1. Introduction: Counter-Terrorism in Europe through Migrants’ Eyes

In September 2001 surreal images of the disastrous collapse of the Twin Towers informed the world that the contemporary history was about to be reshaped on a clashing narration of West versus East, Christianity opposing Islam, good against evil. In the aftermath of 9/11 counter-terrorism has become a focal issue for Western communities, because, as President Bush publicly declared, «this is not [...] just America’s fight. And what is at stake is not just America’s freedom. This is the world’s fight. This is civilisation’s fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom. [...] Either you are with us, or you are with the terrorists». Counter-terrorism measures have triggered an escalation process, which has progressively eroded values and principles that are essential in a democratic frame. This article will assess the effect of the war on terror on a particular group of people, that is migrants, whose fragile rights and freedoms are often sacrificed on the altar of national sovereignty and territorial integrity. The subject appears to be extremely broad for a comprehensive and complete scrutiny, given the various aspects and elements that should be considered for an exhaustive analysis of the topic under investigation: research will consequently be limited to the impact that counter-terrorism generated on immigration in the years immediately following the collapse of the World Trade Center (2001-2009). Although presented as a limitation, time constraints will indeed allow the author to focus on a period of time in which counter-terrorism measures result to be more harsh and severe by reason of the temporal proximity of the attacks as well as the attitude adopted by the American leadership of that time. In addition, the assessment will be concentrated on
the effects produced by the war on terrorism at the European level and at the national level of one of the member states. The first part will, thus, take into account the European reaction after 9/11 attacks and will examine possible migration policy revisions arising from the fight against terror. In the second part a similar analysis will be conducted, but from a regional perspective, considering the effects of countering terrorism within the national system of a European country, that is Italy, chosen on the score of the author’s familiarity with the Italian legislation and social apparatus. Finally, after having scrutinised possible consequences generated by counter-terrorism in the migration field, it will be assessed if the European Union, in the role of a supranational system, is more reliable and effective than a national system in the matter of protection of fundamental rights in time of declared public emergency. Throughout the essay, counter-terrorism will be considered and treated as a facet of a wider security discourse, whose risk is to legitimate brutal measures resulting from the attempt to address an intense sense of peril.

2. Western First Reactions: US Immediate Radicalism versus EU Progressive Radicalisation

The destruction of a prime symbol of Western values, combined with the growing uncertainty in the economic field, the lack of stability in the professional area and the undeniable precariousness of social rights, has fuelled the rise of the security question. The terrorist attacks have justified a state of emergency, whereby some illegal practices become legal in the name of national security and public order. Within the security discourse the fight against illegal immigration becomes neuralgic and the status of illegal aliens represents a perfect room to examine the impact of emergency policies on the Western legal order. In the aftermath of 9/11, the US President Bush was the first to approve an anti-terrorism policy that included several alterations of the migratory picture, thus repainting the way aliens are treated when trying to access the US. The devolution of the Immigration and Naturalisation Service competences to the Department of Homeland Security, for instance, fuelled the common opinion that migrants are potential terror threats

and spread the conviction that aliens of certain nationalities are more disposed to become terrorists. The USA Patriot Act, whose enforcement indirectly suggests that before 9/11 the FBI and CIA were not completely free to investigate and intervene in such a way that they would stop further attacks, amended the immigration law in force at the time (Title IV) and created a net-widening of criminal repression. These measures contributed to mould the common thinking and to strengthen citizens’ ties against the evil, easily represented by migrants that are often seen as demoniac rivals in a period of economic crisis because of their availability to work for a lower wage: the US policy affected the American public opinion by attributing a realistic nature to a threat that is undoubtedly generic and undefined.

By presenting the war on terrorism as a just war against an absolute enemy, President Bush also influenced the reaction of European governments and peoples and implicitly stimulated a propitious European collaboration. The EU counter-terrorism policy repeatedly refers to UN Security Council Resolution 1373, in particular to paragraph 1, on preventing the financing of terrorist organisations, and two, on countering terrorist attacks, collaborating in multilateral criminal investigations, improving border controls. While EU achievements in the coordination of the fight against terrorism had always been modest, 9/11 assault significantly accelerated the development of a Community framework to oppose terror: various extraordinary meetings, held before the end of 2001, led to the improvement of judicial and police collaboration and to the adoption of several decisions on combating terrorism. Terrorist attacks undoubtedly pushed EU member states to agree on topics that represented controversial elements of debate in a peaceful context: the Commission itself declared that efforts of the European countries should be aimed at ensuring «that the momentum generated by recent events is not lost and that both the Commission and the Member States are committed to making real and rapid progress».

