WARLIKE OUTLINES OF THE SECURITARIAN STATE. LIFE CONTROL AND THE EXCLUSION OF PEOPLE

Edited by
GABRIELA RODRÍGUEZ FERNÁNDEZ
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IÑAKI RIVERA BEIRAS
HÉCTOR C. SILVEIRA GORSKI

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PREFACE and ACKNOWLEDGMENTS

**GABRIELA RODRÍGUEZ FERNÁNDEZ, CRISTINA FERNÁNDEZ BESSA,
IÑAKI RIVERA BEIRAS AND HÉCTOR C. SILVEIRA GORSKI**

The present book collects some of the thoughts developed during the 5 years (2004-2009) of work in the frame of the CHALLENGE project, "The Changing Landscape of European Liberty and Security"[1]. The project has related academic knowledge and research with the analysis of the policies and practices of the member States of the European Union [EU] around the couple liberty and security. These two concepts, which sometimes are understood as alternative, even as opposite, have been part of the policy debates at the EU and the member States' Parliaments.

With the effort of the 14 research workpackages [WP] from 23 universities and research institutes of different European countries[2], the project seeks to facilitate a more responsive and responsible assessment of rules and practices of security and of the measures that restrict fundamental rights. The project analyses the so-called illiberal practices of liberal regimes and challenges their justification on grounds of emergency and necessity, in the context of an asymmetric globalization process.

The objectives of CHALLENGE have been:

- To understand the merging between internal and external security and evaluate the changing character of the relationship between liberty and security in Europe.

- To analyse de role of the different institutions in charge of security (police, intelligence services, military forces and private agencies) and they current transformations.

- To facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the

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1. Funded by Sixth Framework Research Programme of the Directorate General for Research of the European Commission (CTI1-ct-2004-506255).

2. CHALLENGE consortium is integrated by: Centre for European Policy Studies (Belgium); Fondation Nationale des Sciences Politiques (France); King's College London (UK); University of Keele (UK); University of Copenhagen (Denmark); European Association for Research on Transformation (Germany); University of Leeds (UK); University of Genoa (Italy); University of Barcelona (Spain); University of Szeged (Hungary); Groupe de Sociologie des Religions et de la laïcité (France); University of Caen (France); University of Athens (Greece); University of Utrecht (Netherlands); University of Nijmegen (Netherlands); Stefan Batory Foundation (Poland); University of Malta (Malta); European Institute (Bulgaria); London School of Economics (UK); University of Cologne (Germany); Autonomous University of Barcelona (Spain); Centre d'Etudes sur les Conflits (France); PRIO International Peace Research Institute Oslo (Norway).

theoretical, political, sociological, legal and policy implications of new forms of violence and political identity.

- To bring together a new interdisciplinary network of scholars in an integrated project focusing on the state of exception as enacted through illiberal practices and forms of resistance to it.

The Observatory of Penal System and Human Rights of the University of Barcelona (OPSHR) has participated in the WP 9 entitled "Exceptionalism and its impact on the Euro-Mediterranean relations". Its main objective has been to analyse the impact that exceptional policies have upon liberties and security of citizens and to underpin to what extent South-European States are breaking citizen liberties and security when using emergency policies. Initially, Professor Roberto Bergalli was the responsible of leading the work and then Iñaki Rivera meet this commitment. Together with them, Jose M. Ortuño, Cristina Fernández and Alejandra Manavella carried out the research of the workpackage; in the last period, Héctor Silveira and Gabriela Rodríguez joined the team; and it also counted on the collaboration of other young researchers of the OPSHR[3].

During these five years the research team of the OPSHR has analysed immigration policies, the everyday life control in the urban areas, antiterrorist policies and the institutional violence that occur in some Euro-Mediterranean countries. This research has materialized a collection of working papers which is available in the website of the OPSHR (www.ub.edu/ospdh) and it constitute the backgrounds of some of the papers of this volume.

Our participation in CHALLENGE has also involved the organization of several national and international conferences and workshops to exchange ideas and discuss some of the key questions of the project (exceptionalism, war, emergency culture, camp, human rights and migrations, etc.). There, different partners of the project have put forward their views and professionals, civil servants or members of the organized civil society have shown us their practices and experiences regarding these topics. The dissemination of the results of the research has been guaranteed with the publication of the working papers in the CHALLENGE website (www.libertysecurity.org), in some books and with the six monographic numbers of *Desafio(s)[4],* a periodical publication coordinated by *Roberto Bergalli* and *Iñaki Rivera*, on the framework of the publishing project *Utopías del control y control de las utopías*, between the OPSHR and Anthropos Publishing House.

Now, after five years of the beginning of CHALLENGE, we could state that the crisis of welfare culture has produced deep transformations on

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3. Mónica Aranda, Pablo Ceriani, Alejandro Forero, Gemma Ubasart, Aura Roig, Valeria Picco, Andrés di Masso, Marta Puig, Marta Cals, Maria Acosta, Francisca Cano, Luis Rodeiro and Ignasi Bernat.

4. The titles of the monographic are the following: "Política Criminal de la guerra" (n.1), "Torturas y abuso de poder" (n. 2), "Emergencias Urbanas" (n. 3/4), "Jóvenes y adultos el difícil vínculo social" (n.5), Poder académico y poder legal (n.6), y "Género y dominación. Críticas feministas del derecho y el poder"(n.7).

different spheres of public policies. Specially after the attacks of 9/11, 2001 the sensation of constant fear and social insecurity has increased and several measures guided by the security obsession have been deployed in a great part of Western countries. The state of "global war", which before 2001 was not such explicitly recognized involve "preventive" attacks, in the military field and also in the citizenship one, with policies of recognition, surveillance and attack; these are the "warlike outlines" that are the framework of the militarization of the penal system, the practice of torture and its transterritorialization, the fight against "illegal" migrants and the spread of fear and emergencies feed back demands for harder policies. The mentioned global war lead to the "need" of securing the threatened cities, to control everything that happens there and the people who stay, enter or get out them. Therefore, public spaces (from the city to specific places of transit like airports or border posts) but also individuals are the centre of the proliferating mechanisms and strategies of control which become "normal" for the citizenship. As we will see in some of the texts of this volume practices of institutional violence are an aspect of exceptional/emergency policies; today this violence is justified in the existence of threats and public fears that the governments have to face.

In this context, we could assert that in the field of the management of migrations, specially through the penal system, in the regulation and control of the everyday life, as in the field of antiterrorist policies, exceptional practices has settled in the Euro-Mediterranean area. This settlement is not something new: the stark return of torture and on the whole, institutional violence and the violation of fundamental rights show the re-emergence of the Leviathan which is in permanent tension with the current legislation. A legislation that sometimes is useful to restrict its effects, to negotiate them, and other times, to hide its consequences or even to legitimate practices which are inadmissible under the Rule of Law.

In this frame we aim to contribute to the culture of Human Rights, much threatened nowadays by processes and policies of exclusion and discrimination, and also by the construction of social concern regarding the raise of criminality, violence and insecurity suffered by modern societies.

This book wants to be a step in this way. Its three parts deal with institutional violence, everyday life control and the legal obstacles for human mobility in the Euro-Mediterranean countries; the 11 contributions that it contains express different opinions and theoretical approaches and they discuss among them composing a diverse but sound volume

For the preparation of the book we have counted on the contributions of some of the partners of the CHALLENGE project and other professors and researcher who have participated in some of the workshops or conferences organized by our workpackage. Didier Bigo, scientific coordinator of the project (and member of the WP 2: "Securatization beyond borders: Exceptionalism inside the EU and impact on policing beyond borders") has introduced the volume, with a thoughtful and controversial point of view on some of the topics included on it; the colleagues Salvatore Palidda and Gabriella Petti from the

University of Genoa (members of the WP 8: "Effects of exceptionalism on social cohesion in Europe and beyond") have contributed with two articles in different chapters of the book; and Mauro Palma, Nicolas Fischer and Stefano Rodotà have collaborated again with our work with their knowledge. Finally the present CHALLENGE research team of the OPSHR has closed its participation in the project with four contributions in different fields. The editors appreciate the time dedicated to the epilogue of this work that Roberto Bergalli has taken from his retirement.

The translation to English of some of the papers that we offer here[5] has been the result of a joint work among the translators -mainly, Alejandro Piombo, who also made a final revision of the papers- and a group of students of the Master in Criminology and Sociology of Criminal Law of the University of Barcelona. Alejandra Manavella, Paula Vázquez, Gonzalo Penna, Ignasi Bernat and Maximiliano Postay have done a particularly thorough work with the papers of the authors; they not only put every effort into the task but they also worked with insight in order to learn. The editors are very grateful to them.

We hope that this book that we offer to the readers could be useful to a reflection, started some years ago, which should be continued: to know how, when and where it is necessary to fight for everybody's rights.

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The editors
Barcelona, May 2009

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5. A hard copy of the Spanish version of this e-book will be published by Anthropos Publishing House.

INTRODUCTION

Global Counter-Terrorism: From war to widespread surveillance*

DIDIER BIGO AND ROB B.J. WALKER

1. The Global Counter-Terrorism Regime

After the terrorist attacks that shook the United States in September 11th 2001 and those that followed in Bali, Spain, Turkey, Morocco and Great Britain, many observers pointed out that the world has entered a new era: that one of the transnational "hyper-terrorism", which is local and at the same time articulated globally through the central figure of Al-Qaida and its boss, Bin Laden. Governments, the media, think tanks and numerous scholars agree on this radical novelty: this would be due to the activities of certain clandestine organizations –mass murder, indiscriminate attacks, suicidal behaviour, political and religious motivations, global action– and its ability to question the attempt of the United States to have a monopoly on the exercise of violence.

From that point on, the ability of the United States to prevent the retaliation and revenge cycles between the various groups would diminish. They would no longer be the "protectors" facing the emergence of powerful internal enemies and communal confrontation, and an eventual re-appearance of religious wars on a global scale. The widespread of capillary violence would give the clandestine organizations a strategic advantage, given its will to do damage and its ability to act undercover. We would have entered a world of terror and a world in war against terror, to which one would have to adapt and it would not be a State product but a "terrorist" one. The future would be an Armageddon schematized by the image of a miniature atomic bomb inside the bag of a suicidal candidate, a little more or a little less fanatic.[1]

* Translation from the Spanish version by Alejandro Piombo.
1. See Heisbourg (2002); or, on the contrary: Paye (2004).

2. To prevent the "worst case scenario"

To prevent the "worst case scenario", governments should take urgent measures declaring the State of Exception and to increase the suspicion about the activities of individuals in certain groups that are potentially dangerous. The counter-terrorism itself should be constructed on a global scale, putting an end to national selfishness, justified by discourses about national sovereignty, and be open to an alliance between police, intelligence and defence forces, not only in every State, but also on a global scale. This would change the structure of the international order opposing, on the one hand, the terrorists and their allies (the "renegade States") and, on the other hand, all the other States. Global counter-terrorism would be a new "international regime", with the object of guaranteeing peace and order, but destabilizing the States' sovereignty, alienating them around a protective empire, and limiting the individual liberties of the people involved in suspicious groups. They would found a new international "community", brought together by shared values and not by interstate agreements.

This counter-terrorism "regime" would certainly have an extraordinary character, where the exception would be the rule. However, this counter-radicalization of violence would be the only way to eradicate terrorism in all its forms, with the purpose of finding peace again and liberal state order, whose objective would be to spread out to all the States allied in the counter-terrorism mission (including Libya, Saudi Arabia, Pakistan…). While we wait for this eradication of global terrorism, it would be necessary to rethink the relation between danger, security and freedom: it would be necessary to sacrifice in the interest of collective security, which would be the first of all the liberties among other liberties of minor importance –such as liberty of religion, speech and movement–, and the right to be presumed innocent and to a fair trial.

After 2001, the United States took this sacrifice logic a little too far, with torture practices, detentions with no grounds for arrest, disappearance and "extraordinary renditions" (that is the official name for extrajudicial transfers) of suspects. The European supporters of the counter-terrorism alliance were more moderate and denied any sort of torture within their territory, but kept their complicity regarding extraordinary renditions, arresting suspects without any charges for longer periods, hardening the existent arsenal of antiterrorist measures and regarding the access to a given territory of foreigners in irregular situation (Bigo, Carrera, Guild & Walker 2007). However, to those in favour of the counter-terrorism alliance, that brings together a lot more States that the one that led to the war in Iraq in 2003, the situation should not last longer than the time it takes to win the war against terrorism. We would immediately go back to normal, even if the war may be long, because the enemy has "changing faces" and acts "stealthily", like those undetectable F117 Night Hawk airplanes, product of the cold war. It is this stealth quality of the enemy what causes the main difficulties, since uncertainty would rule, and they would not be discovered in time. We would then need more information in order to control the enemy successfully. The victory would depend on the knowledge of

the individuals and their networks, to anticipate their actions with the purpose of preventing what is "irreparable".

Counter-terrorism would not only try to punish the guilty but also prevent the attacks in order to protect the population. It would then need to anticipate and simulate the future, turning it into almost certainty. From this point of view, the data base technology, together with biometric identification of the individuals and the profiling software, would help prevent the terrorist actions of unknown individuals, identifying their malignant intentions thanks to a small insight into their behaviour: in order to be efficient, counter-terrorism would need to be able to obtain information from any person at any place. It would not be able to work if the States' sovereignty and the typical legal and judicial mechanisms to protect liberties were obstacles to it. The choice would no longer be a proper election, since a small inefficiency would lead to the risk of crumbling down in the face of enemies impervious to negotiation, dialogue or reason.

