

How the War on Terrorism Affected Migration Policies in Europe in the Aftermath of 9/11: EU Reaction in Comparison with Italian Response

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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 evil¹. 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»². 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

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¹ D. McGoldrick, *From «9-11» to the «Iraq War 2003»: International Law in an Age of Complexity*, Oxford, Hart Publishing, 2004, pp. 9-10.

² US President George W. Bush, *Address to a Joint Session of Congress and the American People*, 20 September 2001, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> (last accessed 13 June 2012).

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 order³. 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 US⁴. 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

³ A. Caputo, *Immigrazione, diritto penale e sicurezza*, in «*Questione Giustizia*», no. 2-3, 2004, p. 364.

⁴ J. Cesari, «*Islam de l'Extérieur, Musulmans de l'Intérieur*»: *Deux Visions Après le 11 Septembre 2001*, in «*Cultures & Conflits*», no. 44, 2001, p. 101.

⁵ K.C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, in «California Law Review», no. 92, 2004, pp. 1177-1178.

⁶ V. Fanchiotti, *Il dopo 11 settembre e l'Usa Patriot Act: Lotta al terrorismo e «Effetti Collaterali»*, in «Questione Giustizia», no. 2-3, 2004, pp. 293-294.

⁷ R. Ciccarelli, *Il fantasma del nemico. Gli argomenti teologici, strategici e culturali della guerra contro il terrorismo*, in «Democrazia e Diritto», no. 3, 2004, p. 236.

⁸ *Ibidem*, p. 239.

⁹ SC Res. 1373, 28 September 2001, S/RES/1373 (2001), available at <http://www.un.org/News/Press/docs/2001/sc7158.doc.htm> (last accessed 13 June 2012).

¹⁰ E. Brouwer, *Immigration, Asylum and Terrorism: A Changing Dynamic. Legal and Practical Developments in the EU in Response to the Terrorist Attacks of 11.09*, in «European Journal of Migration and Law», no. 4, 2003, pp. 400-401.

¹¹ S. Leonard, *The Use and Effectiveness of Migration Controls as a Counter-Terrorism Instrument in the European Union*, in «Central European Journal of International and Security Studies», vol. 4, no. 1, May 2010, p. 34.

¹² E. Brouwer, *Immigration, Asylum and Terrorism...*, cit., p. 401. A special meeting of the Justice and Home Affairs and Civil Protection Council was held on 20 September to enhance a stronger cooperation in the judiciary, among police control activities and within the intelligence services.

¹³ Multiple organs of the European Union, such as the General Affairs Council, the Justice and Home Affairs and Civil Protection Council and the European Council, called special meetings in order to approve emergency measures on the war on terror, namely the «Plan of Action to Combat Terrorism», the «Coordination of Implementation of the Plan of Action to Combat Terrorism», the «Framework Decision on Combating Terrorism, Defining a Common Understanding of Terrorist Acts», the «Framework

and spread the conviction that aliens of certain nationalities are more disposed to become terrorists⁵. 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 demonic rivals in a period of economic crisis because of their availability to work for a lower wage⁶: the US policy affected the American public opinion by attributing a realistic nature to a threat that is undoubtedly generic and undefined⁷.

By presenting the war on terrorism as a just war against an absolute enemy⁸, 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 1373⁹, 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 controls¹⁰. 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 terror¹¹: various extraordinary meetings, held before the end of 2001, led to the improvement of judicial and police collaboration¹² and to the adoption of several decisions on combating terrorism¹³. 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»¹⁴. 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 agreements¹⁵.

However, after the Madrid train bombings in March 2004, European actors unequivocally started to identify migration

Decision on the European Arrest Warrant and Surrender Procedures», the «Common Position on Combating Terrorism», the «Common Position on the Application of Specific Measures to Combat Terrorism», the «Regulation 2580/2001 on Specific Restrictive Measures Directed against Certain Persons and Entities with a View to Combating Terrorism», and the «Decision Establishing the List Provided for in Article 2(3) of Council Regulation 2001 L. 344».

¹⁴ Commission of the European Communities, *Increasing the Capacity of the EU to Fight International Terrorism*, 18 September 2001, SEC (2001) 1429/3, quoted in R. Bossong, *The Action Plan on Combating Terrorism: A Flawed Instrument of EU Security Governance*, in «JCMS», vol. 46, no. 1, 2008, p. 35.

¹⁵ S. Leonard, *The Use and Effectiveness of Migration Controls...*, cit., p. 34.

¹⁶ Council of the European Union, *Declaration on Combating Terrorism*, 25 March 2004, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/79637.pdf (last accessed 13 June 2012).

¹⁷ *Ibidem*.