Nevertheless, the strengthening of border controls was not immediately identified as a priority by the European member states: the EU focused instead on enhancing ground cooperation through the adoption of legal instruments and binding agreements. However, after the Madrid train bombings in March 2004, European actors unequivocally started to identify migration
control measures as a priority in the development of the EU counter-terrorism policy: as a matter of fact, Section 6 of the *Declaration on Combating Terrorism* (2004), entitled «Strengthening Border Controls and Document Security», calls for the implementation of multiple strategies in the area, such as the approval of a «Regulation establishing a European Borders Agency», the adoption of a «Council Directive on the Obligation of Carriers to Communication Passenger Data» and the favourable reception of «Proposals for the Incorporation of Biometric Features into Passports and Visas»\(^{16}\). In addition, the first Annex of the Declaration qualifies the purpose of ensuring «effective systems of border control» as one of the seven strategic objectives to combat terrorism\(^{17}\), as subsequently reasserted in the revised *EU Plan of Action on Combating Terrorism*\(^{18}\). The *European Union Counter-Terrorism Strategy* (2005) further highlights the «need to enhance protection of [...] external borders to make it harder for known or suspected terrorists to enter or operate within the EU. Improvements in technology for both the capture and exchange of passenger data, and the inclusion of biometric information in identity and travel documents, will increase the effectiveness of [...] border controls and provide greater assurance to [...] citizens»\(^{19}\). Since the attacks launched in New York (2001), Madrid (2004) and London (2005) proved that terrorists may exploit the rifts in the «national management of immigrants and asylum seekers»\(^{20}\), population movements started to be considered as a lee shore for national security by European leaders and EU policy-makers\(^{21}\), who consequently started to support the implementation of provisions aimed at limiting aliens’ access into the European Union.

3. Evolution of the EU Migration Policy in the Aftermath of 9/11

3.1. Admission Mechanisms

In order to evaluate the effects that the EU response to terrorism directly or indirectly provoked on the migratory flow, it appears worthy to firstly analyse amendments introduced within the admission mechanisms. Since the creation of the Schengen area\(^{22}\) and the relating abolition of internal borders, cooperation...
among EU member states has evolved around the designation of nationalities that need a visa to enter the Community, the creation of a common visa format, and the standardisation of visa issuing process\textsuperscript{23}. The \textit{Council Decision of 8 June 2004 establishing the Visa Information System (VIS)} determined the construction of a Central Visa Information System and National Interfaces in each member state\textsuperscript{24}. According to the \textit{Regulation No. 810/2009 of the European Parliament and of the Council Establishing a Community Code on Visa}\textsuperscript{25}, «the applicant shall present a valid travel document», «documents indicating the purpose of the journey, [and details on] accommodation»\textsuperscript{27}, and «particular consideration shall be given to assessing whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory»\textsuperscript{28}: it means, in a counter-terrorism perspective, that the personnel authorised for the issue of Schengen visas have to certify that the applicant does not embody a terrorist risk\textsuperscript{29}. In order to facilitate the identification of possible threats to national security, the European Union implemented the listing strategy promoted by UN Security Council Resolution 1390\textsuperscript{30} through the \textit{Council Common Position} of 27 May 2002\textsuperscript{31}, while the Council of the European Union released a draft recommendation promoting profiling activities based on «a set of physical, psychological or behavioral variables, which have been identified, as typical of persons involved in terrorist activities and which may have some predictive value in that respect»\textsuperscript{32}. Notwithstanding, ethnic profile resulted to be both discriminatory\textsuperscript{33}, since it violates Article 14 of the \textit{European Convention on Human Rights} (ECHR) which prohibits all forms of discrimination\textsuperscript{34}, and ineffective, as «the religious, ethnic, and nationality criteria that are relevant to post-9/11 terrorism are [too] broad [...] to offer [a reliable] guidance to law enforcement»\textsuperscript{35}. Given the lack of demonstrated usefulness in tracing possible terrorists and the unlawfulness of the system, the European Council distanced itself from the profiling activity and publicly declared that such a strategy may be implemented only after statistical evidence of connection between certain profiles and terrorist actors\textsuperscript{36}. Unfortunately, although racial profiling errs both on the side of over-inconclusiveness (not all migrants from crucial nations are committed to terrorism) and under-inconclusiveness (terrorists might come from countries
where al-Qaeda is not present)\(^{37}\), several European nations did not follow the Union stand and, indeed, integrated profiling mechanisms into their legal order\(^{38}\).