Summarized like this, the central argument that justifies counter-terrorism sounds similar to that of a "republican Roman dictatorship" whose purpose is to protect democracy by means of establishing extraordinary processes during the course of transitional dangerous periods. Whether it is implied or explicit, we can find it in the discourses of leaders and the scholars and media that support them, while it manifests in different ways. We must help the police catch the culprits, the military to make the external war against enemies' bases, help the investigation services to accumulate and handle information with the purpose of preventing a catastrophe. Each individual is responsible for the protection of everyone. The mobilization is patriotic and in the interest of humankind's well-being. We must "face" terrorism. The policy to fight terrorism is certainly exceptional, but legitimate and proportional to the unlimited danger ahead of us. Sometimes the responsible political leaders have to act against the sensibility and comfort of the citizens in order to protect them efficiently. They must "decide": who the enemy is and how to fight it. They should not "doubt", but on the contrary, reassure. They should act like leaders.

The description of the counter-terrorisms and exception policies adopted by the United States, Australia, Great Britain and, at a more general level, the European Union and its member States evokes the name of the German philosopher Carl Schmitt (the author of the controversial thesis about the role in politics of the friend/enemy distinction), the parallelism with the 1930s and the need to control the increasing revolutionary mobilizations and disorder. These references are evoked to justify these policies in the name of the new situation demanding an international order beyond the rivalry between sovereignties; and to criticise them in the name of the dangers of an increased fascism in democratic societies, which can be summarized in the battle of the modern State to strip individuals from their qualities and reduce them to "bare life"[2]. In both cases (support or criticism), we stress the relationship

2. See, Agamben (2003); Diken & Laustsen (2004:89-113); Schmitt (1972); Walker (2005: 13-51).

between terror policies and the novelty of the phenomenon. In the end we will notice that these analysis, as much interesting as they may be, while putting the stress on the insecurity as terror, they leave out the part of this insecurity phenomenon as a daily concern. However, before getting there, we need to establish what practices of violence, coercion, detention and surveillance are used as counter-terrorism measures and to which extent they can be justified by their global character and urgent necessity.

3. Terror policies and exceptional illiberal practices

The global counter-terrorism regime, facing what represents itself as a strict description of reality and an irrepressible argument, the global counter-terrorism sounds convincing. And we need to bear in mind that, except for Jose Maria Aznar in Spain, the citizens themselves were the ones to re-elect the responsible for this policy –like George Bush in the United States, Tony Blair in Great Britain and John Howards in Australia. Therefore, it is difficult to think about a radical rupture between the ruling elite and the civil society: the support to these policies is really strong and the criticism was mainly focalized in the war in Iraq but never in the whole set of practices.

Nevertheless, what can we say when we have the feeling that something is not working properly, when a certain amount of measures in the interest of the antiterrorism fight are antidemocratic and "illiberal" (in the anti-libertarian sense)? Does the antiterrorism fight justify these measures in the name of a higher necessity as we are made to believe in? Doesn't the discourse about antiterrorism war put the sight on a series of ethical and political dilemmas, in practices that are oppose to its arguments (the war in Iraq and the attacks in Great Britain for example), while on the other hand, it links them with no real justification (terrorism, organized crime, cyber delinquency)? Could we or should we believe in this worst-case scenario (which in the end is the monotheistic argument of punishment in the event of disobedience)? What is our ability to judge, most of all in the face of experts and the facts that they assure they know, but must keep secret (for our own good)? Can we and should we accept the fact that they know the situation better than us and can decide by themselves instead of proposing a democratic debate, most of all when this involves State violence (external war, arrests with no grounds and torture, extrajudicial transfers of the suspects, phone tap and invasion of privacy, profiling techniques that are discriminatory to certain population categories, collection of information on a large scale and use of it for other reasons than the one it was collected for, reconsideration about national population)? How can we appreciate the proportionality of actions taken in these cases? Are the responsible politicians the ones who decide or do they base their decisions on the opinion of their security experts and their belief in technology? Can they exonerate themselves from decisions taken under the pressure of urgency? Does the novelty of the situation only have to

do with the action of clandestine organizations or also the excess of certain "responses"?

These questions make you consider real consequences, wanted or not, of violence and surveillance practices that the liberal regimens found in the name of global counter-terrorism. These practices also kill. In addition, they can generate or accelerate a self-destruction process of representative democracies and misplace values and institutions; they can multiply the issues without solving the problem of a political violence that takes erratic forms on a transnational scale. Thus, it is necessary to draw up the list of counter-terrorism practices in order to understand whether they are legitimate or at least proportional to the predicted danger and what principles they are jeopardizing.

Some will oppose to this stand because it would imply a critique to those who are doing the best they can to protect us and may weaken this protection giving room to doubt. What is worst, it could be used by the "enemy's propaganda". The argument of treason in an environment of mobilization between two war fields is always very strong. However, it requires a full involvement of the entire world in this war atmosphere and the insecurity policies, which is surely excessive: it is not only possible, but also legitimate, to exclude oneself from this insecurity atmosphere that imposes itself as a "*doxa*" in an almost consensus way.

In our opinion, the critique is legitimate when it is not trying to justify the violence of clandestine organizations, but dares to question the State, the government, the transnational organizations and the many others involved in the mechanisms of its own violence, even if it is identified, as our security. It is then a question of breaking with the magical thought that the counter-violence would be purified as long as it is dealing with impure violence. It is all a question of reasoning as a third party and not as a combatant mobilized by one field or the other.

3.1. Is war the solution?

As we all know, the day following the attacks of 9/11 George W. Bush together with his team decided to go to war without declaring the war –against the advise of the military and his Secretary of Defence Colin Powell–, they retaliated immediately against the Taliban in Afghanistan for the attacks executed by the Arabian, and denied the non Afghan prisoners in Afghanistan the status of prisoners of war as it was established by international conventions (or otherwise the status of criminal as designed by the national legislations). This way they invented an illegitimate category (enemy combatants) to imprison them indefinitely and put them in a state of complete sensory deprivation in Guantanamo camp.

These unprecedented decisions developed a vindictive ultra-patriotism in favour of the military option, which left a deep mark on the United States' citizens, but also on its foreign policies, allies and the whole world. From the very first day, this created a specific counter-terrorism strategy, excluding

the traditional options of antiterrorist fight carried out by the police: naming investigators and attorneys that demand an international rogatory commission, the use of liaison agents of the FBI and other external police agencies to put pressure on foreign governments, some through undercover death threats (such as Clinton did after the first attacks to the Twin Towers in 1993). This excluded the possibility of a petition to have this form of terrorism recognised as a crime of war and to be pursued by the International Criminal Court, as it was suggested by many members of the UN: or even react imposing economic sanctions against those "renegade" governments that support terrorists and put them under diplomatic pressure (as it would be done later on the case of North Korea and Iran).

The arguments of a legitimate defence and the possibility of launching, without the authorization of the UN, a retaliatory attack under the form of a war that has the purpose of overturning a regime, are a matter of legal discussion. However, under no circumstances are these arguments a license to except oneself from the legal regulations controlling international relations and the local jurisdictions making up *ad hoc* terminologies to justify the exercise of violence at the expense of detained people. This does not justify the invasion of States that had been linked before to clandestine organizations or to consider the local population as potential enemies, while at the same time pretending to do exactly the opposite assuring them that they are coming to free them from a dictatorship.

The argument of a legitimate defence would fail three years later: the reports sent in 2004 by investigators in the parliamentary commission would convince the American majority that the justification for invading Iraq based on the presence of weapons of mass destruction and elements of Al-Qaida was all a fabrication.[3] But this did not completely question the issue of legitimacy of the decision, since other reasons had been declared in advance: the liberation of the Iraqi population from the dictatorship of Saddam Hussein, the need to "re-balance" the Middle East promoting regimes more favourable to the United States (and Israel), anticipating the rise of a potential competitor to the United States –China– and securing the supply of petroleum in the long term. So many well versed and cynic arguments, about the "right" of the United States to an hegemonic world position, were able to convince part of the electorate that the lies behind the war were more or less of the same nature that the ones Bill Clinton said about his extramarital affairs… In addition, today we are still hearing the Congress asking for explanations regarding George W. Bush's initial allegations. In Great Britain, Tony Blair had a lot more difficulties and even a televised fiction showed him as condemned for "war crimes" –nevertheless he was not prosecuted for this.

3. *The 9/11 Commission Report. Final Report of the National Commission on Terrorist Attacks upon the United States*, Norton, New York, 2004 ; *The 9/11 Commission Report. Review of Aviation Security Recommendations*, Chamber of Representatives, Washington, August 15th 2004.

If its legitimacy is questionable, was the war option at least efficient? Was it capable of reducing the terrorist threat as it was promised? Whether we are talking about Iraq or Afghanistan the answer is far from being positive. Since, in both countries, the military process of counter-terrorism was renewed by the forms of "counter-insurrections" from the colonial period (like the French period in Algeria) and post-colonial (like the Americans with Vietnam): the anti-subversive doctrines of yesterday were fully applied, with the same counterproductive effects resulting in more important resistances of entire segments of the population. But also causing a worsening of the terrorist actions in Spain, Great Britain or Morocco –countries in which the government made an effort to deny, against all evidence, the link between their participation in the Iraq war (and Afghanistan) and the attacks or attempts committed in their territory.

As they went along, by the end of 2007, the United States and its allies were facing a huge dilemma: whether to extend the war to other countries (Iran, Syria, Sudan, Pakistan, Palestine…) maintaining the policy to eliminate every "renegade State"; or to accept certain diplomacy questioning the initial options and reinstating the national sovereignty game in the international sphere. The second option would imply a retreat leaving in these territories an allied government in a good position but also recognizing that the reality of the war against terrorism was a lot different from the one the dominant "information" led to believe. From this point of view, without a doubt, we were able to see the lexicon evolving: kamikaze terrorist, isolated fanatics in the middle of a population strongly in favour of the coalition troops were many times named as "insurgents" in view of the amount of connections they had with local communities and their relative successes. In addition, the colonial vocabulary that refers to the "battle for the hearts and spirits" resurfaced again.

The tension between western politicians and the generals in those countries (in Afghanistan as much as in Iraq), caused by a possible defeat or at least a forced retreat, focussed the attention on the ambiguity of the "war against terrorism" discourse: on the one hand, it tried to minimize the reality of the continuity of the war abroad and its colonial vices, as long as they did not have to give credit to the idea that the terrorist suspects arrested in Europe were "combatants" that wanted to give the western population "a taste of what war is like"; and on the other hand, it multiplied the anxiety about the possibility of a domestic war brought by "home grown terrorists" (the terrorists that were born within the country). The meaning of this war –transformed into operations of "peace keeping" abroad (despite the great amount of violence) and into a general suspicion atmosphere in the interior (despite the decrease on the amount of victims of attacks)– was changed to the point of getting mixed up with that of the antiterrorist police fight. This gave way to the abolishment of the frontiers between the internal and external and to talk about a "global terrorism" that needs global answers, all this covering up the responsibilities of this response to terror that provoke also numerous civil victims, but out of our sight.

3.2. The global cooperation between police service and intelligence

The consequences of an international cooperation in a global counter-terrorism regime were a lot less discussed than the consequences of the war in Iraq and Afghanistan. The cooperation between governments, police forces, justice administration and intelligence services, was free of the secrecy imperative related to the national interest. Direct collaboration platforms were established or reinforced. Coordination services and cells were created (linking in most cases the services of border control, customs, immigration, territorial police forces, magistrates police and even military intelligence services and the military itself), on a national level (starting with the creation in the United States in 2002 of a "super-ministry", the Department of Homeland Security) as well as on a transnational one.

In the heart of the regional interstate organizations, the development of this cooperation was more or less important according to its institutionalization degree, going from the simple exchange of information to the complete sharing of their information thanks to the inter-operable technical platforms, to which every member State can resort to –as it is the case of certain fields in the heart of the European Union. Certainly, not every State has resigned to the preservation of the exclusive property of information –for example, as it was illustrated on the European Union level, by the difficult extension in 2007 of the regulations of the Prüm treaty–[4] and several regional groups settled for informal exchanges of information, strictly bilateral on a fair's fair basis. The foundation of a global counter-terrorism regime generated the creation of hundreds of new information channels between services on a global scale (Bigo 2005: 53-101).

After it was put in practice, the discussions were more about its impact on the national sovereignty than about the risks it represented to the fundamental rights. The discussions were almost exclusively devoted to data exchanges between democratic states. The European Union estimated that its specialized agencies (Europol for the police coordination, Eurojust for the legal cooperation, Frontex to fight illegal immigration) or its analysis centres (such as Sitcen, an intelligence agency that consists of military and civil people in charge of evaluating security risks) may contribute with an added value regarding recollection, exchange and analysis of information. The discussion gain intensity when it came to the point of dealing with the transatlantic exchange of personal information, since the North American system of independent control of these data was always less supported than it was in Europe. More over, the United States had a much more "exceptionalist" attitude since 2001: they considered that their services had all the right to the information considering they were dealing with national security, even to the

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4. It is an International police co-operation agreement, signed on May 27th 2005 by Belgium, Germany, Spain, France, Luxemburg, Holland and Austria; in June 2007, its main regulations were integrated within the legal framework of the European Union, applying to every Member State.

point of not respecting the rules established by their European equivalent (no respect for treaties regarding the transfer of PNR –Passenger Name Records– data of the passengers in European airlines), intervening in the territory without authorization (kidnapping suspects) or even investigating financial information (through the agency of financial coordination, Swift).

We obviously do not have that much reliable information available regarding secret agreements between intelligence services. The hyperactivity on the part of the Israeli services is quite notorious, but poorly documented: there was evidence of this in July 2005, after the death in the London underground of a young man from Brazil mistaken for a terrorist suspect and killed during a police operation, we knew then that the British antiterrorist services had been trained in Tel-Aviv following a "shoot to kill policy". We know that the surveillance networks via satellite that monitor the telephone networks that link the United States, Great Britain, Australia and other countries of the Commonwealth, formerly known as Echelon, gathered and exchanged millions of data, saturating the computers from time to time and creating multiple errors on the list of suspects. The G8 that consists of the wealthiest countries in the planet made its contribution: the specialized groups created beforehand to fight organized crime (the Lyon group) and to fight terrorism (Rome group) intensified the identification of the illicit financial flows and exchanged information regarding Islamic terrorism.