¹⁸ Council of the European Union, *EU Plan of Action on Combating Terrorism*, 1 June 2004, available at <http://www.statewatch.org/news/2004/jun/eu-action-plan-terr-04.pdf> (last accessed 13 June 2012).

¹⁹ Council of the European Union, *The European Union Counter-Terrorism Strategy*, 30 November 2005, para. 16, available at <http://register.consilium.eu.int/pdf/en/05/st14/st14469-re04.en05.pdf> (last accessed 13 June 2012).

²⁰ F. Galli, *The Legal and Political Implications of the Securitisation of Counter-Terrorism Measures across the Mediterranean*, in «EuroMesco Paper», no. 71, 2008, p. 7.

²¹ G. Karyotis, *European Migration Policy in the Aftermath of September 11: The Security-Migration Nexus*, in «Innovation», vol. 20, no. 1, 2007, p. 1.

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 terrorism¹⁷, 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-makers²¹, 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 area²² and the relating abolition of internal borders, cooperation

²² Benelux, Federal Republic of Germany, and French Republic, *Acquis de Schengen - Accord entre les Gouvernements des États de l'Union Économique Benelux, de la République Fédérale d'Allemagne et de la République Française Relatif à la Suppression Graduelle des Contrôles aux Frontières Communes, Signé à Schengen le 14 Juin 1985*, in «Official Journal of the European Union», L239, 22 September 2000, pp. 13-18.

²³ S. Leonard, *The Use and Effectiveness of Migration Controls...*, cit., p. 38.

²⁴ Council of the European Union, *Council Decision of 8 June 2004 Establishing the Visa Information System (VIS)*, in «Official Journal of the European Union», L213, 15 June 2004, pp. 5-7.

²⁵ European Parliament and Council of the European Union, *Regulation (EC) No. 810/2009 of the European Parliament and of the Council Establishing a Community Code on Visas*, 13 July 2009, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:243:0001:0058:EN:PDF> (last accessed 13 June 2012).

²⁶ *Ibidem*, Article 12.

²⁷ *Ibidem*, Article 14(1): «Supporting documents: 1. When applying for a uniform visa, the applicant shall present: (a) documents indicating the purpose of the journey; (b) documents in relation to accommodation, or proof of sufficient means to cover his accommodation; (c) documents indicating that the applicant possesses sufficient means of subsistence both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or that he is in a position to acquire such means lawfully, in accordance with Article 5(1)(c) and (3) of the Schengen Borders Code; (d) information enabling an assessment of the applicant's intention to leave the territory of the Member States before the expiry of the visa applied for».

²⁸ *Ibidem*, Article 21(1).

²⁹ S. Leonard, *The Use and*

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 process²³. The *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 state²⁴. According to the *Regulation No. 810/2009 of the European Parliament and of the Council Establishing a Community Code on Visa*²⁵, «the applicant shall present a valid travel document»²⁶, «documents indicating the purpose of the journey, [and details on] accommodation»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»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 risk²⁹. 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 1390³⁰ through the *Council Common Position of 27 May 2002*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»³². Notwithstanding, ethnic profile resulted to be both discriminatory³³, since it violates Article 14 of the *European Convention on Human Rights* (ECHR) which prohibits all forms of discrimination³⁴, 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»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 actors³⁶. 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

Effectiveness of Migration Controls..., cit., p. 38.

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)».

³² Open Society Institute, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory*, New York, Open Society Institute, 2009, p. 70.

³³ K. Touzenis, *Legislazione anti-terrorismo: diritti fondamentali sotto doppio attacco?*, in «Futuribili», 1, 2007, pp. 85-86.

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.

where al-Qaeda is not present)³⁷, several European nations did not follow the Union stand and, indeed, integrated profiling mechanisms into their legal order³⁸.

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 protection³⁹. 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 System⁴², 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 analyses⁴⁴. 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

37 K.C. Tumlin, *Suspect First...*, cit., p. 1191.

38 Open Society Institute, *Ethnic Profiling in the European Union...*, cit., pp. 60-68.

39 European Research Project Transnational Terrorism, Security and the Rule of Law, *Conflict and Coherence: The Relation between the EU's Counterterrorism Efforts and Other Policies*, 12 November 2008, available at <http://www.transnationalterrorism.eu/tekst/publications/WP6%20Del%2012a.pdf> (last accessed 13 June 2012).

40 SC Res. 1373, cit., Article 2(g).

41 European Council Meeting in Laeken, *Presidency Conclusions*, 14-15 December 2001, Article 42, available at http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf (last accessed 13 June 2012).

42 Council of the European Union, *Council Decision of 8 June 2004...*, cit.

43 Council of the European Union, *Council Regulation (EC) No. 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, in «Official Journal of the European Union», L349, 25 November 2004, pp. 1-11.

