

“PROTECTION SEEKERS, STATES AND THE NEW SECURITY AGENDA”

A Comparative Analysis of the Impact of Anti-terrorism Legislation on the Law Relating to **Asylum Seekers** in the United Kingdom, the United States of America and Australia.

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ABSTRACT

PROTECTION SEEKERS, STATES AND THE NEW SECURITY AGENDA - A COMPARATIVE ANALYSIS OF THE IMPACT OF ANTI-TERRORISM LEGISLATION ON THE LAW RELATING TO ASYLUM SEEKERS IN THE UNITED KINGDOM, THE UNITED STATES OF AMERICA AND AUSTRALIA.

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This book is concerned with the subject of anti-terrorism laws and their impact on the rights of refugees and asylum seekers. In particular, it looks at the compatibility of anti –terrorism laws with international human rights law instruments.

Over the last decade international terrorism and the subsequent anti-terrorism laws have created insecurities both for States and individuals and, as a result, have become important issues both internationally and nationally. This book critically evaluates these topical subject areas, which States are frequently reluctant to divulge information on details due to their political nature and the sensitive security-centered information they entail. Contained herein is a comparative study of law and policy, which attempt to fill gaps in current analysis in the literature. I argue that the recent anti-terrorism and asylum law has had a dire impact on the legal rights of asylum seekers. More specifically, the core international human rights standards that are central to the integrity of World War II asylum law have become weakened and to a significant extent even perverted by special criminal law responses to national security and terrorist threats after 9/11 by the a number of Western States.

While there is a wide spectrum of anti-terrorism laws, there are also a number of safeguards and rights provided by international human rights law, instruments designed to provide legal protection for individuals. Some states - the U.S., the U.K., and Australia - have chosen to disregard the legal protections they are obliged to uphold, arguing that the current security climate justifies the exceptional nature of such apparently negative action. Apart from the politics of security concerns, international relations and media priorities contribute to the moulding of laws and policies. This has been particularly the case for the current treatment of asylum seekers.

Most of the anti-terrorism laws and policies impact on the treatment and rights of non-nationals and immigrants, particularly on those seeking protection either as refugees or asylum seekers. This impact can be

seen in two spheres, one within context of immigration control - including asylum determination processes - and another within the judicial procedures involved when asylum seekers are suspected of being a threat to national security and/or a terrorist. The measures that will be focused are detention; restriction of movement and exclusion.

Chapter One examines why immigrants seeking protection are considered threatening to the host State and how policies are moulded by this idea. Historical events, international law and relations, foreign policy and domestic politics are all examined. This chapter emphasises and explains how the nexus of territorial security and the movement of persons and terrorism have changed in nature since September 11, 2001. It portrays a scenario of *rights vs. rights*: on the one hand the rights of individuals who seek protection and, on the other, the right of a State to protect itself and provide security to its citizens. The contest of rights takes place in a dualist environment created by governments ('us' and 'them') and the national security concerns of the state subordinate individual rights. In doing so the Chapter One concludes that with the use of anti-terrorism and national security law and policy asylum seekers and refugees are criminalised and treated with discontent which has resulted in their basic human and legal rights being curtailed.

Chapter Two has three aims: an analysis of the labeling and definition of a terrorist act; an examination of the theoretical and jurisprudential approaches to the exclusion of refugees and asylum seekers suspected of being terrorist; and, an exploration of the dignitary principles (that should be) used when assessing the possible exclusion from protection.

Analysis of jurisprudence and policy since September 11, 2001, suggests the interpretation and use of exclusion clauses in the Refugee Convention have been transformed and, as a result gave rise to many criticisms. The conclusion is reached that when applied in its full spirit the Refugee Convention provides an effective and wide scope of protection both for the host states seeking security from terrorism and the individuals seeking refuge. However, the states have chosen to go beyond what the Refugee Convention proscribes and this trend has had a dire impact on the legal rights of asylum seekers and refugees.

Chapter Three examines the respective anti-terror laws and procedures in Australia, the U.K. and the U.S., and the impact they have had on the legal rights of refugees and asylum seekers. It involves critiquing substantive law and an analysis of how and why the recent counter-terrorism legislation has been created. It pinpoints the tensions and contentious issues governments have experienced and sought to address. In doing so, differences and similarities are drawn out. For example, while the U.S. and the U.K. have codified aspects of international human rights law instruments in their domestic legislation and, consequently, also have procedures which provide a scrutiny of anti-terror laws and policy, Australia differs in her stance towards any scrutiny over her national laws and has viewed any criticism with suspicion and discontent. Moreover, while the U.S. and the U.K. have experienced terrorist attacks on their soil thus giving them the context in which anti-terror measures

were argued to be justified, Australia used these attacks abroad to expand most of the anti-terror legislation. In comparing counter terrorism law and policy, specific provisions that directly or potentially have an impact on asylum seekers and refugees have been identified and compared in three different jurisdictions. In light of relevant international and regional human rights legal instruments, the conclusions underline how the rights of asylum seekers and refugees have been altered and/or reduced.

Chapter Four examines how international law is incorporated in the three countries examined and how international human rights law standards become relevant to and indispensable in State practice. It selectively critiques the important, contentious and topical areas of mandatory detention, procedural rights and the rule of law, and the recent practice of diplomatic assurances. While emphasising the importance of international human rights law in relation to counter-terrorism and protection seekers, the chapter's conclusion is that state practice - in a number of areas - does not fully comply with the international human rights law.

Chapter Five, in the light of dignitary principles emanating from international law and academia, provides a number of safeguards and recommendations which, if implemented, could ensure that States observe the minimum standards of international human rights whilst protecting their national security and combating terrorism. In this chapter conclusions are also drawn on the success of anti-terror laws, and the desirability of their use in immigration control context. Evaluation is by a survey of successful prosecutions, as well as by reference to the ethical methods envisaged by international human rights law. In concluding remarks section, the themes addressed throughout the book are drawn together and a number of areas for further research are highlighted.