On the other hand, the intensification on the international antiterrorism cooperation has allowed many dictatorships or non-democratic regimes, whose information was requested in the process of collecting data regarding suspected terrorists, to strengthen their repression against their political opponents or against certain ethnic or religious minorities. Such is the case of Libya, Egypt, Algeria, Tunisia or Nepal, but also Vladimir Putin's Russia. The request for cooperation has given these regimes the possibility of turning their fights against their opponents into a new element on the global war against terrorism. By calling "terrorists": the Chechens, the Muslim Brothers, the Maoist guerrilla or the migrants passing through their territories, these States were able to impose their point of view to the westerners, in exchange for their involvement in the fight against radical Islamism and its networks. They quite down the critiques of their politicians or at the very least they managed to limit the effects of such critiques, since western governments turned a lot less sensitive to the reports made by the international NGOs that defend human rights.

3.3. Terror stock market: the market of the "suspect" lists

Global counter-terrorism created a real exchange "market" of insecurities and forms of terror. The transactions were not limited to collaboration between democratic regimes. The intelligence services, on the contrary, tried to develop exchanges with those they had more to learn from; and certain "remorseful" States like Libya, have hard-foughtly negotiated the provision of their information about networks in exchange for their international

reinsertion. These transactions were developed trough the recognition of lists of "suspicious" individuals and clandestine organizations: each service had to acknowledge the list established by a specific State in order to get the acknowledgment of its lists by the other ones. Since 2001, this bargaining of lists were constant and had little to do with the information regarding criminals, since they were mainly "suspect" lists, a lot longer than those of wanted people from the criminal police. Each one included finally the individualized enemies of the others accepting to classify them as "terrorists".

Nevertheless, the system has its limits. The diplomatic, the military and the judges had something to say about this "transactions". The sovereignty game of the States and the different regimes were certainly affected, but never eliminated. There was no unification or centralized rationalization. The diversity of interest at stake has prevented the creation of a consensus definition of terrorism by the UN, and even of a common list accepted by every one. The discussions have been hard-fought, and the priority was given to the regional associations and the bilateral agreements, mainly to those that were more discreet. All of them gathered groups of experts whose primary purpose was to build the lists. The G8 has its list. The United States has a list. The European Union has several –depending on whether they want to intercept financial transactions or incriminate individuals. Many European countries have also their own lists, unpublished most of the times. And to these official lists, or at least known, must be added other lists, longer but also more confidential, since they widen the range of suspects (thus they are considered better lists).

But, *de facto*, the American no-fly lists (lists of the people that are banned from taking flights within or destination the United States), generated after 2001 from the addition of all the data (based on a logic described by the Total Information Awareness project, renamed in 2003 as Terrorism Information Awareness), are evidence of the inconsistency of information, rumours and misinformation gathered from individuals, their name or pseudonym. These lists of suspects, far from having the coherence of proper knowledge, are more similar to a poem of the surrealist *Prérvert* inventory where: a boy of 18 months can be considered a dangerous international terrorist and, hence, detained at the airport with his mother for eighteen hours under the pretext of sharing with another individual the same name, the same surname and two other behaviour characteristics, which are confidential. The main purpose of these lists is to give more substance to the idea of a global terrorism that includes all the individuals and clandestine organizations that violently oppose to their States, and that would have Al-Qaida and Bin Laden as their leader, even if they are members of ETA that had been wanted for years or young people that recklessly visited a mosque qualified as "radical" by the intelligence services.

The market, in which information about fear is being exchanged, has a kind of "stock-market places", where the different actors are in competition against each other, according to the classic neoliberal logic. For this reason, the CIA took some distance from the Department of Homeland Security. So

did the Europol and Sircen that belong to different "pillars" of the European Union (third pillar or Justice and Home Affairs regarding Europol; second pillar or Defence and External affairs regarding Sitcen), elaborating jointly a state of threat, but they instantly disagree on the rank of this threats and the strategies to follow. Interpol reinvented itself with a new information network faster and more efficient than others, and set up for terrorism suspects. The OTAN also got involved in counter-terrorism. Russia, China and Central Asia countries understood the need to build their own exchange market, and to include in it for example the name of some providers of services of private military companies in Iraq: this would give them a bargaining tool at the time of removing people from other lists.

Global counter-terrorism is not free from the transaction logics of the States; they have even been activated in unforeseen sectors. It did not create reciprocal confidence between intelligence agencies, adding to this that the area to collect data expanded. Talking about "trust" has turned into the *leitmotiv* of every collaboration speech, given the fact that the practices collide with the socialization of distrust and the logics of not doing anything for nothing. The "market" (the terror one) does not work based upon the trust between the participants but based on their transactions and competition.

Surrounding this stock market a network of professionals in the management of insecurities linked to terror was consolidated, that has become more or less independent from the national governmental logics; and has started a struggle with politicians with the purpose of demanding the truth about threats and about who the enemy was and how to fight against him. This network already existed, but was divided in different areas: the area of internal security professionals grouping networked police; the military and external affairs area structured by the OTAN; and the other Anglo-American networks around the world. The military and police areas did not have a good relation and did not like each other, tending to compete against each other. However, since then they have fallen in interdependency chains that have forced them to work together, since the liberation of missions that do not respect the separation between that which is internal for the police and external for the army.

The intelligence services, each one determined according to national interest but already used to working jointly in the context of alliances in the cold war, reinforced their connections at an international level –giving way to the access of new member to the existing "clubs"– such as the connections between police and military services on a national level (which occasionally could imply even their merging). They accessed almost every informal network that groups criminal police and they wanted access to its information channels, extending the request to the customs and immigration services. Supported by politicians that only cared about technology and the maximum amount of information gathered to control the danger of the furtive enemy that attacks whenever and wherever he wants, they restructured this universe of professionals of (in)security on a transnational scale, turning into the active centre of this universe and minimizing the imperative to respect legality and the

judges role, despite the resistance of the latter. The spreading of the activities of these professionals in the management of anxieties, whose sphere also includes more and more private actors, created a qualitative leap that allows them to have considerable influence on our lives[5].

3.4. Secret detention, torture and inhuman treatment: extracting information from human beings

The role of the prediction of future behaviours of potential terrorism suspects by the intelligence services was the heart of the reconfiguration of limits between people's fundamental rights and the agencies' powers. In the interest of prevention, the right to act before a criminal act is committed; the focus went from the territorial police investigations or the military repressive action to the collection of information, its storage and classification to simulate possible future trajectories using elements from the past.

Somewhere between science and prediction, this reference to the future of potential criminals that must be arrested and stopped before they have committed the crime, organizes the whole rationality of the worst-case scenario. It is never disputed, because it is founded on the idea of a secret knowledge leaders have that would make their decisions informed decisions, with no room for arbitrariness, "there is no smoke without fire", and where it is considered that a detained person is there for a reason. But the analysis of the mistakes in the reasoning made by the governments and intelligence services since 2002 shows that this claim to have knowledge about uncertainty, about enemy's behaviour and the ability to localize them in time, it is at the very least, debatable. It is more similar to an astrology that looks for signs in the body and human behaviour than a scientific technique founded on the analysis of rational risks. The novel by Philip K Dick "Minority Report" that inspired the film with the same name directed by Steven Spielberg is without a doubt noteworthy of this dream of an absolute preventive policy that turns into a nightmare in a society under surveillance.

It is this will to prevent that explains the arguments that justify torture, detentions, the absence of a fair trial and all the practices that challenge fundamental rights. It is all a question of "extracting information", make the individuals talk and, if they do not talk, make their bodies talk. Numerous places were used for this "extraction of information" which always includes degrading and inhuman treatments: Abu Ghraib in Iraq, Guantanamo Bay, but also a whole archipelago of secret detention places all over the world, connected by the network of American military bases and of the OTAN (Diego Garcia in the Indian Ocean, Camp Bondsteel in Kosovo and so many other places that the parliamentary reports discover from time to time).

The military staff on these bases has been trained in specific interrogation techniques by the operational responsible of the intelligence services: they have been taught how to weaken the individuals' resistance, with the purpose

5. See dossier *Suspicion et exception*, *Cultures & Conflits*, n. 58, 2005.

of being able to "extract the information" themselves through cracking the will. This goes hand in hand, as it is always the case when authorities have justified several forms of cruelty, with individual manifestations of sadism, tolerated or not, without the intention of getting any information; when this has been sanctioned, it allowed the action against certain individuals, without questioning the whole system.

Five years after these devices were set in motion, it is clear that the psychological war that tries to avoid the international prohibitions regarding torture has failed. It failed in the legitimacy field, since the court houses refuted distinctions of this sort and maintained the *jus cogens* (the imperative regulations of International Law established by the Vienna convention in 1969) of the individuals to be protected against any form of torture and inhuman or degrading treatment. It also failed in the effectiveness field, in the sense that the degrading and inhuman treatments to which suspects are subjected to in all these bases did not result in valid information or well-founded accusations.

Regarding Guantanamo, most of the times we are dealing with "common" people victims of the circumstances and paying the price of these indefinite detentions. About those who were freed we know that most of them were foreigners arrested in Afghanistan (that had gone there to assist a wedding, for tourism purposes, religious and, some, for political motives), that were sold out to the Americans by the local communities, since they had offered rewards for each foreigner that was taken. So, the communities, –to get the rewards– accused unjustly some foreigners of being Al-Qaida combatants. It would have been a lot more efficient to use from the beginning the rules of the process leaving the defence to do its job, and concentrate on the people that were responsible. However, the logic of suspicion produced the inverse effect, prolonging to the absurd the circle of potential culprits. The information had to be extracted, make the person recognize his mistakes, sound out his kidneys and soul (just like the Inquisition demanded). Even worst, after a while, it seamed like the inhuman treatments had continued on a daily basis, without new questionings. They fell on the arbitrary rules of this concentrationary universe.

What might even be more shocking in the field of the liberal principles, is that the American government not only practiced tortures and inhuman and degrading treatments, but it –and its supporters– tried to justify them and let some images spread out (like the case of the terrible photographs of Abu Ghraib). In January 2002, for example, the American lawyer Alan Dershowitz tried to justify "legal" torture evoking –as it had been done before by French military during the war for independence in Algeria– the scenario of a terrorist that knows where the bomb that is about to explode is and refuses to talk; not a very realistic scenario, but the mere mention of it was enough to legitimize the use of the practices we mentioned before, where the information that needs to be "extracted" is "unknown" and, sometimes, not even with the purpose of knowing but as a simple routine.

What is true is the counterproductive effect of these counter-terrorism processes. They made the best propaganda in favour of Al-Qaida increasing the amount of suicidal combatants, radicalizing sectors of the Muslim world population that, before, were not as hostile to the Americans. They also tore down the image of the United States as the country that has the most advanced democratic values; and, leaving aside Bush's administration, it is the image of the western diplomacy in its whole (including the NGOs) that is in danger of suffering this set back, even though there was a refusal by the European to participate in some of the worst practices it did not stop certain type of complicity.

3.5. European reluctance and complicity

It is clear that Washington's logic of exception to justify counter-terrorism did not work as well in Europe. The possibility of a sanction to those governments that violated fundamental rights played an important part. The European Court of Human Rights and the European Court of Justice played a moderator's role that the Inter-American Court of Human Rights (no sanction ability) and the Supreme Court of the United States –which did not intervene except in minor cases and in order to protect judges power before the executive one more than to protect fundamental liberties– did not have.

In Great Britain, on the contrary, the House of Lords, so easily accused of being too conservative in the past, played a central role in order to block the initiatives of Tony Blair's government: a political game developed between the judges and the will of the British government to break the European Convention on Human Rights and the principles of *habeas corpus*. One by one, they invalidated the arguments and measures that violate those rights: the undefined detention of non deportable foreigners in the maximum security prison of Belmarsh (in the context of the antiterrorist law of 2001), the use of the Anti-social Behaviour Orders, ASBO, or the attempt to extend preventive detention with no charges for more than twenty eight days.

No national European government had been submitted to the exception decision without their sovereign control: they were cornered about the regulations of the European Union (Guild 2005: 183/204). The same thing happened with the exchange of information regarding personal data: the intelligence services of European countries were willing to cooperate with their American equivalents and they did in many occasion in an official way; but the European authorities that control personal data, as well as the European Parliament, exerted so much pressure on the governments, the Council and the Commission, that they had to elevate the level of requirements and oppose to the demands of the Americans. The debate surrounding the transfer of PNR data and more generally of transatlantic exchange of data put the focus on a subject that the ruling classes wanted to keep confidential. It did not stop these practices from happening, but it made them illegitimate, made them less often, and prevented the excess. The idea of a control carried out by independent authorities that verify the facts the intelligence services provide, made its

way and reached in 2006 the United States, where the ACLU (*American Civil Liberties Union*) was making a campaign regarding this issue by reflecting on the European experience.

From this point of view, those who are watching us should also be controlled, as well as those who decide, even if the control is done afterwards. It should be able to sanction them. The urgency argument is not enough anymore, no more than the "worst case scenario" one. There is a need to explain, give legitimate reasons for the suspicion and concrete elements of appreciation, preferably to the judges. It is not a question of blindly trusting in the information gathered by the transnational networks of information or the declarations made by politicians, whether they are home secretaries or prime ministers. Certain proportionality between threat and answer is necessary. The discourse about preventing actions before a virtual irreparable damage is not acceptable: the worst-case scenario must be seen for what it is: a paranoid logic with no other limit than the one imposed by the person who announces it. The focus is again on the criminal police and the information handled by police services about known perpetrators, and not on the extraction of information and profiles made from the crossing of the greatest amount of information possible and the simulation of the future.

