1951 Convention relating to the Status of Refugees is the main document in the field of refugee protection.

According to Article 1 of the 1951 Convention, which states that a refugee is any person who,

“as a result of events occurring before 1 January 1951, and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

However, the definition of the term “refugee” in the 1951 Convention had two limitations: the first (temporal) was that, according to the 1951 Convention, the right to be considered a refugee did not extend to persons who became such as a result of events that occurred after 1 January 1951, and the second (geographical) was that the above-mentioned events could mean either “events that occurred in Europe before 1 January 1951” or “events that occurred in Europe or elsewhere before 1 January 1951”. The presence

of two restrictions complicated the solution of the refugee problem by excluding millions of actual refugees from the scope of the convention. To solve these issues, a Protocol was adopted that removed the temporary limitations provision of the 1951 Convention, making the Convention a truly universal agreement.

The existence of three international agreements simultaneously: the UNHCR Statute, the 1951 Convention and the 1967 Protocol, which contain a definition of the term “refugee”, has led to another legal problem. The essence of this problem is that there are currently two categories of refugees among those recognized as such on the basis of the above-mentioned international documents.

The first category is the so-called “mandate refugees”. These are persons considered by UNHCR as refugees in accordance with the provisions of the Statute. This definition is independent of the State of asylum being a party to the 1951 Convention and the 1967 Protocol, as “mandate refugees” may receive assistance directly from UNHCR. However, they cannot enjoy the rights and benefits granted to refugees who are not recognised as refugees by a State party to the 1951 Convention (so-called Convention refugees). This term is applied to refugees in accordance with the broader competence of the High Commissioner, subsequently confirmed by the UN General Assembly. The second category is “convention refugees”. These are persons who have been recognized as refugees by a state of asylum that is a party to the 1951 Convention and/or the 1967 Protocol. Only in this capacity do they enjoy all the rights and benefits that states have undertaken to provide to refugees on the basis of international law.

Therefore, for a person to be recognized as a refugee under international law, he or she must meet the following conditions:

- 1) be outside his or her country of origin;
- 2) has a well-founded fear of persecution;
- 3) this fear must be based on one of five grounds – race, religion, nationality, membership of any particular social group, political opinion;
- 4) be unable or unwilling to avail himself or herself of the protection of his or her country of origin or to return to that country due to fear of persecution.

The 1951 Convention also sets out the fundamental rights of refugees and “minimum standards” of treatment for forced migrants, defines the legal status of refugees, contains provisions on employment and labour rights, social security, provisions on the right of refugees to obtain identity documents and travel documents, regulations on taxation and the rights of refugees that they have the right to transport property in order to settle in another country to which they have been granted entry.

Other provisions of the Convention define the rights of refugees in the country of asylum: non-discrimination, freedom of religion, the right to association, the right to a court, the right to work, social rights, the right to education, freedom of movement, the right to travel documents.

Furthermore, the universally recognized human rights enshrined in the International Bill of Human Rights also apply specifically to refugees. The International Bill of Human Rights sets out standards that guarantee the dignity of human treatment. These include the right to life, protection from torture and cruel treatment, the right to a nationality, the right to freedom of movement, and the right not to be refouled, etc.

The International Bill of Human Rights contains many provisions relating to the protection of the rights of refugees in the country of asylum. Fundamental civil and political rights include: protection from arbitrary detention; freedom of conscience; freedom of religion and expression; freedom of movement; protection of the family; the right not to be subjected to torture or degrading treatment; protection of foreigners from deportation. The main economic, social and cultural rights include: the right to social security; the right to work; the right to education; the right to an adequate standard of living, health care and housing; the right to seek asylum, which is directly guaranteed by Article 14 of the Universal Declaration of Human Rights.

It should be noted that international standards on refugee status are based on the following fundamental principles:

- inalienability of fundamental rights and freedoms (according to Article 4 of the UN Convention on Civil and Political Rights);
- the right to citizenship and the right not to be arbitrarily deprived of citizenship or the right to change citizenship;
- prohibition of discrimination of human rights;
- prohibitions on the use of armed force to restrict the exercise by individuals or groups of individuals of human rights or to deprive them of their national, religious, cultural, linguistic or ethnic identity;
- prohibitions on measures such as forced displacement of population or any other acts that might lead to the forced displacement of people;
- the right to seek asylum from persecution in other countries;
- the right to leave any country, including one's own, and the right to return to any country, etc.

International refugee law includes a number of principles that are fundamental in the implementation of the mechanism for ensuring the rights of refugees. These principles include:

- *the principle of non-refoulement* (Article 32 of the 1951 Convention). This principle generally applies to persons seeking asylum, at least initially and in appropriate circumstances.