### 3.2. Border Controls

The consequences of EU counter-terrorism measures on immigration could be secondly examined through the lens of border controls: counter-terrorism entails the need for defence against external menaces, thus leading to the «“securitization” of border protection»\(^{39}\). The necessity to establish control systems on frontiers was first expressed by the UN Security Council, maintaining that «States shall [...] prevent the movement of terrorists or terrorist groups by effective border controls»\(^{40}\), and then reasserted by the European Council, declaring that «better management of the Union’s external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings»\(^{41}\). In addition to the establishment of the Visa Information System\(^{42}\), European leaders reached an agreement on the creation of a «European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union»\(^{43}\), in charge of improving cooperation in the administration of Community lines, providing a standardised training for national border guards and formulating risk analyses\(^{44}\). Furthermore, in order to reinforce the «fight against terrorist offences and serious criminal offences, such as trafficking in human beings and drugs», the Commission of the European Communities issued a Proposal for a Council Decision on Requesting Comparisons with EURODAC data by Member States’ Law Enforcement Authorities and Europol for Law Enforcement Purposes\(^{45}\): the proposal has been abandoned after having been strongly criticised by the European Data Protection Supervisor, who has defined the proposal as a «further step in a tendency towards giving law enforcement authorities access to data of individuals who in principle are not suspected of committing any crime»\(^{46}\). Finally, in 2007 the Commission framed a proposal on the establishment of a Passenger Name Record (PNR), concerning «travel movements, usually flights, and include passport data, name, address, telephone numbers, travel agent, credit card number, history of changes in the flight schedule, seat preferences and other

\(^{30}\) SC Res. 1390, 16 January 2002, S/RES/1390 (2002), Article 2: «[...] all States shall take the following measures with respect to Osama bin Laden, members of the al-Qaeda organization and the Taliban and other individuals, groups, undertakings and entities associated with them, as referred to in the list created pursuant to Resolutions 1267 (1999) and 1333 (2000) to be updated regularly [...]».

\(^{31}\) Council of the European Union, Council Common Position of 27 May 2002 Concerning Restrictive Measures against Osama Bin Laden, Members of the Al-Qaida Organization and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with them and Repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, 29 May 2002, Article 4: «Member States shall take the necessary measures to prevent the entry into, or transit through, their territories of the individuals referred to in Article 1 under the conditions set out in paragraph 2(b) of UNSCR 1390(2002)».


\(^{34}\) Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Article 14: «The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status».

\(^{35}\) Open Society Institute, Ethnic Profiling in the European Union..., cit., p. 114.

\(^{36}\) Ibidem, p. 71.
information, with the ultimate purpose of harmonising national legislation on transport and improving the prevention of terrorist attacks. After heated negotiations, the Council of the European Union adopted a Framework Decision on the Use of Passenger Name Record (PNR) for Law Enforcement Purposes introducing substantial modifications of the original proposal, which essentially state that «the Passenger Information Unit shall process PNR data only for [...] carrying out real time risk assessment of the passengers in order to identify the persons who may be involved in a terrorist offence or serious crime and who require further examination by the competent authorities of the Member State. [Moreover] Member States shall ensure that a positive match as a result of such automated processing is manually reviewed in order to verify whether to the competent authority [...] needs to take action with a view to preventing, detecting, investigating or prosecuting terrorist offences or serious crime». The PNR system has attracted criticism from the academic field, since it may justify breaches of the right to privacy, to data protection, and non-discrimination: as long as there is no evidence of the efficacy of these provisions, the instauration of new databases and the extension of bodies authorised to access information should not be allowed.

3.3. Asylum Seekers

Thirdly, it is suitable to examine also the repercussions that EU counter-terrorism measures produced on asylum seekers’ status. From the beginning of the new millennium the European Union opened the negotiating table for the creation of a Common European Asylum System (CEAS). In 2005 the European Council approved the Hague Programme, whose final aim is «to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection [...] to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organized cross-border crime and repress the threat of terrorism [...] by the development of a Common Asylum System and by improving access to the courts, practical police and judicial cooperation». Later efforts and talks drove to the drafting of the Green Paper on the Future Common European Asylum System, which mainly deals with the definition of CEAS architecture and issues arising from its
concrete implementation. The Commission recently observed that «a genuinely coherent, comprehensive and integrated CEAS should ensure access for those in need of protection: asylum in the EU must remain accessible. Legitimate measures introduced to curb irregular migration and protect external borders should avoid preventing refugees’ access to protection in the EU while ensuring a respect for fundamental rights of all migrants».

Although any plan has been practically enforced yet and none of the above mentioned proposals explicitly penalise the right to seek shelter in virtue of the war on terror, asylum seekers are living through tough times: they are victims of the controversial nexus existing between the needed protection of refugees and the recently pervasive desire to prevent the sheltering of terrorists in the name of the right to asylum. Unfortunately several Western countries incurred into the risk assessed by UNHCR immediately after 9/11 attacks, namely that «bona-fide asylum seekers may be victimized as a result of public prejudice and unduly restrictive legislation or administrative measures».

As a matter of fact, after the collapse of the World Trade Center a general discriminatory attitude has developed towards migrants: aliens are increasingly perceived as a threat for national integrity. The British case of *R (Saadi) v Secretary of State of the Home Department* represents a perfect example of the leverage that political climate exercises on the treatment of migrants and, in consequence, of asylum seekers. Dr. Saadi and three Iraqi Kurds asked for judicial review maintaining that they had been subjected to illegal detention while waiting for the acknowledgment of asylum status. In September 2001, the High Court found that the incarceration violated Article 5(1) of the ECHR, as it occurred merely for administrative convenience.