The sometimes resentful speeches of British home secretaries or Italian ones, about judges who would not let them proceed the way they wanted to and would call them irresponsible are proof of the tensions that global counter-terrorism provokes in the heart the European Union. The institutional mechanisms of resistance were more elaborated, based on public opinions that were not convinced by the "need" for the derogation of the law, exceptions and war logic. They also took advantage of the lack of unity in the European government, –which could not be reduced to only one institution– a unity that it is necessary for Schmitt's argument of the sovereign decision of exception: multiplicity and diversity of the European Union, so frequently criticized, were the key elements in its ability (involuntary?) in order not to follow the United States.

The argument of exception did not do well in Europe. It is what partially explains why practices which were less violent and coercive than in the United States have been strongly criticized. The arrest with no charges or preventive detention in terrorist matters and its duration whether in the British accusatory system or in the inquisitive continental system puts the right to a defence and the idea of a fair trial in danger, as well as the status of presumption of innocence. However, these forms of detention bear no comparison to the incommunicado detentions, kidnappings, and disappearance of people in the archipelago of secret prisons of the OTAN and its allies, or with the undefined detentions in Guantanamo, even with the requirement finally imposed by the Supreme Court of the United States on how to conduct the processes, after the civil society and the American liberal judges struggles. The European system continued to base in police logic. Of course, there are some exception magistrates and infiltration activities of the intelligence services, but the system

has not connected (yet) with the logic of the military intelligence services and the technology praised by the Americans.

The transatlantic information channels do exist, but they are at the same time elements to fight and objectives to be controlled, for its content as well as for its form. Some are disappointed and accuse the European of not understanding the new challenges, of being an "old" Europe (including certain pro-Bush European scholars); others on the contrary see the resistance as hope and accuse the American government of being tempted by the "orwellian" tide (including activists and anti-Bush American scholars).

The reports announced to the public in 2006 and 2007 by the European Council (Dick Marty reports 2006/2007), the European Parliament (reports by Claudio Fava, 2006/2007), and by the Council of Human Rights of the UN (report by Martin Scheinin, 2007) analysed these contradictions in the attitudes of the governments of the European Union and its intelligence services: they refused to practice tortures in their territory, although they were (active or passively) accomplices in the kidnapping of people in European territory by the American services, as well as the authorization of air traffic to planes transporting suspects in order to send them to secret prisons outside the Union. Apparently some European governments tolerated with knowledge this type of activities, like Rumania, while others were kept in the ignorance by their own intelligence services, collaborating on their own behalf with the American services, such is the case of Italy.

We need to emphasize that the work of these informants collided with the obvious lack of will to cooperate from the group of questioned services and its governments. Because of this, they could not establish whether these tortures were committed in the European Union's territory or in the candidate States to access to the EU (leaving aside, maybe, the American base Camp Bondsteel in Kosovo and the area handed over to the CIA by Rumania, near Tulcea). The European Union cannot redeem itself that fast from the illiberal practices. Even though it did not participate in the extreme acts, some of the States that are part of the Union did take part in the war actions in Iraq and certain war crimes, and participated as well in the actions that took part in Afghanistan and in the information exchanges by the military phone taps (Dieben & Dieben 2005). France, hardly involved in Iraq's war, collaborated through DST *[Direction de la Surveillance du Territoire]* agents and antiterrorism judges, in the interrogations that took place in Guantanamo. It also provided several lists of suspects that linked the Algerian GIA, supposed Chechen subsidiaries and Al-Qaida.

But if the two shores of the Atlantic join forces, it is mainly in the development of illiberal practices more ordinary and less spectacular.

4. Restlessness policy and ordinary illiberal practices

We have described the typical practices of a global counter-terrorism regime, focusing on the action of western governments, transnational

networks of insecurity management, particularly of intelligence services. However, the root of illiberal practices on liberal regimes is not explained by terrorism and exceptional reactions of the western States: the tendency to a silent acceptance of these practices by the society is based on a feeling of insecurity that it is not reduced to terror. This feeling is also an expression of a more diffuse concern, generated by the confusion between ordinary bureaucratic policies concerning both "excluded" and "included": citizens tend to be treated as foreigners, regular travellers as migrants. This evokes our individual responsibility for these policies as well as those responding to "great events" provoked by international terrorism[6].

We cannot understand the relation proposed between citizens of western societies and the detention of foreigners and their difficulty to mobilize while facing illiberal practices such as those in Abu Ghraib, Guantanamo or Belmarsh, if we do not relate them to other practices. Practices like the treatment given by their States to the foreigners demanding asylum while they wait the procedure of their files, or to people whose trips have been interrupted because they are missing a document, quickly qualified as irregular or illegal by the press, but also by the police stations and even public prosecutors. If we do not come to understand the situation these people have to go through in detention centres or in the waiting zones of the airports, with our implicit acceptation we are justifying the unjustifiable, losing sight of a central dimension of these practices: presented as exceptional, when they were elaborated to be ordinary.

The political game about criminalization of migrants, and more generally about the instrumentalization of the connexions between terrorism, foreigners, Muslims, migrants and young citizens products of immigration, are part of the reason why the concerns increase: they give the rivalry an intimate quality, creating an environment of suspicion in which the people "without papers", religious, unemployed and that have acceded irregularly to the country become the members of clandestine organizations. All this despite the fact that the sociological profile of bombers elaborated on an investigation made by the police regarding the "Islamic terrorism" in Europe, revealed that they have completely different characteristic: regular access to the country (even born in Europe), not a very strong religiousness but a profound feeling of injustice, uncommon job qualifications but real (usually in the service sector). But in the name of antiterrorism fight, the members of parliament everywhere accept without questioning all the restrictive measures concerning irregular immigration (and regular), the conditions of family reunification and the principles of right to asylum. It is an obvious green light for the Home secretaries and the police to spread with these measures their leeway and an incentive to limit the judicial controls placed upon them.

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6. We have analized these issues in various places: Bigo (1998: 13-38; 2002: 63-92; 2005: 53-101; 2007). In the same sense see: Huysmans (2005); Ceyhan (2006: 11-32); Lyon (2006).

We can always reproach governments or members of parliament, but numerous private and public speeches evidence that many of our contemporaries do not ignore their actions and they even tolerate and approve them. This cynicism, mixed with certain disgust for politics in general, reinforces the tendency to "sacrifice somebody else's freedom in other to protect our own security" (Cole 2003). Even though the repressive measures only seem to affect specific categories of people, determined by global counter-terrorism, the concern is limited. It is not expressed until the repression is openly manifested on a daily basis, like the arrest of children with no papers in the French schools in order to expel them (we can observe, for example, the amazing mobilisation since 2006 done by the parents of students of *Réseau education sans frontières*[7]). It only becomes a real concern, when certain privileged groups are turned abruptly into the object of control, because they share parameters with "abnormal" populations and they highlight what the individual security may lose when it collides with the imperatives of national security. When arbitrariness comes from the police or the State, it is when people notice how the legal guarantees to know the reason of an internment, to have the right to a lawyer and a fair trial, are central issues. This is why the American no-fly-lists are every time more questioned.

This is even more blatant in the identity controls done by the police and the private surveillance mechanisms: citizens do not rebel against these mechanisms until they realise the information they are gathering can be used years after it was taken, in different social contexts and according to interpretations far from the moment it occurred. It is interesting to emphasize that societies that still have the memory of a dictatorship, are more reluctant to abandon their right to certain lack of transparency when the police checks out their intimate activities (intimate being the most exact definition of the term privacy), their reading material, correspondence, or movements.

We are left with the essential: the daily indifference –even more the explicit approval– regarding the new forms of surveillance explains the simplicity with which young people of popular classes (and even more of ethnic groups stigmatized as different) are not seen as scum from which society has to protect itself from with security measures, where the only role of prison is to keep them on the sidelines, if not indefinitely at least for as long as possible (Bonelli 2008; Garland 2001). These behaviours, together with the counter-terrorism discourse and the demand of derogation of some legal guarantees on behalf of urgency and danger, set the structure for the rules and of what is considered admissible or not. Reflecting on the concern policy leads us to question ourselves about our own responsibilities –and not only those of our leaders– for the mechanisms of an insecurity management of insecurity in which we actively participate, and usually with more willingness than we would like to admit.

7. www.educationsansfrontieres.org

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-PART I-

THE CRIMINAL JUSTICE SYSTEM AS PRODUCTION FIELD OF THE INSTITUTIONAL VIOLENCE

Logics of the processes
to the global enemy*

GABRIELLA PETTI

1. A judicial strategy against global terrorism[1]

Barack Hussein Obama opened his presidency by ordering the suspension of all proceedings at Guantanamo, the closure of the camp within a year and the immediate cessation of the use of violence in interrogations of terrorist suspects. While the imperial power seeks to amend the mistakes of the reaction to the wound caused by the attacks on September 11th 2001, some Italian judges do not take into account the possibility that a man under their jurisdiction[2], only one among many, may be expelled to a country that admits the use of torture[3]. Apparently, this is a strange action to a judiciary system that tends to put at a distance the American vision of the "war on terror", claiming the option of staying within the bounds of the Rule of Law. In this way, the role of the enemy is limited to the reassuring category of criminal/terrorist, and represents a challenge for those countries that must fight against it while being respectful of the democratic rules and principles. In fact, in Italy and throughout Europe, there is an increasing amount of jurists who are concerned about the possibility that also the Italian penal system is being polluted by the

* Translation from the Spanish version by Paula Vázquez.

1. This is a synthesis of the research on the processes regarding international terrorism in Italy, developed in the frame of the European project "CHALLENGE" ("The Changing Landscape of European Liberty and Security"). The methodology used is those of the ethnographic research: analysis of the orders or rulings issued by courts, interviews with the actors involved (judges, lawyers, interpreters, journalists...) and field observation of trials.

2. Even when investigations have not led to any success, they have not been enough to initiate a process or were concluded with an acquittal, the accused have been dismissed on the basis of assessments made by the police. Once they returned to their country of origin, many of those who were expelled have been arrested, tortured and in some cases have disappeared.

3. It is the expulsion (completed in late 2008) of Mourad Trabelsi who after completing his sentence (seven years) must return to a country where he might face another twenty years of imprisonment and possibly torture. This measure, provided as an additional security measure in the condemnatory sentence, has been upheld by the judge at the completion of the sentence and merely confirmed by the Ministry of Interior. The European Court of Human Rights has made numerous references to Italy for the expulsions to countries that recognize torture. See for example the decision in the case of Saadi Nassim.

"logic of war"[4], in line with a generalized state of emergency or an incessant management of the emergency[5].

However, the option to choose the law and the courts rather than war and military camps to face global terrorism, appears not to have secured the rights of the people involved in investigations, but in many cases it has made their personal stories invisible. Guantanamo, in fact, through the unanimous recognition of the aberration that it means, has attracted the interest of the public opinion, making the prisoners highly visible, while their personal circumstances have been widely documented (see Worthington 2007). By contrast, little is known about the investigations on terrorism in Italy, and it is much more difficult to asses the impact that these experiences caused on the life of the people involved in these police and judicial mechanisms. This essay seeks to consider the less spectacular work of the Italian courts, based on the premise that the treatment received by many citizens of Islamic religion can not be reduced simply to the exceptionality of the measures taken or to the climate of moral panic constantly reproduced these years, but, at least in Italy, it must be interpreted at the light of the activity at the Courts.

Italian inquiries on international terrorism began in 1993, but at first did not get relevant results. Before 2001, the philosophy of judicial intervention was based on the principle of the prevalence of countries' sovereignty: the subversive or terrorist activities concerned internal Law in the cases on which Italy was directly affected. The investigations were related to groups belonging to the hazy concept of Islamic radicalism, differentiated by their national origin and generally formed by opponents of governments with which Italy had commercial agreements or relationships[6].

The legal strategy against international terrorism was re-established after the attacks in the United States: from that time the investigations refer generically to Al Qaeda, and other groups and individuals that before acted independently, sharing objectives, were from that time on assimilated to Al Qaeda. The most recent rulings that define a terrorist act take into account the objective pursued: the *jihad*. Beyond that, we witness the loss of specificity of "terrorism", in terms of national identity and ideology, which over time has been replaced by a conception based on a social point of view. The figure of

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4. The debate on what has been defined as the "Criminal law for the enemy" (Jakobs 2003/2005) is especially abundant. As an example of the Italian debate: Gamberini & Orlandi (2007); Donini & Papa (2007).

5. Several scholars have taken up, reworked and/or criticized Agamben's position (2003). On the subject: cf. Bigo (2007), Guild (2003/2005). On the differences between "state of exception" and "state of emergency" in the era of global terrorism, see Ciccarelli (2006). The legal notion of emergency is particularly uncertain and varies from country to country. On this cfr. Bonetti (2006:61).

6. The first processes were respectively related to the Algerian groups GIA, FIS and Takfir W-al-Higra; the Egyptian groups of Al-Jihad and Al-Gamà Al-Islamia; the Moroccan of the Moroccan Islamic Combatant Group; the Tunisian persons of the Salafi Group for Predication and Combat; and recently with the Kurds reconverted into Ansar Al Islam.

the "terrorist" is confused with the condition of the migrant (Muslim-Arab) and illegal practices or on the borderline of legality that are usually attached to this situation.

In fact it is the crime of terrorism itself which is progressively losing its specificity. The package of measures adopted in Italy after September 11 (Law 438/2001) extends the range of behaviours subsumed under the previous criminal figure (270 bis) to activities developed against other countries, and offers new incriminating possibilities. It is, however, a definition so ambiguous that often reveals itself too vague to lead to a conviction for international terrorism. These are the problems encountered in trials, which have inspired the changes that have characterized the new legislation –I refer in particular to the law 155/2005. The category of "terrorism" is so elastic that allows even a conviction against one who only has breached the rules on immigration or regarding the forgery of documents, if such activity is framed inside a programme of "terrorist aim".