44 *Ibidem*, Article 2(1).

45 Commission of the European Communities, *Proposal for a Council Decision on Requesting Comparisons with EURODAC Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes*, 10 September 2009, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0344:FIN:EN:PDF> (last accessed 13 June 2012).

46 European Data Protection Supervisor, *Opinion of the European Data Protection Supervisor on [...] the Proposal for a Council Decision on Requesting Comparisons with EURODAC Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes*, in «Official Journal of the European Union», C92, 10 April

information»⁴⁷, 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»⁴⁸. 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-discrimination⁴⁹: 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 allowed⁵⁰.

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»⁵¹. Later efforts and talks drove to the drafting of the *Green Paper on the Future Common European Asylum System*⁵², which mainly deals with the definition of CEAS architecture and issues arising from its

2010, Article 18.

⁴⁷ Commission of the European Communities, *Proposal for a Council Framework Decision on the Use of Passenger Name Record (PNR) for Law Enforcement Purposes*, 6 November 2007, Article 2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0654:FIN:EN:PDF> (last accessed 13 June 2012).

⁴⁸ Council of the European Union, *Framework Decision on the Use of Passenger Name Record (PNR) for Law Enforcement Purposes*, 17 April 2009, Article 3, available at <http://www.statewatch.org/news/2009/apr/eu-pnr-council-5618-rev1-09.pdf> (last accessed 13 June 2012).

⁴⁹ E. Brouwer, *The EU Passenger Name Record (PNR) System and Human Rights: Transferring Passenger Data or Passenger Freedom?*, CEPS Working Document No. 320, 3 September 2009, pp. 16-24, available at <http://www.ceps.eu/book/eu-passenger-name-record-pnr-system-and-human-rights-transferring-passenger-data-or-passenger-f> (last accessed 13 June 2012).

⁵⁰ *Ibidem*, p. 17.

⁵¹ European Council, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, in «Official Journal of the European Union», C53, 3 March 2005, p. 1.

⁵² Commission of the European Communities, *Green Paper on the Future Common European Asylum System*, 6 June 2007, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0301en01.pdf (last accessed 13 June 2012).

⁵³ Commission of the European Communities, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, 17 June 2008, p. 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF> (last accessed 13 June 2012).

⁵⁴ E. Brouwer, *Immigration, Asylum*

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»⁵³. 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 asylum⁵⁴. 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»⁵⁵. 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 ECHR⁵⁶, as it occurred merely for administrative convenience⁵⁷.

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»⁵⁸. 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

and Terrorism..., cit., p. 411.

⁵⁵ UNHCR, *Ten Refugee Protection Concerns in the Aftermath of September 11*, 23 October 2001, available at <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=3bd5469b7> (last accessed 13 June 2012).

⁵⁶ Council of Europe, ECHR, Article 5(1): «Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition».

⁵⁷ J. Collins declared that «once it is accepted that an applicant has made a proper application for asylum and there is no risk that he will abscond or otherwise misbehave, it is impossible to see how it could reasonably be said that he needs to be detained to prevent his effecting an unauthorised entry. He is doing all that he should to ensure that he can make an authorised entry», in *R (Saadi) v Secretary of State for the Home Department*, quoted in UK Parliament-House of Lords, *Regina v Secretary of State for the Home Department Ex Parte Saadi (Fc) and Others (Fc)*, [2002] UKHL 41, 31 October 2002, available at <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd021031/regina-1.htm> (last accessed 13 June 2012).

⁵⁸ UK Parliament-House of Lords, *Regina v Secretary of State for the Home Department Ex Parte Saadi (Fc) and Others (Fc)*, [2002] UKHL 41, paras. 35 and 47.

⁵⁹ K. Touzenis, *Legislazione anti-terrorismo...*, cit., p. 96.

⁶⁰ S. Eylemer, S. Şemşit, *Migration-Security Nexus in the Euro-Mediterranean Relations*, in «Perceptions», no. 12, Summer-Autumn 2007, p. 60.

⁶¹ G. Lahav, *Immigration Policy as Counterterrorism: The Effects of Security on Migration and Border Control in the European*

accessing via legal doors⁵⁹. As Eylemer and Şemşit state, borders securitisation 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 attacks⁶¹. 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 policies⁶³. 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 terrorists⁶⁵. 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.

Union, in M. Crenshaw (ed.), *The Consequences of Counterterrorism*, New York, Russell Sage Foundation, 2010, p. 137.

⁶² G. Karyotis, *European Migration Policy in the Aftermath of September 11...*, cit., p. 6.