The Court of Appeal, however, overturned this decision in October 2001 and, in October 2002, the House of Lords ordained that «until the State has “authorised” entry the entry is unauthorised. The State has power to detain without violating Article 5 until the application has been considered and the entry “authorised”. [...] the balance is in favour of recognising that detention under the Oakington procedure is proportionate and reasonable». Furthermore, the restrictive controls introduced by the European Union after 9/11 attacks induce refugees to reach Europe illegally owing to the difficulties encountered in
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accessing via legal doors.\(^{59}\) As Eylemer and Şemsit state, borders securisation has provoked unexpected and unsought side-effects, such as «the “increasing professionalization of irregular immigration” in the form of an increase in human smuggling and the flow of migration movements through more dangerous routes»\(^{60}\).

As demonstrated above through the specific cases of admission policies, border controls and asylum seekers, the European Union welcomed the beginning of the new millennium by introducing remarkable restrictions in the migratory framework. According to some authors, however, the EU had already begun a reformation process of the migratory picture long before 9/11 attacks\(^{61}\). Karyotis, for instance, argues that the European reaction against terrorism is nothing other than the strengthening of a pre-existing «security logic of migration»\(^{62}\): the offence against the iconic symbols of the American economy and values did not generate insecurities regarding migratory issues, rather it speeded up previously manifested expectations regarding Community security policies\(^{63}\). Although it may be true that Europe had programmed to amend migration measures before September 2001, at that time changes were formulated in a more liberal perspective. The Commission, for instance, affirmed in 2000 that «migrants can make a positive contribution to make to the labour market, to economic growth and to the sustainability of social protection systems»\(^{64}\). Notwithstanding, the tragic events that took place in the US first and in Europe later paralysed the efforts to develop an harmonised and opened policy towards aliens and, indeed, facilitated the assimilation of migrants with terrorists\(^{65}\). In a working paper issued at the end of 2001, the Commission itself resorted to a much harsher strain when describing aliens as potential threats: even though the Commission acknowledged that «any security safeguard [...] needs to strike a proper balance with the refugee protection principles at stake», it meanwhile recognised as «legitimate and fully understandable that Member States are now looking at reinforced security safeguards to prevent terrorists from gaining admission to their territory through different channels, [which] could include asylum channels».\(^{66}\) The Council too urged to take «appropriate measures [...] before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts»\(^{67}\).
Finally, while the EU member states agreed on the development of more permissive legislation during the Tampere European Council of 1999, in the Seville Summit of 2002 they focused exclusively on the fight on illegal migration.

4. (In)effectiveness of EU Counter-Terrorism Policy

9/11 attacks have certainly represented a stimulus for the European Union to reach an agreement on various controversial issues that were far-back under members’ consideration. In addition, the decisions adopted at the EU level are probably more balanced and reasonable than the provisions that a sole nation could have supported in a context of general fear and national insecurity. Nevertheless, the restrictions introduced by the Community counter-terrorism policy involve serious side-effects, that should be considered when evaluating the effectiveness of a supranational machinery, both from the point of view of legislative productiveness and concrete protection of fundamental rights and democratic liberties. First, emergency measures, such as computer profiling or limitations on migratory flow, have generated or, in certain circumstances, confirmed and strengthened the conviction that migrants represent a threat to internal security: according to the European Monitoring Centre on Racism and Xenophobia «throughout many parts of the EU in the post-September 11 period, a rise in ethnic xenophobia was identifiable. [...] Through a greater perceived threat of the enemy within, and an increased sense of fear and vulnerability both globally and locally, this type of xenophobia resulted in many countries experiencing a dramatic increase in the type of prejudices and hatreds that were already pre-existent». Discriminatory attitudes towards aliens entail social marginalisation, which, in turn, may fuel terrorism, if the latter is conceived as the violent expression of social and economic discontent. In this perspective, the assimilation of the security discourse into an indiscriminately severe counter-terrorism policy results to be counterproductive, since it creates conducive conditions, such as financial straits, cultural and social segregation, and a profound sense of frustration, that may contribute to enhance terrorist dynamics instead of preventing further violence.
Obama, admitted, when referring to Guantanamo prison, the unsuitability of a war on terror that resorts to arbitrariness and aggressiveness: «instead of serving as a tool to counter-terrorism, Guantanamo became a symbol that helped al-Qaeda recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained.»

Moreover, to date there is no statistical evidence on the effectiveness of migration control mechanisms. On the contrary, the Commission has recently acknowledged that «in view of the latest terrorist acts in the EU, it can be noted that the perpetrators have mainly been EU citizens or foreigners residing and living in the Member States with official permits. Usually there has been no information about these people or about their terrorist connections in the registers, for example in the SIS or national databases.» The Europol found that more than 86% of failed, foiled or successful attacks occurred in 2006, 2007 and 2008 on the European soil were linked to separatist groups, which are unlikely to be composed by individuals of a third non-European nationality. The elaboration of a counter-terrorism policy also distract decision makers’ attention from their main duty, that is to create a safe and comfortable society where to live. Finally the measures introduced as of the beginning of the 21th century raise serious questions on the protection of migrants’ rights: the theorisation of new criminal offences, the implementation of administrative detention or long-lasting pre-trial custody, the strengthening of police powers, and the creation of special tribunals might «interfere and conflict with the European Union’s fundamental values of equality and respect of human rights [and] with the legal obligations of the Union towards asylum seekers.»