The last modification of the crime of terrorism was introduced implicitly by a ruling of the Court of Cassation in 2006 (1152/06), which expanded the definition even further, through an interpretation that combines a number of international standards[7]. According to it, as the conspiracy in terrorism is recognized in almost every case, the trials on international terrorism are in fact limited to establish the quantum of the conviction.

To understand the developments of the facts we must refer to a context that has played a key role in Italy in the fight against international terrorism: Milan. The judiciary system of this city has started most of the processes and often has carried out the investigations that started in other cities. The courts of Milan have been the venue of 23 of the 30 trials carried out from 2001 to 2007. Indeed, this is not an inevitable matter, given that the cases dealt with in other cities –for example Turin, Genoa and Rome– have often been filed. Rather, we can talk about a special sensitivity towards terrorism in the local police and judicial system.

The analysis of trials gives us an unusual reading of terrorism and measures to fight against it: it clarifies the way in which practices and activities of the courts, even the most insignificant ones, produce effects and influence the legal definitions of terrorism. At the same time, the latter helps us understand the mechanism by which the trials are being developed, that is, allows us to understand that trials against terrorism do not have much to do with the context of legal exceptionalism, but with the absolute normality of everyday practices in the courts and their efficiency mechanisms. Such an analysis presupposes that the courts should not be considered as a homogeneous community, but as a "field" where professionals with diverse and specific

7. The Court has indicated that the Convention of the UN of 1999 must be taken into account as the reference point when searching for the general definition of terrorism in order to evaluate the actions committed during wartime, and that the European Union Council Framework Decision on Combating Terrorism of 2002 must only addressed to the actions committed during peacetime.

capital and with differentiated positions within that space, compete with each from a series of shared assumptions on which rely the legitimacy of each of their own actions[8].

2. Milan, the centre of the fight against Islamic terrorism

An analysis of sentences and rulings in Milan shows the line of continuity between the two eras in which the fight against international terrorism can be divided. A considerable part of the investigations and prosecutions –most of them concluded– after September 11 is actually the continuation of the period which began in 1993, as the accused ones are of the same kind and frequently share the same type of crime scenes. What has changed is the climate in which trials and investigations are conducted. If at first all the actors of these events were secondary players in the local judicial landscape, after the first attacks they rapidly conquered the centre of the stage, and nowadays they are constantly exposed to the glare of the media[9].

Here I am especially interested in drawing attention to another feature that seems to characterize this case: the multiplication of a trial for the same acts, to the point of forming a "judicial *continuum*", which broadly recalls to the time of "gigantism in procedural law" (Ramat 1985: 63-67). In fact, more than to the number of accused, I refer to practices in investigations and proceedings that were used for domestic terrorism and the *mafia*, but that afterwards were used in the fight against political corruption. Ferrajoli (1989) had classified them as a "penal sub-system of exception" and during a long time, these practices have been considered an aberration caused by the emergency legislation. These, however, not only are the main instruments of the judges, but also represent an expression of the Italian guarantism. On this topic, one of the main actors in the investigation of Islamic terrorism cases said in a paper presented at a congress of lawyers:

> "We should start from the premise that the Italian judiciary system, especially in the darkest years of domestic terrorism, in the '70s and as well into the 80s, has been able to develop an excellent level of professionalism: expertise, teamwork, spontaneous coordination between courts, loyal and effective collaboration with the judicial police, management capacity of almost a mass phenomenon known as *pentiti*[10] and respect for the guarantees of the accused, were the

8. I refer to the concept developed by Bourdieu (1986:6), through which we can see the professional aspects and the confrontations that take place within the legal field.

9. The extremely high relevance of trials on media has been widely studied in the sociological field (Gilioli, Cavicchioli, Fele 1997) and legal (Garapon 2007).

10. [E.N.: Repentant people: particular form of informers upon which a great deal of the most spectacular processes –both for the Red Brigades or similar and for the mafia– were based. The fact that the repentant persons were commuted their sentences if they accused their accomplices

main characteristics of their work. And those are the parameters of professional behaviour that we must now also appreciate, recover in full, especially at a time like the present one in which even top-level political figures argue that '*we can not expect governments to fight terrorism with the code in the hand'*." (Spataro 2007: 5)

A large part of the integrants of the Magistracy -particularly the examining magistrates- and some of the lawyers involved with the trials for terrorism, were politically and professionally trained precisely during the period to which the quotation refers to. Therefore, it can be said that judicial practices have precedence over the definitions of law. More specifically, I try to say that the concept –classification, characteristics, methods– of international terrorism that gradually has been formed through these processes is the effect of a set of processes and techniques of investigation constantly reproduced, rather than the result of an effective political and ideological coherence. Indeed, the persistence over time of such judicial and police practices[11] seems to imply a continuity in addressing the issue of terrorism, in a way that the situation created in the last 20 years can not be described as exceptionalism. Here are some brief examples of technologies borrowed from the era of domestic terrorism, characterized by the existence of the *maxi processi*[12]. The practice of so-called "gigantism in procedural law", as Ferrajoli (1989) said, involves the horizontal, vertical and temporal expansion of criminal proceedings, a characteristic that, in my opinion, can also be identified in the present organization of the trials of terrorism.

Regarding the "horizontal" dimension, we must remember the opening of a series of prosecutions against several accused: the detention orders in this case –as in the previous terrorist era– are often released "under weak pieces of evidence, as initial acts of preliminary criminal proceedings" (Ferrajoli 1989:861) and the dragnets also involve many people, but without reaching the numeric paroxysm of past times. The search for terrorists, in fact, generally focuses on the ambiguous area of Islamic fundamentalism, mainly within known places, where those who attend them are then captured.

The "horizontal" expansion is often accompanied by a "vertical" expansion of the procedures, through the raising amount of crimes against each accused, tautologically deduced from each other –crimes associated to specific crimes, or vice versa–, or attributed to other external members of the association. Especially in the decisions that order or confirm provisional measures, the organizational structure and the characteristic features of the crime are blurred almost to disappear into empty formulas in which the "violent program"

produced a number of sentences for innocent people that were judged with the only "proof" of the repentant persons' testimonies.]

11. Something similar happened in Britain, where much o the legislative and judicial practices were already tested against suspected Irish communities. Cf Hillyard (2005).

12. [E.N.: Trials with many accused. Some of them became very famous for the number and relevance of the accused, and by the absence of procedural guarantees that they suffered.]

appears deduced from conversations drawn from religious radicalism, while the "associative link" is expressed in an ideological commitment to *jihad*, which is identified as antagonistic expression to Western culture (Morosini 2005:409). The adequacy of the organizational structure for terrorist purposes is deducted from the commission of specific crimes such as forgery of documents or even facilitating illegal immigration, while the terrorist purpose of these acts is demonstrated by adherence to the *jihadist* ideology or the provision of propaganda, even without proving the direct involvement in attacks or at least the specific knowledge of such facts. The crime of armed band with terrorist purposes is demonstrated through telephone contacts and the "circularity of relations": little, if compared with the difficulty to prove the association with the mafia or the external collaboration with it.[13]

These processes do not lack the expansion of the temporal dimension. Some procedures have been dragging on for years, with significant time intervals between the closing of the preliminary criminal proceedings and the opening of the trial: between the arrest and the start of the trial several months have passed, and many more have been necessary for end of the first instance. The total period of detention often exceed the three years. One of the technical tools used to lengthen the period of legal detention is to add to the generic charge the aggravated figure of use of weapons. We must specify that the weapons were never found and so the aggravated figure was never reflected in the sentences. Still, prosecutors systematically use the accusation. The actual charging of the terrorist purposes, as aggravating first and after 2001 as an autonomous penal figure, has doubled the time of arrest.

Another tactic often used to "aggravate the procedural position of the accused, or to conceal the failures of the investigations, or to extend the preventive detention indefinitely" (Ferrajoli 1989: 861) is the issuance of a series of capture warrants for the same facts. This was in the past –and still is– a technique used to keep in jail people considered dangerous but that are still under investigation, by applying new charges or new aggravating circumstances for facts that are already known, but without specification, inserting them in a wide criminal activity. This is an essential aspect of the transformation of the processes into a "judicial continuum" (Ramat 1985) in which some individuals are subjected to periodical controls, searches, arrests and eavesdropping –a suspect has come to collect five preventive measures while he was in prison– by developing a fixed cast in the repetition of the representations of the legal drama. The use of preventive detention is combined with the search for partners or confessions, especially if it occurs in the long periods of preliminary criminal proceedings: a technique proved in the processes of terrorism in Italy and perfected during the processes of Tangentopoli[14] (Moccia 1997).

13. Consider the Andreotti sentence. For an analysis of the sentence and the court materials see Pepino (2005).

14. [E.N.: "City of bribes" trial of a widespread system of bribes that resulted in a radical political turn by making disappear most of the traditional parties, in the mid-90s, and led to the passage of the first to the second Italian republic.]

The potential of the *mix* preventive custody/prize measures becomes more evident when we consider that for some prisoners, including political ones, it is possible to suspend the normal rules of detention, and that it is necessary to be collaborative in order to have access to benefits[15]. The role of justice collaborators has also been fundamental in the processes of international terrorism: without their testimonies, the accusatory hypothesis has always been too fragile in order to state a conviction. Everything began to take shape after the appearance of the figure of collaborators. They are people who have been previously processed by the Milan Judiciary, even for completely different crimes such as minor drug trafficking. These people only have begun to collaborate with justice since the incentive of a sentence reduction. All these mechanisms come from the police practices previous to the reform of the Criminal Procedure Act of 1989 and have been reproduced and intensified with the "new law"[16]. Despite the attempts to change the procedure based on the inquisitorial principle, certain police practices have never been abandoned, but they rather have been reinforced and focused on the stages of preliminary investigation conducted by the prosecutor through the dissemination of "alternative procedures"[17].

Moreover, we should add that the investigations are often composed of thousands of pages, and in that scenario the exercise of the defence is very limited especially if the accused cannot access free legal aid[18]. Besides this, the defences of the different attorneys are often uncoordinated and frequently there are some veiled conflicts among them. Indeed, the success of the first trials have been in a great part due to the defence strategies aimed at quick and cheap arrangements –usually adopting conformity sentences or abbreviated procedures–. The convictions in these first trials served as legal basis for the forthcoming.

The above mechanisms have little to do with the exceptional procedures, but they are a symbol of the ordinary activities of the courts. The court is basically an "autonomous community of meaning"[19] where members share between them much more than they share with the outside world. This community includes all those who attended it, including the press and even lawyers, who often feel closer to the usual behaviour of the court than to the demands of their clients. The full judicial institution can become a place where, rather than examine the existence of crime, crime is constituted directly by operational procedures from the administration of justice. From

15. Cfr. Law 279/2002 which modified the Prison Regulations.

16. [E.N.: We translated as "Criminal Procedure Act" and the "new law" the Italian terms "*Codice di Procedura Criminale* " and "*Nuovo codice*"].

17. They are brief special procedures that may only be carried out with the consent of the accused because it establishes lower procedural guarantees. Other modifications introduced between 1998 and 2003, to make prosecution more efficient and effective, have strengthened the so-called alternative procedures.

18. [E.N.: In Italy, the benefit of "free legal aid" does not avoid the possibility of attorney election.]

19. [E.N: "*provincia di significato autonoma*" in the original.]

this perspective, the categories of criminal law and procedural rules are not mechanisms of verification and definition of guilt, but that function as a device of speech production that judges, prosecutors, police, lawyers and journalists use in order to organize the exchanges, conflicts, alliances and relationships that bind them to each other daily (Sudnow 1983:146). Therefore, they act as tools through which can be developed the modalities of belonging that are traded daily in the interior of this particular *community of meaning*.

3. To let die

Through these mechanisms, the accused is no longer the subject of the process, as he becomes the "field of conflict" of the possible interpretations of the facts and rules made by the different actors involved; the space in which the new legal definitions are tested and reproduced; the place to regulate the inner balance of the legal field. The depersonalization of the defendant, through its conversion into moral categories that are confronted with the choices and careers of law practitioners, is a fairly diffuse process, when the courtrooms are transformed into the arena of ritual fights between "good" and "evil". The dividing line between "us" and "them" is even more evident when the *other,* the *internal enemy*, is different both culturally and geographically. These lines are easily recognized when we pay attention to the peculiarity of the Islamic terrorism processes. First of all, we can see a certain "lightness" in the performance of court interpreters, although the need of knowing and understanding a phenomenon that until 2001 had not taken part in the daily work of lawyers is something recognized by all persons interviewed. The consultation with interpreters involves numerous difficulties, in general in all cases where foreigners are submitted to criminal procedures, but this is accentuated even more in the case of international terrorism. Above all, professionals dealing with these issues are a scarce resource: prosecutors and judges, in fact, usually come to the same list of interpreters. Moreover, it appears that the prosecutor is who recommends to the judges a handful of "reliable" advisers.

> "We have a record. The finding depends on the availability and confidence. I tell you one thing, when I did the first trial we had the problem of finding an interpreter, then, as I say, I do not remember who the interpreter at the trial was. However, the General Attorney[20] gave us a name that never was, in fact [...] has never been charged to my knowledge; I've never seen him as a defendant. "We must say that some investigations are underway, he may be a frequent of extreme environments, and so on." The prosecution pointed at him and I did not charge him. That is why it is not easy because there are few, but

20. [E.N.: At the original procura de la Repubblica.]

with the agreement, finally, also on the advice of the Attorney General saying, "well, do you have problems with this guy?" It is possible, it is possible ... we have found interpreters that in the end are always the same." (Judge).