⁶³ European Research Project Transnational Terrorism, Security and the Rule of Law, *Conflict and Coherence...*, cit., pp. 9–10.

⁶⁴ Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy*, 22 November 2000, p. 21, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0757:FIN:EN:PDF> (last accessed 13 June 2012).

⁶⁵ G. Karyotis, *European Migration Policy in the Aftermath of September 11...*, cit., p. 7.

⁶⁶ Commission of the European Communities, *Commission Working Document: The Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments*, 5 December 2001, p. 6, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0743:FIN:EN:PDF> (last accessed 13 June 2012).

⁶⁷ Council of the European Union, *Council Common Position of 27 December 2001 on Combating Terrorism*, in «Official Journal of the European Communities», L344, 28 December 2001, Article 16.

⁶⁸ G. Lahav, *Immigration Policy as Counterterrorism...*, cit., p. 138.

⁶⁹ *Ibidem*, pp. 131–133.

⁷⁰ E. Brouwer, *Immigration, Asylum and Terrorism...*, cit., p. 424.

⁷¹ C. Allen, J.S. Nielsen, *Summary Report on Islamophobia in the EU after 11 September 2001*, May 2002, p. 42, available at http://www.pedz.uni-mannheim.de/daten/edz-b/ebr/05/Synthesis-report_en.pdf (last accessed 13 June 2012).

⁷² *Ibidem*, p. 60.

⁷³ European Research Project Transnational Terrorism, Security and the Rule of Law, *Conflict and Coherence...*, cit., pp. 7–8.

⁷⁴ B.E. O'Neill, D.J. Alberts,

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 migration⁶⁸.

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 insecurity⁶⁹. 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 security⁷⁰: 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»⁷¹. Discriminatory attitudes towards aliens entail social marginalisation⁷², which, in turn, may fuel terrorism, if the latter is conceived as the violent expression of social and economic discontent⁷³. 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 violence⁷⁴. Even the US President, Barack

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»⁷⁵. Moreover, to date there is no statistical evidence on the effectiveness of migration control mechanisms⁷⁶. 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»⁷⁷. 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 groups⁷⁸, 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 in⁷⁹. 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 tribunals⁸⁰ 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»⁸¹.

Responding to Psychological, Social, Economic, and Political Roots of Terrorism, in J.J.F. Forest (ed.), *Countering Terrorism and Insurgency in the 21st Century: International Perspective*, Westport, Praeger Security International, 2007, vol. 2, pp. 306-314.

⁷⁵ US President Barack Obama, *Remarks by the President on National Security*, 21 May 2009, available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-National-Security-5-21-09/ (last accessed 13 June 2012).

⁷⁶ S. Leonard, *The Use and Effectiveness of Migration Controls...*, cit., p. 40.

⁷⁷ Commission of the European Communities, *Commission Staff Working Document: Accompanying Document to the Communication New Tools for an Integrated European Border Management Strategy. Impact Assessment*, 17 January 2008, p. 20, available at <http://www.statewatch.org/news/2008/feb/eu-com-ia-border-man.pdf> (last accessed 13 June 2012).

⁷⁸ Europol, *EU Terrorism Situation and Trend Report 2009*, 2009, available at https://www.europol.europa.eu/sites/default/files/publications/tesat2009_0.pdf (last accessed 13 June 2012).

⁷⁹ G. Karyotis, *European Migration Policy in the Aftermath of September 11...*, cit., p. 12.

⁸⁰ F. Galli, *The Legal and Political Implications of the Securitisation...*, cit., p. 6.

⁸¹ G. Karyotis, *European Migration Policy in the Aftermath of September 11...*, cit., p. 12.

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?⁸² 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. 374/2001⁸³, 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 policy⁸⁴: in 2002 the Italian Parliament enacted Law No. 189, also known as «Bossi-Fini Law»⁸⁵, 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 Constitution⁸⁶. 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 borders⁸⁷; 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 field⁸⁸; finally, it restricts the possibility of family reunification⁸⁹. Second, concerning the working sphere, the «Bossi-Fini Law» exacerbates the conditions for an alien to find a job⁹⁰: 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 necessity⁹¹; furthermore, the period of enrolment in the Social Security lists is narrowed down from one year to six months⁹². Third, the new legislation extends from five to six years the period of time necessary to obtain a residence permit for long-term EC residents⁹³. Moreover, when requesting the renewal of the residence permit, the alien has to be subjected to fingerprint recording⁹⁴. Fourth, although Article 32 states that asylum seekers cannot be arrested merely to check

⁸² G. Lahav, *Immigration Policy as Counterterrorism...*, cit., p. 133.