5. Italian Reaction to Terrorist Attacks

5.1. The «Bossi-Fini» Law

After having analysed the reaction of the European Union to terror and its effects on migration policy, a question arises spontaneously: in time of claimed emergency is the Community machinery more «well-equipped» to address problematic issues while protecting fundamental democratic principles? Is it a more...
reliable guardian of agreed liberties when facing the «migration-security-rights trilemma» than a national apparatus focused on the protection of its citizens and territorial integrity? Given the vastness of the topic under investigation, only one national case will be further scrutinised to provide an element of comparison, namely the Italian counter-terrorism policy. The first Italian reaction to 9/11 attacks on a legislative level is embodied in Decree Law No. 374/2001, later promulgated as Law No. 438 of 15 December 2001. It consists of a series of provisions aimed at reinforcing the existing tools for the prevention and countering of international terrorism: it principally calls for the imprisonment of individuals directly or indirectly involved in terrorist activities and regulates the use of wire-tapping. Being Italy a preeminent port of entry for migrants and, consequently, for potential terrorists, the Government also attempted to tighten national migration policy: in 2002 the Italian Parliament enacted Law No. 189, also known as «Bossi-Fini Law», which amended the existing Consolidated Law No. 286/1998 on migration policy and aliens’ status. The «Bossi-Fini Law» introduced negative alterations of the criminal law applied to migrants, essentially causing an infringement of the fundamental freedoms listed and protected by the Italian Constitution. First, with reference to national admission, it repeals Article 3, paragraph 4 of Consolidated Law No. 286, consequently attributing to the Government the right to close borders; it abolishes the possibility for a foreigner to get access into the country under the guarantee offered by a third person that the foreigner will be inserted into the working field; finally, it restricts the possibility of family reunification. Second, concerning the working sphere, the «Bossi-Fini Law» exacerbates the conditions for an alien to find a job: the foreigner is allowed to stay on the Italian soil as long as he/she has a working contract and the employer declares to be able to find an accommodation for the employee and to pay the repatriation expenses in case of necessity; furthermore, the period of enrolment in the Social Security lists is narrowed down from one year to six months. Third, the new legislation extends from five to six years the period of time necessary to obtain a residence permit for long-term EC residents. Moreover, when requesting the renewal of the residence permit, the alien has to be subjected to fingerprint recording. Fourth, although Article 32 states that asylum seekers cannot be arrested merely to check
the submitted application, it has become worryingly frequent for asylum applicants to be detained in «Centri di Accoglienza» (Temporary Shelters for Migrants) or «Centri di Identificazione ed Espulsione» (Identification and Deportation Centres): this typology of custody may represent an act of administrative coercion unreasonably disproportionate compared to its purpose, a segregation tool ascribable to contingent situations.

Finally, Law No. 189 also attempts to reduce the judiciary autonomy through various provisions, such as the omission of several aggravating circumstances, that diminishes the degree of independent analysis for the case in issue, or the configuration of other aggravating circumstances as new offences. Furthermore, the coercive accompaniment to the border is identified as an ordinary tool for the execution of deportation orders, while the jurisdictional protection against expulsion provisions has been reduced to a formal procedure that does not even provide for a necessary hearing of the deportee: in 2004 the Constitutional Court eventually declared the constitutional illegitimacy of this norm, since it violates Article 13 of the Italian Constitution, that prohibits any form of detention if not approved by the judiciary authority.

As shown by the above-mentioned amendments, the «Bossi-Fini Law» reveals a new conception of the migratory phenomenon, conceived as a threat for both private and public safety: the embitterment of sanctionary measures and the hardening of the expulsion doctrine hide the attempt to discourage migratory flows directed towards Italy. The innovations introduced by the new law are certainly relevant both for the message they convey and the concrete results they produce on migrants’ everyday life. The previous legislation clearly distinguished between legal and illegal migration and harshly condemned clandestinity. The strong opposition against illegal immigration was justified by the conviction that such a strategy represented the only way to avoid conflicts and xenophobic attitudes. While it was completely forbidden to regularise illegal entries ex post, the legal migrant was, at the time, favoured by social and economic measures aimed at facilitating the integration within the local community.