The list of interpreters is not always based on specific cultural and linguistic skills, as reliability is the most sought quality. In fact, it is rare that the expert examinations are carried out by interpreters of the same nationality as the accused, probably due to the assumption that *they all talk in the same Arab*. In general, the interpreters speak of the low level of preparation and qualification of most of his colleagues, in fact, often what they say, more than the language deficits or differences determined by the geographical area of origin, is the poor knowledge of the Italian. According to one of the interviewees, the latter aspect may influence the activity of interpretation to the point of trying to hide as far as possible the linguistic difficulties of the Italian translation, searching for an appropriate linguistic expression in collaboration with the judicial police, and striving to make a translation that can meet the expectations.

It is also problematic the issue of religious knowledge. Interpreters rarely have a specific knowledge of the Koran or the possible nuances of the religious vocabulary with the result that the translations are approximate and sometimes even contradictory with expert evidence.

> The issue is mainly that often these interpreters do not know the true meaning of the word not from the point of view of semantics, but religious, when I tell someone *A salaam alaiku*, peace be with you, the expression corresponds to the Italian *ciao*. On the other hand the translations made in Italy in the process Rabei, said the opposite things when they were sent to Spain. (Interpreter).

This is an extremely relevant fact if we have in mind the importance of terms like *jihad* or *fatwa*, that in Islamic religion have different meanings according mainly to the context in which they are used. The same perspective that we assumed when referring to the linguistics aspects should be recalled as to the knowledge of political aspects and, above all, the confusion within "terrorists" organizations and radical or subversive organizations:

> "If you do not know the objectives of black terrorism[21], how can I condemn Mambru and Fioravanti? It is impossible. The trial that I just witnessed is based on these elements: an opening trial disposition that causes horror when read. It is a page that says that there is evidence of an association matrix operating to commit terrorist attacks, I got that page and I showed it to the judge and I asked him "Do you think that

21. [E.N: Terrorism of fascist roots that in the late'70s and the early'80s caused hundreds of deaths in Italy.]

this could be an evidence to prosecute the *Bigatte Rosee*?” When did the *Brigtte Rosse* stopped being called BR to be an association with terrorist purposes? Can you understand the process and the death of Moro if they did not make reference to either the BR or the NAR[22]? There is a fundamental difference. One thing is fundamentalism and another one is terrorism, these prosecutors do not know anything at all”. (Lawyer)

In the case of the so-called Islamic terrorism –with some exceptions– these distinctions do not seem to be taken into account: there is confusion between the different organizations, and everyone ends up into the same basket of *Jihad*. Thus, the radical simplification of the language spoken by the alleged terrorists –a unified Arab produced *in vitro* by the judicial machinery– is added to a drastic reduction of the political framework of their alleged militancy. More specifically, the depolitization of terrorists is obtained by producing a kind of bidimensional moral, which definition falls between the extremes of religious radicalism and the history of their own emotional traumas –which range from children suffering to the typical “uprooting” of the immigrant, who does not feel welcomed into the society of arrival[23]. They are individuals with a fragile identity, easy preys to who wishes to instruct them into a belief that most of them had never previously professed. In other words, the terrorist is progressively brought forward from the political field to the pathological condition. His profile will be identified with the *religious fanatic*, lacking any political or social reasons, which came close to free fall into madness –thus an abnormal (Foucault 2000)– and is fleeing the brutality of reality to take refuge in the comforting space of divine justice. This is a double minority, influenced by a vague pathology and by the escape from political maturity to a bloody religious dream.

Therefore, the red thread of the discourses described in these pages seems to be a judicial variant of racism: while subversive national groups are recognized an autonomous capacity and political claims, in the case of Islamic terrorists that capacity is denied, and it is dissolved into a “barbarian character” –in their “almost animal” enmity. We can see it clearly in this example, according to a prosecutor:

“Then we have the inductive method to say that the person belongs to that type of organization. Therefore, the acronyms we have found by chance during investigations, but also because unlike domestic terrorism eh... mafia associations, how can I put it, mafia associations have a very definite structure –BR also had a kind of Marxist-Leninist organization that excelled and so on... a mafia family has its rules...– here there is no very definite structures, there are “movements”.

22. [E.N.:Nucli Armati Rivoluzionari]
23. To those problems refer the article by Spataro (2008).

That is, to use a category, there are movements based on a general availability of killing as many infidels as possible and, occasionally, who belongs to or is close to the group does not mean that they may belong to another group."

As a conclusion of what has been expressed up to this point, I think that it is precisely the formal equity of the judicial processes is the element that allowed the violation of the rights of many individuals that were accused of being part of terrorist organizations. Notwithstanding exceptional or discretionary practices have not jammed the whole judicial mechanism, illegitimating the role of the judicial system itself. In fact one can achieve a more efficient result simply by reproducing in the criminal proceedings, in an implicit or explicit way, all the social prejudices picked up in what Foucault described as *State racism*, in the case of the "Islamic terror", applying the hyperbolic sense, because "presupposes a priori its exclusion of mankind" (Dal Lago 2005:30). Besides this, in the case undertaken on these pages, more than *make die*, we may talk about *let die* –a more compatible action with the Government techniques of a normalised society– aseptically applied to every individual to whom it is not convenient to *let live.* One of the acquittals clarifies this mechanism. On one side it says that:

"We cannot accept the hypothesis of a different procedural treatment for some categories of defendants. The highly known opinion of Günther Jakobs, who has recently argued that terrorists have no rights, cannot effectively be applied, because it bounces against the procedural system runs outlined by the Italian legislature, and even more, against the one that draws the Convention on Human Rights".

However, the same judge, although he released the accused, suggests between the lines their possible dangerousness, due to their proximity to fundamentalists' environments. According to the defence lawyer, in fact, a fragment of the sentence compromises the situation of his clients, because it exposes them to expulsion for reasons of "public order". This option would involve a return to a country where one of the accused has been subjected to torture, according to what is deduced from the wiretap stated in the file:

"With this fragment of the sentence I will never have the confirmation of the suspension [of the expulsion, wn], because they will say: "it is true that he is not a terrorist, but he is dangerous, the sentence says so." Writing in an acquittal "The fact that despite all the subjects were connected to international terrorism does not mean that ..." is a way of squaring the circle".

In this way, the process represents a kind of mechanism of defining the many "convenient enemy" (Petti 2008) who enter the courtrooms only to be

petrified in their monstrosity –cultural, if they attack the "Western civilization", moral and natural if they violate the family normality or shatter the established order. But above all, it is one of the symbolic places where the social standards to define the enemies is reproduced. This device of procedural transformation of identity also turns the Court into a kind of transitional space: it is the walkway that leads to the dark areas of administrative control, where the terrorists, immigrants, and every abnormal human are placed, candidates to "disappearance", with no one showing interest and without making any noise.

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The CPT Control
on Deprivation of Liberty
by a Public Authority

MAURO PALMA

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1. Introduction

The prohibition of torture and inhuman or degrading treatment is regarded as an imperative rule of international law. No exceptional circumstances of any kind may be invoked to diminish the absolute nature of this ban and allow practices disrespectful of the dignity of a person deprived of his/her liberty by a public authority.

The fight against torture and inhuman and degrading treatment implies three different actions by States: prevention, repression and compensation. States must not only refrain from such practices but must proactively seek to prevent them. Moreover they must punish such practices whenever they occur and compensate victims for damage inflicted, granting them the means necessary for their fullest possible rehabilitation.

These principles are accepted by all the States party to Conventions against torture. Unfortunately, the gap between standards on paper and the actual situation continues to be striking. Acts of torture still occur, even in our European context. And the conditions under which persons are deprived of liberty are often such as to fall within the meaning of "inhuman or degrading treatment". Numerous CPT country reports attest to this.

Particular mention must made of some of the discreditable conduct which has accompanied in recent years the fight against terrorism. Secret detentions, secret memoranda authorising so-called "enhanced" interrogation techniques, persons being seized in one country and spirited away to another without due process, prolonged periods of administrative detention without trial. In other words, basic principles long enshrined in both national and international law have been flouted.

It is disturbing, at the beginning of the 21st century, to be obliged to recall basic principles long enshrined in both national and international law and which one had assumed would be inviolate. Deprivation of liberty must be based upon grounds and procedures established by law, be formally recorded, and be open to review by a judicial authority. Further, any person deprived of his liberty by a public authority should be held in facilities which are officially

recognised for this purpose and placed under the responsibility of a clearly identifiable entity. The practice of secret detention constitutes a complete repudiation of these principles.

Secret detention can certainly be considered to amount in itself to a form of ill-treatment, both for the person detained and for members of his family. Further, the removal of fundamental safeguards which secret detention entails –the lack of judicial control or of any other form of oversight by an external authority and the absence of guarantees such as access to a lawyer– inevitably heightens the risk of resort to ill-treatment. And there can be little doubt that the interrogation techniques applied in the CIA-run facilities concerned have led to violations of the prohibition of torture and inhuman or degrading treatment.

More and more reports have highlighted the possibility that certain of the above-mentioned secret detention facilities were located in Europe. The Parliamentary Assembly of the Council of Europe on 27 June 2007 has reached some worrying conclusions concerning the possible involvement of European states in consenting or supporting illegal transfers of detainees by providing unofficial places of deprivation of liberty or hiding flights over their territory (Resolution 1562/2007).

The Committee for the prevention of torture –CPT–, the mandate of which I will expose in the present article, operates in the framework of the Council of Europe's protection of fundamental rights of people in the European territory; its mandate extends to all forms of deprivation of liberty by a public authority that occur within the jurisdiction of a Party to the European Convention on the Prevention of Torture, irrespective of whether the deprivation of liberty is lawful or not and regardless of the identity of the public authority involved.

Over the recent years the CPT has promptly reacted upon any concrete and credible information that it received about possible unlawful detentions, but the extension of the phenomenon seems to be far more extended that its possibility of intervention. However bringing States practice fully into line with the standards to which they have formally adhered is surely one of the greatest challenges that the Committee, as all the Human Rights monitoring bodies, is facing in these times.

2. The European Committee (CPT): main features

The CPT is a treaty-based non-judicial mechanism of a preventive character, tasked to examine the treatment of detained persons by carrying out visits to places of deprivation of liberty. Its field of operations now extends throughout the European continent, with the single –and hopefully temporary– exception of Belarus.

The task of ensuring compliance with the European Convention of Human Rights was initially entrusted to the European Commission and European Court of Human Rights –two bodies, which were merged into a single Court in 1998. The European Court of Human Rights examines complaints lodged

by individuals, and occasionally by States; the end result is a legally binding judgment as to whether or not a state has violated its obligations under the European Convention on Human Rights.

Over time, it became apparent that reliance on a reactive judicial mechanism was not sufficient to ensure compliance with the prohibition of torture and inhuman or degrading treatment or punishment. Consequently, a proactive non-judicial mechanism based on visits to places of deprivation of liberty was set up. To date, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has been ratified by 47 member States of the Council of Europe.

The Committee acts on its own initiative. It rarely becomes involved in individual cases, as its role is more to assess the overall situation of deprivation of liberty in order to identify negative elements, potentially conducive of violations. Its goal is to intervene *ex ante*, that means before ill-treatment might occur. Its action can be easily summarised by the key-words: overall assessment, preventive mechanism, recommendation, ex ante intervention.

Therefore its role is different, but complementary to that of the European Court of Human Rights, the action of which can be summarised by the key-words: individual petition, judicial mechanism, sanction, *ex post* review.

The CPT has two guiding principles: co-operation and confidentiality. Co-operation with the national authorities is at the heart of the Convention establishing the CPT; the aim is to protect persons deprived of their liberty from being ill-treated rather than to condemn States for abuses. Confidentiality is a direct consequence of such an approach. Therefore the Committee's reports are in principle strictly confidential, their publication possible only upon a specific request of the authorities of the State concerned. Fortunately, the vast majority of States have adopted the approach of authorising publication.

However, if the authorities refuse to co-operate or fail to improve the situation in the light of the Committee's recommendations, the CPT may decide, under a specific article of the Convention, to breach the confidentiality and make a public statement.

The core of the CPT's activity lies in the system of regular, unannounced visits, which has a variety of functions. First, the mere fact that an external body is entitled to enter at any time a country's detention facilities, to have access to documents and to speak with every prisoner in private, can have a strong deterrent effect. Second, the visits offer the possibility to both react immediately to urgent problems found on the spot and to assess the overall adequacy of the deprivation of liberty system. Third, the visits are the starting point for a continuous dialogue with the relevant authorities in order to improve the situation.

An annual programme of routine, periodic, visits is increasingly supplemented by "ad hoc" visits deemed by the CPT to be "required in the circumstances". The CPT requires no authorisation, no invitation, from a country; it invites itself. The CPT is entitled to visit, at any time, day or night, weekdays or weekends, any place where persons are deprived of their of liberty

by a public authority: this means, of course, prisons, police establishments, centres for immigration detainees, military detention facilities, and closed psychiatric institutions, but also offices or other facilities where persons are temporarily kept to be questioned even for very short periods of time. And the CPT will also check that persons said to be "voluntarily" present in places it visits have indeed been placed there –and remain there– at their own wish. The power to interview detained persons in private, and the State's obligation to provide the CPT with the information necessary for the Committee to carry out its task, are also indispensable to the effectiveness of the CPT's work.

A visit ends as it begins with a meeting with Ministers and other senior officials responsible for the places visited. The end-of-visit meeting is the occasion for the delegation to provide its preliminary findings and deliver any so-called "immediate observations" on urgent matters. The ongoing dialogue starts here, without waiting for the preparation of a detailed visit report.

A comprehensive visit report will subsequently be adopted by the CPT in plenary session, setting out in full the Committee's findings and recommendations.