The principle of non-refoulement applies regardless of the presence or absence of legal status of the asylum seeker. It does not matter in what way such a person enters the territory of the state where he or she seeks asylum. If an asylum seeker is forcibly returned to a country where he or she has a well-founded fear of persecution or is subject to any form of harassment, this is a forced return that is contrary to international law.

It is important to emphasize that the protection of refugees in European countries (the principle of non-refoulement) is the cornerstone (foundation) of refugee protection, which serves as a kind of guarantee against the forced return of such persons to a situation of persecution or other danger. This principle is enshrined in various forms in several international instruments concerning the granting of refugee status and human rights (in particular, in Article 33.1 of the 1951 Convention).

- *the principle of non-expulsion* of refugees. There is a general prohibition in international law on the extradition of refugees. This principle is one of the main ones in international humanitarian law.

The text of the 1951 Convention does not contain definitions concerning the extradition of refugees, since its drafters did not consider it necessary to repeat the prohibition of extradition of persecuted persons at the request of a particular state. At the same time, Article 33 of the 1951 Convention contains a provision on the forced return of refugees to the countries from which they arrived if such “persons are considered a potential threat to the security of the country in which they are located or are convicted of committing a serious crime and create a public danger for the host country”. (part 2 of Article 33). This legal norm clearly defines the legal possibility of extraditing refugees only in exceptional situations that may pose a threat to the security of the country of asylum or the commission of a serious crime by the person. In all other situations, the principle of non-extradition remains unchanged.

- *the principle of equal sharing of the burden of receiving and accommodating refugees by all States*. This principle is not reflected in the text of the 1951 Convention. However, it has found wide recognition and support in international legal practice in recent years.
- *the principle of flexible, prompt and humane determination of refugee status*. It is also not regulated by the 1951 Convention. However, the UNHCR Executive Committee in Conclusion No. 8 (XXVIII) recommended to States a procedure for determining refugee status.

- *the principle of voluntary repatriation.* It constitutes one of the fundamental foundations of refugee rights, enshrined in international and national acts.

The content of this principle is that repatriation should be carried out only in the presence of the freely expressed will of the refugees: the voluntary and individual nature of the repatriation of refugees must always be respected, and the need for its implementation occurs in conditions of complete safety of the returnees.

- *the principle of temporary protection.* The idea of temporary asylum or protection appears in international law as an alternative to forced return.

Temporary protection is in line with the spirit of the 1951 Convention and the 1967 Protocol. This principle applies in the event of a mass influx of refugees into a country. A striking example of its application is the granting of temporary protection status to Ukrainian refugees within the European Union from March 2022.

- *the principle of possible granting of political asylum.* In international law, this principle is regulated mainly by international legal customs, as well as by the Declaration on Territorial Asylum, adopted by the UN General Assembly on 14 December 1967.

In national law, this is a special personal right that national constitutions and laws of modern democratic states grant to foreign citizens and stateless persons. Political asylum is the ability of a foreigner to remain for a sufficiently long time on the territory of a certain state if in his home country this foreigner is subject to persecution for political, religious, scientific or other reasons of a similar nature. By the act of granting such asylum, the state undertakes only the obligation not to extradite such a person to the state in which he/she was subjected to various types of persecution. A distinction is made between territorial asylum and diplomatic asylum.

Having considered the main aspects of the mechanism for ensuring the rights of refugees, it is necessary to highlight the problems that refugees face within the framework of modern legal relations.

Today, the norms of international law applicable to refugees are numerous and heterogeneous, so there is no unified view on their place in the system of modern international law. The lack of a legal connection between the definitions of the concept of “refugee” enshrined in universal agreements has led to the emergence of several categories of refugees – “mandate refugees” and “convention refugees”.

Moreover, existing international conventions in this area do not regulate some important aspects of forced displacement of people. Namely, the modern definition of the concept of “refugee” does not fully take into account modern trends in migration flows,

does not take into account the emergence of new categories and forms of forced migration and deprives millions of people of the legal basis for receiving international protection and assistance not only from individual states, but also from the entire international community.

Improving international legal regulation in the area of recognizing refugee status and granting the corresponding rights remains quite relevant today and is a priority for the international community. This is because the legislation of individual countries often does not meet international requirements regarding the determination of refugee status.

To summarize, it can be concluded that the global problem of refugees and internally displaced persons is one of the most complex issues facing the world community today. The refugee situation is a classic example of the interdependence of the international community, which clearly shows how the problems of one country can directly affect other countries, sometimes even without their consent. The refugee situation is also an example of the interdependence of different issues united by one global problem.

The migration crises that have been observed in recent years require the development by the world community of new approaches to the formation of migration policy at the global and national levels.

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