Law No. 189, on the contrary, assimilates the migrant with a potential delinquent and substitutes a repressive approach with a downright logic of war: the fight against clandestinity is easily transformed into a war on enemies, who
are usually identified with non-EC migrants\textsuperscript{105}. Although the majority of migrants in Italy is part of those categories that are traditionally considered as reassuring (children, cleaning staff, care-givers) and statistics prove that, all conditions being equal, crime rates are inferior for regular migrants than Italian citizens\textsuperscript{106}, aliens are relegated in a second-class citizenship and their inferior status is blatantly expressed by the precariousness of residence permits, the weaknesses in the protection of professional relations, the difficulties in the achieving citizenship, the exclusion from political rights\textsuperscript{107}. Besides the fact that the «Bossi-Fini Law» provides a misleading portrait of migrants, which plays on a common fear generated by 9/11 attacks, it may also be inefficacious in the regularisation of the migratory flow. In fact, Law No. 189 is probably not successful in reducing the number of incoming migrants, indeed it contributes to modify the composition of foreigners inside the country, given that it facilitates the risk of becoming an irregular migrant and admits the possibility of retroactive acts of indemnity, which are likely to stimulate illegal migratory flows towards Italy\textsuperscript{108}. In 2002, for instance, 700,000 applications were submitted by irregular aliens working off the books within the Italian market in order to upgrade their clandestine status\textsuperscript{109}.

5.2. Decree Law No. 144/2005 on Urgent Measures to Counter International Terrorism

New regulations have been subsequently developed starting from the same purpose, that is to fight clandestinity as a source of criminality and terror. In 2003 the Home Secretary proposed a decree designed to prevent and counter illegal immigration by sea, in which the use of force is recognised as legitimised, although assuring the inviolability of human life and dignity\textsuperscript{110}: the ministerial decree attributes an ordinary character to the military intervention of the Italian Navy, thus bypassing the extraordinary circumstances that could, but should not necessarily, justify such an action\textsuperscript{111}. Despite new and restrictive measures enhanced by almost all European countries in the aftermath of 9/11, the 2004 bombing in Madrid and the 2005 offence against London public means of transportation clearly demonstrated the vulnerability of the EU control system. The Italian government reacted by inserting additional provisions

\textsuperscript{105} Ibidem, p. 16.  
\textsuperscript{106} Ibidem, p. 19.  
\textsuperscript{107} Ibidem, p. 20.  
\textsuperscript{109} Ibidem, p. 7.  
\textsuperscript{110} Italian Council of Ministers, Decreto Ministeriale del 14 Luglio 2003, Disposizioni in materia di contrasto all’immigrazione clandestina, in «Gazzetta Ufficiale», no. 220, 22 September 2003, Article 7, para. 5.  
\textsuperscript{111} A. Caputo, Immigrazione, diritto penale e sicurezza, cit., p. 366.
into the national legal order: the Decree Law No. 144/2005, later transposed into Law No. 155 of 31 July 2005, deals with urgent measures to contrast terrorism and constitutes the first Italian norm that includes specific sanctions directed towards foreigners suspected of having committed terrorist acts. The Home Secretary himself publicly acknowledged the “imperfection” of the proposed decree but, at the same time, declared the overriding necessity to fight terrorism, even to the detriment of justice and fairness.

Among the amendments introduced by Law No. 155, a large number contains incentives for migrants willing to collaborate in the war on terror, such as a special permit of stay, valid for one year and renewable for the same period of time, for aliens who cooperate in investigation activities, or an EC residence permit for long-term residents that have remarkably contributed to the prevention of terrorism on the Italian soil. These forms of reward raise several doubts on the legitimacy of the new law, since they attribute an almost unlimited arbitrary power to the army police in the process of permits concession and they may affect the reliability of aliens’ declarations. Innovations in terms of deportation are also characterised by the attribution of a broad discretionary power to the executive branch, according to which terrorism prevention appears to be of prominent interest compared to the jurisdictional assessment of the crime under consideration. Article 3, for instance, invests the Home Secretary of the faculty to expel a foreigner when there is the suspect that his/her presence on the Italian soil may facilitate terrorist activities. Besides the fact that the concept of national security might be subjected to impaired and ambiguous assessments, it may also be affected by political considerations, so that a migrant could be expelled not in function of a particular behaviour considered dangerous for the presumed common good, but simply for his/her presence inside the country, thus infringing the freedom of movement enunciated by Article 16 of the Italian Constitution. Moreover, Law No. 155 calls for a temporary strengthening of the secret of state in order to favour the war on terror and to avoid appeals against deportation verdicts pronounced for security reasons.