⁸³ Italian Council of Ministers, Decreto-Legge No. 374 del 18 ottobre 2001, *Disposizioni urgenti per contrastare il terrorismo internazionale*, in «Gazzetta Ufficiale», no. 244, 19 October 2001, pp. 6-7.

⁸⁴ K. Archick et al., *European Approaches to Homeland Security and Counterterrorism*, in «Congressional Research Service», 24 July 2006, p. 23, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA453727&Location=U2&doc=GetTRDoc.pdf> (last accessed 13 June 2012).

⁸⁵ Italian Parliament, Legge No. 189 del 30 Luglio 2002, *Modifica alla normativa in materia di immigrazione e di asilo*, in «Gazzetta Ufficiale», no. 199, 26 August 2002, supplemento ordinario no. 173.

⁸⁶ A. Caputo, *Immigrazione, diritto penale e sicurezza*, cit., p. 362.

⁸⁷ Italian Parliament, Legge No. 189 del 30 Luglio 2002, cit., Article 3, para. 2.

⁸⁸ *Ibidem*, Article 19.

⁸⁹ *Ibidem*, Article 23.

⁹⁰ A. Corneli, *Flussi migratori illegali e ruolo dei paesi di origine e di transito*, Roma, CeMiSS, 2005, p. 153.

⁹¹ Italian Parliament, Legge No. 189 del 30 Luglio 2002, cit., Article 6.

⁹² *Ibidem*, Article 18.

⁹³ *Ibidem*, Article 9. The minimum period of time required to obtain the status of long-term resident is subsequently reduced to five years in accordance with Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents.

⁹⁴ Italian Parliament, Legge No. 189 del 30 Luglio 2002, cit., Article 5(2-bis).

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)⁹⁵: this typology of custody may represent an act of administrative coercion unreasonably disproportionate compared to its purpose, a segregation tool ascribable to contingent situations⁹⁶. Finally, Law No. 189 also attempts to reduce the judiciary autonomy through various provisions⁹⁷, 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 offences⁹⁸. Furthermore, the coercive accompaniment to the border is identified as an ordinary tool for the execution of deportation orders⁹⁹, 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 deportee¹⁰⁰: 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 authority¹⁰¹.

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 Italy¹⁰². 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 clandestinity¹⁰³. 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 community¹⁰⁴. 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

⁹⁵ L. Pepino, *La Legge Bossi-Fini: Appunti su immigrazione e democrazia*, in «Diritto, immigrazione e cittadinanza», no. 3, 2002, p. 12.

⁹⁶ A. Caputo, *Immigrazione, diritto penale e sicurezza*, cit., p. 376.

⁹⁷ *Ibidem*, p. 370.

⁹⁸ Italian Parliament, Legge No. 189 del 30 Luglio 2002, cit., Article 11.

⁹⁹ L. Pepino, *La Legge Bossi-Fini...*, cit., p. 11.

¹⁰⁰ Italian Parliament, Legge No. 189 del 30 luglio 2002, cit., Article 13.

¹⁰¹ Constitutional Court, Sentenza No. 222 del 15 Luglio 2004, in «Gazzetta Ufficiale», no. 28, 1a Serie Speciale Corte Costituzionale, 21 July 2004. The Constitutional Court also declared the constitutional illegitimacy of Article 13, para. 5-*quinquies* of the Law No. 189 of 2002, which provided for the mandatory arrest in flagrante delicto for the stranger who, without justification, has not complied with the order of the commissioner to leave the country within five days, Constitutional Court, Sentenza No. 223 del 15 Luglio 2004, in «Gazzetta Ufficiale», no. 28, 1a Serie Speciale Corte Costituzionale, 21 July 2004.

¹⁰² A. Montanari, *Stranieri extracomunitari e lavoro*, Milano, CEDAM, 2010, pp. 77-78.

¹⁰³ E. Zanrosso, *Diritto dell'immigrazione: Manuale pratico in materia di ingresso e condizione degli stranieri in Italia*, Napoli, Esselibri-Simone, 2008 (2nd ed.), p. 125.

¹⁰⁴ L. Pepino, *La Legge Bossi-Fini...*, cit., pp. 12-13.

are usually identified with non-EC migrants¹⁰⁵. 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 citizens¹⁰⁶, 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 rights¹⁰⁷. 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 Italy¹⁰⁸: 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 status¹⁰⁹.

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 dignity¹¹⁰: 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 action¹¹¹. 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

¹⁰⁵ *Ibidem*, p. 16.

¹⁰⁶ *Ibidem*, p. 19.

¹⁰⁷ *Ibidem*, p. 20.

¹⁰⁸ Fondazione ISMU, *Ottavo rapporto sulle migrazioni 2002*, Milano, Franco Angeli, 2003, p. 51.