We can identify different types of recommendations:
– to amend national legislation;
– to change or amend bye-laws and/or administrative acts;
– to fully implement existing legal provisions;
– to effectively investigate serious events or allegations of ill-treatment;
– to deliver a clear message to all law enforcement officials or other categories of staff that ill-treatment will be not tolerated and will be severely sanctioned;
– to improve the material conditions of accommodation or the regime activities available;
– to provide specific and effective training of law enforcement officials, so as to improve their professionalism and human rights awareness.

This list is far from exhaustive of the panoply of recommendations and other suggestions included in a CPT visit report.

Although not a judicial body, the CPT has developed a set of standards which it employs during visits to help in the assessment of existing practices and to encourage States to meet its criteria. These standards are often more detailed and demanding than those found in existing international texts.

In this context the CPT considers that cooperation with the competent Committees of the Council of Europe during the recent process of reviewing the European Prison Rules was very positive. There is a high degree of consonance between on the one hand the principles elaborated in the EPRs and on the other hand the recommendations contained in CPT visit reports as well as the body of standards relating to prisons which have been articulated in the Committee's General Reports. As regards at least one of the areas falling under the CPT's mandate, namely that of imprisonment, it is fair to

say that we now we have in greater Europe a well established set of agreed standards. Of course, their implementation in practice is one of the goals to be achieved by a common effort.

3. The CPT's action in the present European panorama

Prison overcrowding is presently one of the main problems in the European panorama.

A quick overview of the prison population rates shows that in Western countries the number of people in prison compared to the population constantly increased during the last ten years: Spain, Portugal and the UK are the leading countries in such a development, having a rate of around 1.5. As regards Eastern countries the rates are slightly decreasing as they started from very high values at the beginning of this decade: the rate is still 3.4 in Ukraine and Estonia, 2.9 in Latvia, 2.5 in Lithuania and Moldova; at the top the Russian Federation having a rate of 6.3 –comparable with the well known rate in US.

Prison overcrowding is an issue of direct relevance to the Committee's mandate because an overcrowded prison entails cramped and unhygienic accommodation and a constant lack of privacy; reduces out-of-cell activities; overburdens health-care services; increases tension and hence more violence between prisoners and between prisoners and staff. Moreover cramped and overcrowded conditions of detention easily result to a situation within the meaning of "inhuman and degrading treatment", as clearly affirmed by the European Court in the rather recent case *Kalashnikov vs. Russia*.

To address the problem of overcrowding, some countries have taken the route of increasing the number of prison places. For its part, the CPT is far from convinced that providing additional accommodation will offer a solution. Indeed, a number of European States have embarked on extensive programmes of prison building, only to find their prison populations rising in tandem with the increased capacity acquired by their prison estates. By contrast, the existence of policies to limit or modulate the number of persons being sent to prison has in certain States made an important contribution to maintaining the prison population at a manageable level.

But even other problems are more and more moving forward. Actual life sentences –i.e. life sentences to be fully executed without any possible access to conditional release– security measures and retention following the execution of temporary sentences are only some of the new problems affecting the current prison systems in the European countries.

More and more we register tendencies to prolong imprisonment as a measure aimed at reassuring the external community and gaining electoral consensus. Particular emphasis is given to the incidence of recidivism in the length of imprisonment and programmes for the prevention of recidivism assume, in some countries and as regards some typologies of offences, the characteristic of measures inhibiting any expression of the person concerned.

And even intentionally endangering his physical and/or psychological integrity: prolonged or indefinite isolation, chemical castration of sexual offenders, extended resorting to coercive means are only a few of the items on the agenda of some European decision makers on prisons.

Facing these new challenges, the CPT has only the measure of last resort I mentioned before: the possibility to make a public statement whenever a State refuses to cooperate with the Committee. In its 20-years experience the Committee refrained from extensively resorting to such an exceptional power. A public statement was made only five times as a result of a continuing absence of constructive dialogue on issues which go to the core of the principle defended by article 3 of the ECHR.

It is worth recalling that the CPT's raison d'être is not simply to carry out visits; it is, by means of visits, to strengthen the protection of persons deprived of their liberty from torture and other forms of ill-treatment. Only if the CPT's dialogue with a State leads to the achievement of that purpose can one speak of effective cooperation. Too often, recommendations on important issues repeatedly made by the Committee, visit after visit, remain unimplemented. To often new laws are adopted in blatant contrast with well established standards and long standing recommendations.

The CPT has always been –and remains– extremely reluctant to make use of its power under this provision of the Convention. But faced with a persistent non-compliance with its recommendations, there comes a point when the Committee has little choice but to consider issuing a public statement. This was the case, this year, in respect of the Russian federation, concerning ill-treatment of detained persons by law enforcement officials and their subsequent impunity in the Chechen Republic.

4. CPT and SPT

Notwithstanding these difficulties the visits system still remains a significant tool in the hands of the international community.

Setting up in Europe a treaty-based mechanism for on-site monitoring of places of detention was seen in 1987 as a way to test the viability and usefulness of such an approach prior to its implementation at universal level. Now, more than twenty years later, the long-awaited machinery of a universal character for the prevention of torture and other forms of ill-treatment is step by step becoming a reality and this is a very positive development. The UN-based Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, with a mandate and powers similar to those of the CPT, was established more than two years ago and has already started visiting countries which have ratified the OPCAT.

Although there are similarities between the two treaties, the OPCAT is far from being a carbon copy of the ECPT. Most significantly, in addition to the Subcommittee on Prevention at international level, States adhering to the

OPCAT are obliged to provide at the domestic level for National Preventive Mechanisms possessing extensive monitoring powers in relation to places of detention. This two-pillar system –visits and national monitoring mechanisms– could prove to be one of the OPCAT's greatest strengths and it is certainly fully in line with the standards developed by the CPT. The Committee has consistently advocated, as a fundamental safeguard against ill-treatment, that all places where persons are deprived of their liberty be subject to oversight by independent bodies at national level. In European States which are also party to the OPCAT, the national preventive mechanisms operating under the Optional Protocol will be among the CPT's most important interlocutors.

The OPCAT explicitly encourages the Subcommittee and regional bodies like the CPT "to consult and co-operate with a view to avoiding duplication". This is plain common sense. It is the firm intention of the CPT to develop concrete plans for co-operation between the two bodies. One way to promote such co-operation and the effective use of resources would be to return to an idea mooted by the CPT as long ago as 1992 in its 3rd General Report. Seventeen European States are at present Parties to both the European Convention for the Prevention of Torture (ECPT) and the OPCAT. The proposal is that States bound by the two treaties agree that visit reports drawn up by the CPT in respect of theses countries be immediately and systematically forwarded to the Subcommittee on Prevention on a confidential basis. This should greatly facilitate the desired co-ordination of activities as well as the maintenance of consistent standards.

5. Conclusions

Having these tools, the CPT, the SPT, the NPMs and the revised European Prison Rules, are we allowed to look at the future with optimism, despite the current persistency of the serious violations I mentioned in my introduction? I am very hesitant to give a positive answer.

Monitoring is an extremely important tool, but not an end in itself; to be worthwhile, it must be accompanied by effective means of ensuring that recommendations made are indeed implemented.

The constant commitment of the national authorities in such a direction is required. Attention and scrutiny by the general society is also necessary. A widespread culture looking at places of deprivation of liberty as part of the community and not as a separate world, hidden by high walls or gates, is required. To date, this has been far from easy to achieve.

Structural and institutional violence, state crimes and war. A "new" epistemological rupture in Criminology*

IÑAKI RIVERA BEIRAS

1. For a critical and global theoretical frame

As it is well known, during the decades of 1960 and 1970, the traditional criminologist discipline, then still based upon positivist and functionalist foundations, was the object of a greater epistemological questioning which has been never expressed before. The historical facts of that time, along with the most concerned social scientists' efforts, generated the rupture with a discipline which was still anchored in power stratus and aspired to legitimate the *status quo* training the Penal System's operators for the different professions. The confluence of the contributions of those people that had been formed in other wide knowledge fields propitiated an epistemological review that opened doors for a critical position in criminology. It is important to quote here the contributions coming from the British *National Deviance Conference* (see Bergalli 2003), or the gradual construction of a Sociology of Penal Control –mainly promoted by Baratta through the first edition of *La Questione Criminale, Rivista di ricerca e dibattito su devianza e controllo sociale*–. Or the first steps of the abolitionist pragmatics from northern Europe –for example, cf. Mathiesen, Christie or Hulsman–, without forgetting the impulse that from Latin America entailed the works of Bergalli, Bustos –these authors from their exile in Barcelona city–, Lola Aniyar de Castro or Rosa del Olmo, among others. All of this implies to evoke a time when the new "paradigm of definition" got established in an rusted knowledge and modified its object of study forever. As Baratta said, forever "means that the definitions of criminal behaviour produced by the system spheres –legislation, dogmatism, jurisprudence, police, and common sense– are not assumed as a starting point but as a problem and object of research. These matters are studied in a more general context of the theory, history, and the contemporary analysis of social structure" (1998ª: 40).

* Translation from Spanish by Alejandro Piombo.

As a matter of fact since then, the consideration of criminalisation processes, the moment of the creation of Law, distinguished from the time when the penalty is actually imposed, the examination of police structure and activity, judges, and the struggle for the re-evaluation of human rights as the epistemological aim, emerged as the new scientific concerns of a "new" criminology –or Penal Control Sociology, as several persons denominated it. This "new" criminology circumscribed the etiological paradigm of criminality, giving it the real political dimension that these objects of study present. Since then, it has been written a lot about that *critical criminology* and its diverse trends along the last decades. The contributions from penal abolitionism, guarantism, and minimal Penal Law, along with the ideas from the realism of the Left, already constitute a corpus of scientific production, debate, and an unquestionable political engagement.

Despite the fact that the death of the critical criminology has been certified –by part of its detractors– and in spite of the crisis of the very same critical thought –remarked by some of its own "fathers"–, one of the most enriching debates from the epistemological point of view of contemporary social science has been being generated in this frame. Moreover, many scholars –including ourselves– working on the "criminal fact" have been trained during at least the last three decades. However, as it has been said, the "market thought" (see Dobón, 2006) has certified the death of critical arguments and the only survival of technocratic, managerial, and risk-management knowledge. The pretendedly "new" bureaucratic rationalities in the field of the Penal System, the emergence of penal exceptionality, zero-tolerance, and the enemy's Penal Law situate us on a stage of -false- reduction over possible elections or choices. In fact it seems that the only actions are those ones leading to regard in a good way penal disciplines characterised by disabling features, or even other matters that present functionalist/efficientist facts –since, as a matter of fact, the decline of the forgotten reform or rehabilitation paradigm seems to be unquestionable despite the political litany that some people insist on repeating over and over again. While in the political-economic field, the death of ideologies was certified and the end of history claimed, in the sphere of the "criminal fact" the death of critical criminology was stated. Moreover, in the face of the "new" war to be undertaken against terrorism and irregular massive migrations, summons to join war or risk-management criminology narrowed the stage during the last years.

Moreover, among these reductionist folds, the germ of a "new" object of criminological study seems to make way for itself –even though, once and again this expression is regarded as unsuitable–. However, and as it can be seen, the term "new" is used between quotation marks because it is not –completely– novel. I refer to the calling from some authors –such as Wayne Morrison (2006), Raúl Zaffaroni (2007) or Vincenzo Ruggiero (2009), just to quote certain relevant people from different continents– for a criminology devoted to the study of State crimes, genocides, State terrorism, and war. Such tremendous atrocities –at least if we review the great XX century's barbarisms examples

that Morrison remind us– have caused the greatest victimisation that has been ever known. Despite that, those great victimisations have almost ever taken part of the scientific concern of traditional criminology. In front of the securitarian and bellicose offensive that nowadays devastate us, the development of a cease-fire criminology (cf. Ruggiero 2009) take us back to the awakening from lethargy and convoke us to a task that some people already qualify as a "new" -quotation marks are necessary here again- critical *global* criminology that belongs to post-modernity that also presents a new shape in this field.

This work should be read in this frame, which breaks the traditional epistemological limits -and questions the established power again-. This paper describes an area –where Euro-Mediterranean relationships take place– featured by a warlike rationality that cannot be regarded as a circumstantial fact but as a situation that belongs to a structural and constitutive rationality. As it was already said, it is important to consider that this is not new. If we remember the first arguments by Galtung, who since 1958 ahead at his *Institute for Peace Research,* defined the concept of "structural violence", it may be understand how we have been turning back to the primitive *homo sacer*, susceptible of being exterminated by the unique –and nude– life that is recognised in contemporary bio-political strategies (see Agamben 2004 and 2005; Silveira/Rivera 2008).

Nevertheless, at this part of the analysis, are there any signs of institutional violence, warlike strategies and/or State crimes in the area of Euro-Mediterranean countries? Or, on the contrary, is this just exclusive of other areas of world developing countries? Let us see.

2. Radiography of torture and maltreatment in the Spanish Estate

Recent strong researches have shown their worrying about (both national and international) rule transgressions related to torture prevention, denunciation and sanction that have been actually proved in the sphere of different agencies of the penal system in the Spanish State. In fact, it is important to mention here the worrying expressed by the Committee against Torture of the UN in its last report –which can be consulted at the Web site http://www.unhchr.ch–. This report underlines the existence of such torture practices inside penitentiary institutions, police stations, and foreigner confinement institutions. It must be also remembered the last reports from Amnesty International –http://www.amnesty.org– and Human Rights Watch, which remark almost the same worry. With regard to similar verifications from national institutions, the reports submitted by the Ombudsman –and other Ombudsmen from Autonomous Communities–, by the Observatory of the Penal System and Human Rights (OPSHR) of the University of Barcelona (cf. www.ub.es/ospdh), or by diverse NGOs and social movements, as well as from visits and reports from the Committee for Torture Prevention of the Europe Council (cf. http://www.cpt.coe.int) are equally relevant sources.