Finally, since the new law is a special administrative provision, it permits the omission of the translation into the foreigner’s language and, meanwhile, it does not imply the prohibition of re-entry provided for in the previous legislation.
5.3. The Vicious Cycle: Exacerbation of Xenophobic Attitudes, Embitterment of Migration Provisions

The hardening of counter-terrorism measures towards aliens reflects an escalation of racist attitudes which have spread among the Italian society in the last decade\(^\text{122}\). As a matter of fact, according to the European Monitoring Centre on Racism and Xenophobia public manifestations of hate and xenophobia have progressively become commonly accepted in Italy, especially in the northern part of the peninsula, where the extreme right party «Lega Nord» is deep-seated\(^\text{123}\). Expressions of ethnic and religious discrimination involve both verbal and physical offences against foreign individuals and acts of vandalism towards Islamic places of worship: in Bologna, for instance, some Muslim tourists were halted as suspected terrorists simply because they were vividly discussing in front of a picture, while in Rome some Afghan citizens were arrested since they had a map of suspected sites that subsequently resulted to be NGOs headquarters\(^\text{124}\). Attacks against foreigners are usually ascribable to visual identifiers (hijab, headscarf, burqa, etc.) that facilitate the classification of the other as a Muslim. At the end of 2001, for instance, an Italian bus driver prevented an Islamic woman wearing a chador to enter the means of transportation\(^\text{125}\). Visual identifiers do not draw only the black looks of common citizens, indeed they captured attention of the Italian legislator as well, thus causing the worsening of the punishment for the violation of prohibition of misrepresentation: before 2005 a person who was not fully recognisable was punished with one to six months of prison and with a penalty of 50,000 to 200,000 £, while nowadays this crime is sanctioned with one to two years of prison and 1,000 to 2,000 € of fine\(^\text{126}\). Even the political élites lapsed into racist demonstrations: the Prime Minister himself publicly upheld the superiority of the Western culture compared to the Muslim one\(^\text{127}\), while various «Lega Nord» representatives repeatedly portrayed migrants as enemies, terrorists, and criminals\(^\text{128}\). Discriminatory attitudes among political leaders contributed to the incorporation of «xenophobic, racist and Islamophobic views into mainstream politics, [consequently] legitimizing their role in the public political discourse»\(^\text{129}\). Mass media played a fundamental role in spreading xenophobic opinions and «Islamophobic stereotypes»,\(^\text{130}\). In the aftermath of


130 Ibidem, p. 22.


135 A second «Security Package» was approved through Law No. 94 of 15 July 2009, which introduced new restrictive regulations concerning public security.

136 Italian Council of Ministers, Decreto-Legge No. 93 del 23 Maggio 2008, cit., Article 1(a): «[...] The judge orders the expulsion of the alien or the removal from the territory of the State of the citizen belonging to a Member State of the European Union, besides in the cases expressly provided for by law, when the alien or the citizen belonging to a State member of the European Union is sentenced to the Twin Towers collapse, for instance, the «Corriere della Sera», one of the major Italian newspapers, published a 14-pages article on the terrorist attacks: the author resorted to an offensive tone and repeatedly expressed her anger and disdain towards Muslim customs and traditions. According to an enquiry conducted by COSPE on migrants’ representation in the media, the topic of immigration is almost always related to news of violent episodes, criminal phenomena, or fundamentalism increase: this connection promotes a stereotyped imagine of migrants as criminals.

The progressive exacerbation of political and civil positions towards aliens increased public anxiety, which eventually found jurisdictional expression in Decree Law No. 92/2008, later converted into Law No. 125 of 24 July 2008, commonly known as «Security Package». Decree Law No. 92 inaugurates a series of amendments to the Italian penal code with the final alleged purpose of improving national security and individual safety. First, Article 1(a) calls for the expulsion of aliens sentenced to more than two years detention and establishes a one-to-four years imprisonment sanction for those who do not conform to the expulsion verdict: it represents a severe alteration of the previous legislation, which provided for the expulsion of non-EU citizens exclusively if sentenced to more than ten years imprisonment. Second, Article 1(f) encloses a new aggravating circumstance to the list identified by the national criminal law, namely the status of irregular migrant, so that Article 61 of the revised penal code confirms that the perpetration of a crime is aggravated by the fact that the offender was illegally residing on the Italian soil when committing the offence: in concrete terms, arrest warrants result to be a third longer for convicted aliens than for Italian citizens. Third, the «Security Package» extends mayors’ faculties concerning the enhancement of cooperation among army forces and the adoption of urgent measures aimed at protecting public security. Finally, Decree Law No. 92 supports and promotes the participation of the army in territorial control: this provision found immediate enforcement in the deployment of 3,000 soldiers in major Italian cities and critical sites. Contemporaneously with severe legislative embitterment of migration policy, the Berlusconi administration also reinforced the readmission agreements strategy: after the signature of several treaties on readmission
imprisonment for a period exceeding two years. [...] The offender of the order of deportation or expulsion pronounced by the judge is punished with imprisonment from one to four years [...]» («Il giudice ordina l’espulsione dello straniero ovvero l’allontanamento dal territorio dello Stato del cittadino appartenente ad uno Stato membro dell’Unione europea, oltre che nei casi espressamente previsti dalla legge, quando lo straniero o il cittadino appartenente ad uno Stato membro dell’Unione europea sia condannato alla reclusione per un tempo superiore ai due anni. [...] Il trasgressore dell’ordine di espulsione od allontanamento pronunciato dal giudice è punito con la reclusione da uno a quattro anni [...]»).