¹⁰⁹ *Ibidem*, p. 7.

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.

¹¹¹ A. Caputo, *Immigrazione, diritto penale e sicurezza*, cit., p. 366.

¹¹² Italian Council of Ministers, Decreto-Legge No. 144 del 27 Luglio 2005, *Misure urgenti per il contrasto del terrorismo internazionale*, in «Gazzetta Ufficiale», no. 173, 27 July 2005, pp. 4-10.

¹¹³ Italian Parliament, Legge No. 155 del 31 Luglio 2005, *Conversione in legge, con modificazioni, del decreto-legge 27 luglio 2005, n. 144, recante misure urgenti per il contrasto del terrorismo internazionale*, in «Gazzetta Ufficiale», no. 177, 1 August 2005, pp. 27-30.

¹¹⁴ Mr. Pisanu, Home Secretary from 2002 to 2006, admitted: «I know that this text is still perfectible, despite the significant innovations and improvements introduced by the Senate. However, the best does not always go hand in hand with the good; and in this case, perhaps, it would not be because, in this moment the absolute priority for the country is to provide the judiciary and the police with an efficient tool in the war on terrorism» («lo so che questo testo è ancora oggi, nonostante le consistenti innovazioni ed i perfezionamenti introdotti dal Senato, perfettibile. [...] Ma non sempre il meglio è amico del bene; e in questo caso, forse, non lo sarebbe, perché, in questo momento, la priorità assoluta per il paese è mettere a disposizione della magistratura e delle Forze dell'ordine uno strumento efficace di lotta al terrorismo»), Stenographic report of the Assembly of the Chamber of Deputies - Session No. Resoconto stenografico dell'Assemblea della Camera dei Deputati - Seduta No. 666 del 30 Luglio 2005, *Discussione del disegno di legge: S. 3571 - Conversione in legge, con modificazioni, del decreto-legge 27 luglio 2005, No. 144, recante misure urgenti per il contrasto del terrorismo internazionale*, p. 13 (translation by author), available at http://legxiv.camera.it/_dati/leg14/lavori/stenografici/framevar.asp?sedpag=sed666/s080.htm|STitolio12%2047 (last accessed 13 June 2012).

¹¹⁵ Italian Parliament, Legge No. 155

into the national legal order: the Decree Law No. 144/2005¹¹², later transposed into Law No. 155 of 31 July 2005¹¹³, 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 fairness¹¹⁴. 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 activities¹¹⁵, or an EC residence permit for long-term residents that have remarkably contributed to the prevention of terrorism on the Italian soil¹¹⁶. 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 too¹¹⁷. 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 activities¹¹⁸. 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 Constitution¹¹⁹. 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 reasons¹²⁰. 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 legislation¹²¹.

del 31 Luglio 2005, cit., Article 2(1).

¹¹⁶ *Ibidem*, Article 2(5).

¹¹⁷ P. Bonetti, *Terrorismo e stranieri nel diritto italiano. Disciplina*

legislativa e profili costituzionali. 2a Parte: Il terrorismo nelle norme speciali e comuni in materia di stranieri, immigrazione ed asilo, in «Diritto, immigrazione e cittadinanza», no. 4, 2005, p. 16.

¹¹⁸ Italian Parliament, Legge No. 155 del 31 Luglio 2005, cit., Article 3.

¹¹⁹ Constitution of the Italian Republic, in «Gazzetta Ufficiale», no. 298, 27 December 1947.

¹²⁰ Italian Parliament, Legge No. 155 del 31 Luglio 2005, cit., Article 3(5).

¹²¹ P. Bonetti, *Terrorismo e stranieri nel diritto italiano...*, cit., pp. 21-22.

¹²² A. Dal Lago, *Non-persone: L'esclusione dei migranti in una società globale*, Milano, Universale Economica Feltrinelli, 2004, pp. 25-26.

¹²³ C. Allen, J.S. Nielsen, *Summary Report on Islamophobia...*, cit., p. 22.

¹²⁴ L. Magliaro, *La libertà delle persone dopo l'11 settembre*, in «Questione Giustizia», no. 2-3, 2004, p. 323.

¹²⁵ C. Allen, J.S. Nielsen, *Summary Report on Islamophobia...*, cit., p. 35.

¹²⁶ P. Bonetti, *Terrorismo e stranieri nel diritto italiano. Disciplina legislativa e profili costituzionali. 1a Parte: Il terrorismo nelle norme speciali e comuni in materia di stranieri, immigrazione ed asilo*, in «Diritto, immigrazione e cittadinanza», no. 3, 2005, p. 30.

