Chapter 2  The Role and Limits of the European Court of Human Rights in Supervising State Security and Anti-terrorism Measures Affecting Aliens’ Rights

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1 Introduction

The European Court of Human Rights (ECtHR) has been faced, for more than 40 years, with the onerous task and challenge of striking a fine balance between European State security interests and individual rights, in political conflict situations involving acts or threats of terrorism, ensuring, at the same time, that the European Convention on Human Rights (ECHR) continues to play its central role as “a constitutional instrument of European public order”.

However, current forms of internationalised terrorism are of an entirely different character and dimension from terrorism that European and other States had to cope with in the 1960s or 1970s.

The terrorist attacks in the US in September 2001, as well as the subsequent acts of terrorism especially in Western Europe, showed the extremely violent, irrational form and the devastating effects of terrorist acts upon human lives and societies based on the principles of democracy, human rights and the rule

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2 Council of Europe Committee of Ministers, Declaration on ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels, 12 May 2004, para. 2, www.coe.int/cm.
of law. These attacks have given an unprecedented high profile to the issue of terrorism and put it on top of international and national political agendas for two main reasons. Firstly, they have rocked the bases of established perceptions of high-level security in many States, especially in the Western world, thus seriously damaging their self-confidence. It is these States which, in turn, adopted instinctively reactive, legislative and other, measures hardly compatible with fundamental human rights principles of modern liberal democracies. Secondly, a major side effect of the post-2001 rise of the terrorism phantom has been the victimisation of aliens, that is, of third-country immigrants, asylum seekers or even refugees. The unfortunate, de facto, connection of international terrorism with ‘other’ social, religious or ethnic groups that constitute also minority parts of the polities of Western liberal democratic States, has put aliens – members of the above groups in these States – at the centre of a phobic cyclone that has eventually prevailed worldwide. The Parliamentary Assembly of the Council of Europe, a few days after the September 2001 attacks, adopted a Resolution that reflected these concerns and expressed its conviction that:

introducing additional restrictions on freedom of movement, including more hurdles for migration and for access to asylum, would be an absolutely inappropriate response to the rise of terrorism.3

Regrettably, the 2001 and subsequent terrorist attacks have not only provided an excuse for Western States’ further restrictive immigration and asylum policies but also led to the introduction of discriminatory legislative and administrative practice against aliens in States considered, so far, as prototypes for the protection of human rights and the rule of law.4


4 See, e.g., A (FC) and others (FC) v Secretary of State for the Home Department, House of Lords judgment of 16 December 2004, [2004] UKHL 56, www.publications.parliament.uk. See also summary of and notes on this case in O. Sands, “British Prevention of Terrorism Act 2005”, Asil insight, April 27, 2005, www.asil.org/insights.htm. In this case, the House of Lords found that the application of UK anti-terrorism legislation providing for indefinite detention of aliens suspected of terrorism was disproportionate and discriminatory. The judgment of the House of Lords has drawn heavily on and reaffirmed the direct effect in the UK of the ECtHR’s case law. After this judgment, the UK withdrew her derogation from Article 5(1) ECHR. See chapter by Bonner and Cholewinski in the volume for an