138 Ibidem, pp. 231-251, Article 61.11-bis: «an aggravating circumstance is introduced, when the offender omits the fact while “illegally on national territory”» («Aggravano il reato [...] le circostanze seguenti: [...] l’avere il colpevole commesso il fatto mentre si trova illegalmente sul territorio nazionale»).

139 Italian Council of Ministers, Decreto-Legge No. 93 del 23 Maggio 2008, cit., Article 6(2).

140 Ibidem, Article 6(4).

141 Ibidem, Article 7-bis.


mechanisms with Morocco, Tunisia, Algeria and Egypt, at the beginning of 2009 the Italian Parliament ratified the Treaty on Friendship, Partnership and Cooperation with Libya. Although the agreement will not be examined in detail due to spatial constraints, it must be remembered that its stipulation generated strong criticism among human rights advocates. Moreover, the strong emphasis on readmission policy enhanced by Italy, Spain and France, combined with the adoption of restrictive measures, contributed to divert the migratory flow towards new destinations. Greece, for instance, has become a major port of entry to Europe in the last years: at the end of 2009 it accounted for «90% of all detections of illegal border crossings to the EU» and, in the attempt to counter this impressive phenomenon, the Greek government has recently announced the establishment of a fence on the Turkish border to contain irregular migration.

6. Conclusions: The National System Is Controlled by the Supranational Machinery, but Who Is the Latter Watched over by?

The proposed analysis of the Italian reaction to international terrorism shows a significant crescendo of harsh legislative provisions, which fuel and are, in the meantime, fueled by discriminatory attitudes against migrants: in the aftermath of 9/11 attacks Italy, like most Western countries, has inexorably sunk into the whirl of «illiberal practices of liberal regimes».

As part of a broader system, that is the European Union, Italy has been repeatedly scolded by EU authorities for the violation of fundamental rights and binding agreements. The European Parliament, for instance, rebuked Italy for collective expulsions to Libya, which «constitute a violation of the principle of non-refoulement» and called on governmental authorities «to grant the UNHCR free access to the Lampedusa detention centre and the people held there, who might be in need of international protection». It also condemned the collection of Roma fingerprints promoted by the Berlusconi administration, «as this would clearly constitute an act of direct discrimination based on race and ethnic origin prohibited by Article 14 of the ECHR and furthermore an act of discrimination between EU
citizens of Roma origin and other citizens\textsuperscript{153}. More generally, in several occasions EU bodies have underlined the importance of respecting democratic principles while countering terrorism: in the OSCE Charter on Preventing and Combating Terrorism, for instance, participating states acknowledge «their commitment to take the measures needed to protect human rights and fundamental freedoms, especially the right to life, of everyone\textsuperscript{154} and «undertake [...] to conduct all counter-terrorism measures and co-operation in accordance with the rule of law, the United Nations Charter and the relevant provisions of international law, international standards of human rights and, where applicable, international humanitarian law\textsuperscript{155}.

Nevertheless, despite guarantee mechanisms implemented by the EU for the protection of fundamental freedoms and good intents publicly flaunted by Community representatives, the present research suggests that episodes of racial intolerance and enforcement of oppressive measures characterised not only national reaction but also supranational response. On the one hand, amendments of the Italian legal order prove that national authorities tend to ride, at least in the case under investigation, the wave of fear generated by economic instability and terrorist attacks to halt migratory flows\textsuperscript{156}. In certain occasions political élites also attempted to discourage foreigners' integration by supporting xenophobic behaviours and prejudiced positions towards aliens, thus providing a socially accepted justification to the adoption of discriminatory norms through the exploitation of a pervasive sense of insecurity. On the other hand, although the EU response results to be unquestionably much more moderate, it nevertheless is the offshoot of a perfunctory and hasty decision process which indirectly provoked the exacerbation of admission mechanisms, border controls, and asylum seekers' status. In countering terrorism both national authorities and supranational bodies have overstepped the legality borderline, thus falling into a paradoxical scheme in which the universalism of human rights is granted through the subversion of international law\textsuperscript{157}: in the war on terror European countries and EU institutions have more than once forgotten that the respect for basic rights and fundamental freedoms guarantees the success of the struggle\textsuperscript{158} and the achievement of the real purpose of counter-terrorism itself, that is to protect and maintain a democratic society\textsuperscript{159}. There is much more on the table than the future development of
counter-terrorism policy. As a matter of fact, the debate initiated by the war on terror «brings to the surface deeply embedded cultural differences among Europeans, concerning the role of the State and the dignity of the individuals»\textsuperscript{160}. The EU is at a crossroads: multiple options may be available, «but if the perception were to prevail that a war is waged against «Islamic extremism» [...] with the weapons of criminal law instead than through dialogue and education, Europe would have lost»\textsuperscript{161}. Consequently, residual responsibility to ultimately prevent vain and grave abuses lies in the hands of those who take advantage of democratic benefits, that is citizens, who have the right and the duty to exercise sovereignty through active participation in the public life\textsuperscript{162}.