¹²⁷ Immediately after 9/11 attacks Mr. Berlusconi declared: «the West has to be conscious of the superiority of its civilization» («l'Occidente deve avere la consapevolezza della superiorità della sua civiltà»), *Berlusconi: «Attacco mirato senza vittime fra i civili»*, in «Repubblica.it», 26 September 2001 (translation by author), available at <http://www.repubblica.it/online/mondo/italiadue/berlusconi/berlusconi.html> (last accessed 13 June 2012).

¹²⁸ Several members of the extreme right party «Lega Nord» ordinarily use discriminatory language when referring to migrants. For example,

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 decade¹²². 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-seated¹²³. 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 headquarters¹²⁴. 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 transportation¹²⁵. 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 fine¹²⁶. Even the political élites lapsed into racist demonstrations: the Prime Minister himself publicly upheld the superiority of the Western culture compared to the Muslim one¹²⁷, while various «Lega Nord» representatives repeatedly portrayed migrants as enemies, terrorists, and criminals¹²⁸. 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»¹²⁹. Mass media played a fundamental role in spreading xenophobic opinions and «Islamophobic stereotypes»¹³⁰. In the aftermath of

in 2009 Mr. Gentilini, Mayor of Treviso and representative of «Lega Nord», has been condemned for racist incitement, *Gentilini, Niente comizi per tre anni: Condannato per istigazione al razzismo*, in «Repubblica.it», 26 October 2009, available at <http://www.repubblica.it/2009/10/sezioni/politica/gentilini-comizi/gentilini-comizi/gentilini-comizi.html> (last accessed 13 June 2012).

¹²⁹ C. Allen, J.S. Nielsen, *Summary Report on Islamophobia...*, cit., p. 50.

¹³⁰ *Ibidem*, p. 22.

¹³¹ O. Fallaci, *La rabbia e l'orgoglio*, in «Corriere della Sera», 29 September 2001, available at http://archiviostorico.corriere.it/2001/settembre/29/RABBIA_ORGOGLIO_co_0_0109291193.shtml (last accessed 13 June 2012).

¹³² COSPE, *Media e immigrazione: Rapporto sulla Settimana europea di monitoraggio dei media in Italia*, 2003, pp. 5-10, available at http://mediva-project.eu/db/sites/default/files/cospe_report.pdf (last accessed 13 June 2012).

¹³³ Italian Council of Ministers, Decreto-Legge No. 93 del 23 Maggio 2008, *Misure urgenti in materia di sicurezza pubblica*, in «Gazzetta Ufficiale», no. 122, 26 May 2008, pp. 4-8.

¹³⁴ Italian Parliament, Legge No. 125 del 24 Luglio 2008, *Conversione in legge, con modificazioni, del decreto-legge 23 maggio 2008, n. 92, recante misure urgenti in materia di sicurezza pubblica*, in «Gazzetta Ufficiale», no. 173, 25 July 2008, pp. 6-22.

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 traditions¹³¹. 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 criminals¹³².

The progressive exacerbation of political and civil positions towards aliens increased public anxiety, which eventually found jurisdictional expression in Decree Law No. 92/2008¹³³, later converted into Law No. 125 of 24 July 2008¹³⁴, commonly known as «Security Package»¹³⁵. 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 verdict¹³⁶: 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 imprisonment¹³⁷. 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 offence¹³⁸: 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 forces¹³⁹ and the adoption of urgent measures aimed at protecting public security¹⁴⁰. Finally, Decree Law No. 92 supports and promotes the participation of the army in territorial control¹⁴¹: this provision found immediate enforcement in the deployment of 3,000 soldiers in major Italian cities and critical sites¹⁴². 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 [...]»).

¹³⁷ L. Alibrandi, *Il Codice penale annotato con la giurisprudenza*, Piacenza, La Tribuna, 2002, p. 665, Article 235.

¹³⁸ *Ibidem*, pp. 231-251, Article 61.11-bis: «an aggravating circumstance is introduced, when the offender ommits the fact while “illegally on national territory”» («Aggravano il reato [...] le circostanze seguenti: [...] l'aver 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.

¹⁴² M. Merlino, *The Italian (In) Security Package: Security vs. Rule of Law and Fundamental Rights in the EU*, CEPS Challenge Research Paper No. 14, March 2009, p. 7, available at <http://aei.pitt.edu/10764/01/1809.pdf> (last accessed 13 June 2012).

¹⁴³ P. Cuttitta, *Readmission in the Relations between Italy and North African Mediterranean Countries*, in J.-P. Cassarino (ed.), *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, Washington, D.C., Middle East Institute, 2010, pp. 30-33, available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c->

mechanisms with Morocco, Tunisia, Algeria and Egypt¹⁴³, at the beginning of 2009 the Italian Parliament ratified the Treaty on Friendship, Partnership and Cooperation with Libya¹⁴⁴. Although the agreement will not be examined in detail due to spatial constraints¹⁴⁵, it must be remembered that its stipulation generated strong criticism among human rights advocates¹⁴⁶. Moreover, the strong emphasis on readmission policy enhanced by Italy, Spain and France¹⁴⁷, 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»¹⁴⁸ 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 migration¹⁴⁹.

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»¹⁵⁰. 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»¹⁵¹ 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»¹⁵². 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

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¹⁴⁴ Italian Parliament, Legge No. 7 del 6 Febbraio 2009, *Ratifica ed esecuzione del Trattato di Amicizia, Partenariato e Cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista, fatto a Bengasi il 30 agosto 2008*, in «Gazzetta Ufficiale», no. 40, 18 February 2009, pp. 1-13.

¹⁴⁵ For a complete analysis of the agreement content see N. Ronzitti, *The Treaty on Friendship, Partnership and Cooperation Between Italy and Libya: New Prospects for Cooperation in the Mediterranean?*, Documento No. 0909 Istituto Affari Internazionali, 2009, available at <http://www.iai.it/pdf/DocIAI/iai0909.pdf> (last accessed 13 June 2012).

¹⁴⁶ Several humanitarian NGOs issued warning reports on the possible effects of the Treaty on Migrants, such as the report published by Human Rights Watch entitled *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*.

¹⁴⁷ J.-P. Cassarino, *Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications*, in J.-P. Cassarino (ed.), *Unbalanced Reciprocities...*, cit., pp. 9-10, available at <http://www.mei.edu/sites/default/files/publications/ReadmissionWeb.pdf> (last accessed 13 June 2012).

¹⁴⁸ Frontex, *Frontex Deploys Rapid Border Intervention Teams to Greece*, 25 October 2010, available at <http://frontex.europa.eu/news/frontex-deploys-rapid-border-intervention-teams-to-greece-voEY8S> (last accessed 13 June 2012).

¹⁴⁹ BBC News, *Greece Plans Turkey Border Fence to Tackle Migration*, 4 January 2011, available at <http://www.bbc.co.uk/news/world-europe-12109595> (last accessed 13 June 2012).

¹⁵⁰ D. Bigo, A. Tsoukala, *Understanding (In)security*, in D. Bigo, A. Tsoukala (eds.), *Terror, Insecurity and Liberty: Illiberal*

citizens of Roma origin and other citizens»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»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»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 flows¹⁵⁶. 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 law¹⁵⁷: 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 struggle¹⁵⁸ and the achievement of the real purpose of counter-terrorism itself, that is to protect and maintain a democratic society¹⁵⁹. 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 individual»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»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 life¹⁶².

Practices of Liberal Regimes After 9/11, New York, Routledge, 2008, p. 2.

¹⁵¹ European Parliament, *Resolution on Lampedusa*, 14 April 2005, Article 2, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0138+0+DOC+XML+Vo//EN> (last accessed 13 June 2012).

¹⁵² European Parliament, *Resolution of 10 July 2008 on the Census of the Roma on the Basis of Ethnicity in Italy*, 10 July 2008, Article 1, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0361+0+DOC+XML+Vo//EN> (last accessed 13 June 2012).

¹⁵³ European Parliament, *supra* n 151, Article 3.

¹⁵⁴ OSCE, *OSCE Charter on Preventing and Combating Terrorism*, 7 December 2002, Article 6, available at <http://www.osce.org/odihr/16609> (last accessed 13 June 2012).

¹⁵⁵ *Ibidem*, Article 7.

¹⁵⁶ A. Spataro, *Otto anni dopo l'11 settembre: Il modello anglosassone e quello europeo nell'azione di contrasto del terrorismo internazionale*, in «Questione Giustizia», no. 5, 2009, pp. 159-160.

¹⁵⁷ R. Ciccarelli, *Il fantasma del nemico. Gli argomenti teologici, strategici e culturali della guerra contro il terrorismo*, in «Democrazia e diritto», no. 3, 2004, p. 240.

¹⁵⁸ OSCE, *Countering Terrorism, Protecting Human Rights: A Manual*, Warsaw, OSCE Office for Democratic Institutions and Human Rights, 2007, p. 259.

¹⁵⁹ *Ibidem*, p. 21.

¹⁶⁰ F. Pastore, *Europe Facing Homegrown Jihad: Achievements, Shortcomings, Dilemmas*, CESPI Working Papers No. 22, November 2005, p. 9.

¹⁶¹ *Ibidem*.

¹⁶² L. Magliaro, *La libertà delle persone dopo l'11 settembre*, cit., p. 329.