As it can be verified, the published studies or researches about the phenomenon of institutional violence in their form of maltreatment and torture are more and more frequent. Therefore, we can mention the report by Amnesty International suggestively named *Salt over the hurt. Effective impunity by part of police agents in torture and other maltreatment cases* (2007). It is necessary to take a detailed reading of this report, since AI refers to several cases of maltreatment. The conclusion of this mentioned report are very clear: "Amnesty International considers that frequent denunciations of maltreatment committed by officials in charge of enforcing the Law emerge from the continuous non-fulfilment of the international legal obligations by part of the Spanish authorities, who are demanded to adopt diverse legislative, juridical and administrative measures in order to prevent maltreatment, to send the responsible people to justice, and to guarantee that victims may receive indemnity. Even though Amnesty International does not consider that maltreatment by part of the Spanish authorities in charge of enforcing Law is a habitual fact, based upon its investigations this organization rejects the idea that those actions are exceptional and that the responsibility for ill-treatment falls on a reduced group of corrupt police officers".

On the other hand, if we pay attention to the reports –the only source of information about torture in the Spain– that have been published by the Association for Torture Prevention in the Spanish State since seven years ago, it can be seen the absolute figures of denounced cases of torture and maltreatment –cf. www.prevenciontortura.org–. Before stating this data, however, a clarification must be expressed. As it will be seen in the charts generated by the Documentation Centre against Torture –which takes part of the mentioned Association–, people that have been stating denunciations due to different types of maltreatment between 2001 and 2006 belong to a wide social spectrum. In fact, this assertion is based upon the fact that the quoted Centre presents detailed graphical information indicating that the victims of such maltreatment do not have a special profile but they belong to different social stratus –youngsters and adults, nationals and migrants, workers and members of diverse collectives–.

As it can be easily verified, nobody potentially escapes from the fact of eventually experience some form of institutional violence as the ones that will be analyzed here. If this last fact refers to the victims' condition, it can be the same about the victimisation agents. Taking into account the condition of civil servant –or the assimilated one– required to consider the crime of torture, it can be checked that the denunciations are addressed to every kind of security agencies in the Spanish State or its Autonomous Governments, penitentiary centres, youth centres, airports and ports areas, and other areas of freedom deprivation that have been mentioned before. If we add to this that the geographical placing of the denunciations comprises almost the entire Spanish territory, it can be easily verified that the denunciations embrace an especially significant and very worrying spectrum.

As it will be able to be seen, from a mere quantitative point, the figure of over 700 denunciations per year due to torture or maltreatment that have been verified during the last years imply a total amount ranging from 3,500 and 4,000 denunciations during the 2001-2006 period. These figures should be taken into a serious consideration since on their own they are talking about a phenomenon that is not isolated and unusual, but subjectively and territorially spread –as certain UN Special Rapporteur has literally indicated during the last years. The considerations from this person will be analysed ahead–. This fact is especially significant by itself, so it is important to question if those figures actually reflect the reach of the phenomenon of torture and other forms of institutional violence in the Spanish State. Let us see.

In fact, the previous information is a significant fact to be taken into account. Despite of such a great amount of cases, it can be said that they just imply the "visible" aspect of a phenomenon that is spread far beyond the mentioned figures. This last assertion requires an explanation.

The data obtained from the Documentation Centre against Torture shows what it is capable to; this is to say, the denunciations that the Centre was able to know as the consequence of news and cases informed by social organizations, common citizens, professional corporations. Another source is the work that the Centre does over the officials reports of authorities and public institutions. Nevertheless, in an inverse sense the figures do not show what have been known. What do we mean with this? We simply mean that those figures do not indicate:

- maltreatment or torture cases that, even though they really happened, have not been known by the mentioned Documentation Centre due to several reasons;
- maltreatment or torture cases that, even though they really happened, have not been denounced by the victims due to a great deal of reasons –impossibility of denunciation, fear of stating it, victims' resignation, some kind of "socialisation" in the introjection of institutional violence, among others– and, therefore, they stay in the shade.

Moreover, the figures from the Documentation Centre against Torture refer to physical violence facts, either catalogued as torture or ill-treatment, that always imply some form of specific intentionality in the practice of inflicting harm. On the contrary, those figures do not show –they could not do it– those situations that have been qualified by the jurisprudence and the doctrine as constituting humiliating or degrading treatment or punishment that sometimes do not require a specific subjective intentionality, but they are the product or the consequence of objective and/or structural situations.

With this, for example, we refer to prison overpopulation and/or overcrowding. This situation in itself and apart from any kind of specific dolus has been qualified by the European Court of Human Rights as violating the prohibition that nobody must be subjected to inhuman or degrading punishment. This punishment qualification may be reached trough the material

conditions in which its fulfilment is verified independently from any kind of specific subjective intentionality.

Therefore, if we consider –in the whole– the disposition/prohibition that "nobody must be subjected either to torture or to cruel, inhuman or degrading punishment or treatment", there is no doubt about the existence, just to use a criminological tool, a real "black figure" about this fact. This aforementioned figure is not reflected in the corresponding files, but it is equally produced in the daily routine of freedom deprivation. Once we have mentioned these elementary facts, let us see some annual data, as follows:

Torture in the Spanish State
Distribution of Denunciations by Autonomic Community

Year Autonomy Community/ Nation	Year 2001		Year 2002		Year 2003		Year 2005		Year 2006	
	Cases	Denoun-cers	Cases	Denoun-cers	Cases	Denoun-cers	Cases	Denoun-cers	Cases	Denoun-cers
Total(a)	334	758	373	745	307	564	313	642	266	610
Andalusia	60	97	81	144	67	104	57	140	55	139
Aragon	6	13	9	10	8	11	12	17	8	8
Asturias	12	24	10	11	3	4	9	10	4	5
Balearic Islands	5	7	18	23	9	14	7	8	7	14
Basque Country	39	115	59	157	44	76	47	107	21	46
Canary Islands	12	74	10	27	7	7	16	27	12	30
Cantabria	1	3	2	3	4	5	1	1	2	2
Castile – La Mancha	0	0	8	8	7	9	3	6	3	3
Castile Leon	12	14	10	22	7	12	15	35	11	13
Catalonia	46	116	59	133	45	64	38	81	62	144
Ceuta	1	1	1	1	4	10	3	7	3	11
Extremadura	4	4	5	6	3	3	6	8	3	3
Galicia	17	56	24	42	17	20	17	26	16	49
La Rioja	0	0	0	0	0	0	0	0	0	0
Madrid	80	113	64	154	54	188	58	91	27	72
Melilla	5	7	5	6	2	3	7	37	3	18
Murcia	6	7	4	5	9	9	6	12	3	3
Navarre	13	38	9	37	12	30	9	28	7	17
Valencia	35	50	24	41	18	44	21	42	23	39
More than one aggression per community (b)	20	51	29	85	24	50	23	41	29	85
Total (c)	354	809	402	830	331	614	336	683	270	616

Some persons denounced having been aggressed in more than one community (e.g. Basque Country and Madrid). Because of that, the total figure (C) is the addition of "a" + "b".

Torture in the Spanish State
Denounced cases
Distribution by the involved public body

Public body Autonomy Community/ Nation	National Police	Civic Guard	Local Police	Autonomic Police	Penitentiary Staff	Others	Total
Andalusia	203	6	29	0	28	12	278
Aragon	0	0	1	0	6	0	7
Asturias	12	0	3	0	1	0	16
Balearic Islands	4	1	13	0	3	1	22
Basque Country	10	14	8	63	2	0	97
Canary Islands	12	6	4	0	0	4	26
Cantabria	1	2	0	0	1	0	4
Castile – La Mancha	0	0	1	0	0	0	1
Castile Leon	5	1	3	0	8	0	17
Catalonia	17	11	46	20	47	2	143
Ceuta	0	4	1	0	0	0	5
Extremadura	1	0	3	0	2	0	6
Galicia	2	2	6	1	13	1	25
La Rioja	0	0	1	0	0	0	1
Madrid	55	16	10	0	29	0	110
Melilla	6	3	1	0	0	1	11
Murcia	2	0	4	0	0	0	6
Navarre	83	2	25	1	0	0	111
Valencia	8	3	18	0	7	0	36
Totals	421	71	177	85	147	21	922

Some persons denounced having been hit by officers from different police agencies.

As the last research of the Observatory for the Penal System and Human Rights (OPSHR) of the University of Barcelona (2008) indicates, torture and maltreatment produced in the field of freedom deprivation in the Spanish State do not constitute, against our wishes, sporadic or isolated situations. All on the contrary, ill-treatment has found there a very favourable background to deploy its most irrational violence, institutionalising by part of the State the giving of incredibly high doses of suffering that are dramatically degrading for its victims. The data initially gathered about denunciations of torture practised in the Spanish State during the years of 2001, 2002, 2003, 2004, 2005 and 2006 -supplied by public institutions and human rights organizations- shows the existence of approximately 4,000 denunciations due to torture, maltreatment and other expressions of institutional violence. This is equivalent to an annual average of around 700 denunciations due to torture and ill-treatment committed against prisoners and arrested people in the different detention areas that have been examined. These denunciations affect:

a) every Autonomous Community in the Spanish State;

b) the entire Bodies in charge of guarding people that have been deprived from their freedom;

c) every kind of person that has stated denunciations (nationals or natives, migrants, workers, youngsters, women, people prosecuted due to the application of ordinary or anti-terrorist legislation).

Therefore, it can be asserted that such a situation is "generalised" with regard to the indicated –spatial and subjective– ambits.

As it can be seen, there are two three deeply worrying aspects regarding the persistence of this disgrace in Spain: a) the verification of the existence of ill-treatment and torture; b) the continuous increase of denunciations due to the said facts, what indicates a very worrying trend; and c) the impunity that lays on these actions.

Furthermore, beyond the irregular performance of some officials, a very serious aspect of the matter dealt here is the possibility that maltreatment or torture occurs in not so few occasions due to the same regulations that rule the behaviour of the mentioned officials in certain situations –people arrests, inmate transfers, migrant expulsions…. As follows, we will see –just as an example, because we should analyse every situation particularly– the recent regulations that order foreigner expulsion and repatriation.

3. The recent *Security Regulations in the repatriations and transfers of arrested people by air or by sea* –from July 20th 2007

As it is well known, the field of migrations, specially their penal management, now is placed in a core position in the worrying of national and international organizations of human rights protection in the face of the considerable increase of denunciations due to ill-treatment at the moment of the police arrests, transfers to police stations, further detentions, transfers to freedom deprivation centres or confinement centres, and the final execution of expulsion measures.

From the Police General Direction and the Civic Guard of the Ministry of the Interior, it has been created the *Security Regulations in Repatriations and Transfers of Arrested Persons by Air and Sea* (from July 20th 2007), with the double aim of

a) "to manage the transfer of migrants in irregular situation from the extern borders of Spain due to the risks and complexity that this implies" and

b) "to coordinate the joined expulsions by air and sea from different State-Members", such as the quoted group of regulations textually expresses.

This set of regulations indicates that they will be applied with the respect for human rights and fundamental liberties and, particularly, the European Charter of Human Rights from 1950.

No matter this declaration, those regulations take into account the use of "coercive measures" that will be commented ahead. After regulating all the aspects regarding the flight arrangements, the accompanying of guards (with the possibility of the participation of "guards from the private sector"), or the repatriates' health condition, the point 3.8 ("Material Resources and Logistics") considers the use of "security links, proper sanitary masks, overalls if the repatriates need them, helmets, belts and immobilising clothes, reinforced tapes to be exceptionally employed", among other measures.

Besides this, the point 4 –"Organization and Execution of the Operation"– orders the practice of "migrants' searches and inspections" that have to be performed in a "meticulous way notwithstanding other searches that had been practised before". This point also regulate the cases which may need the use of "contention elements –security links, helmets, homologated immobilising clothes, handcuffs or similar". It will be the chief of the operation who will direct the actions in order to restore the order and, if necessary, apply such "elements". Besides the "coercive measures", it is indicated that the repatriated that resist the actions may be "immobilised" without the "use of coercive measures that may affect the vital functions of the repatriates" in any case. It is forbidden the use of "sedatives", except from the case when an authorized prescription may indicate their administration.

In the face of all these facts, and as a consequence of the denunciations due to the massive application of such "restraints", the Spanish Committee for the Prevention of Torture has expressed to its report for the United Nations Special Rapporteur on Torture, its deep worrying. The Spanish Committee has said: "such a set of regulations considers the use of straight-jackets, adhesive tapes to immobilise the repatriates, as well as the possibility of getting them sedated under medical control".

4. *Geopolitics* and *Biopolitics* in the European context. The war against the constitutive rationality

In order to give some conclusions, let us remember what was said at the beginning of this work and let us state that such a regard can and must start from war. It is not a contextual fact any more, but a situation that involves our time in a constitutive way. Nowadays, children use the word "war" not to play in an innocent way, but they refer to it fearfully, they ask their parents to turn the TV sets off when they watch dantesque images on TV. Children have deeply internalised their sights and they are not prepared for incorporating such terrible visions. War is not any more a fact that takes place in a specific area of the world. The current concept of *global war* (Dal Lago 2005; Bergalli/ Rivera 2005) tells us about a constitutive rationality that lays the foundations for the post-modern order. From the very heart of the Empire to the enlightened Europe, the attacks of the so-called "international terrorism" –just let us think about the examples of New York, Madrid and London, curiously the three

partners on Iraq War…– have provoked very clear effects on our current time. On the one side, they have demonstrated the vulnerability of the "developed World". On the other hand, the mentioned attacks have been functional for the creation of new "enemies" that justify every kind of restrictions over rights and guarantees that in the past were inherent in a "modernity" that currently is becoming demolished.

Moreover, in addition to the concept that some "enemies" have been also created along the line going from the United States to Europe, the issue of migrations becomes now a paradigmatic event. From the United States border to the building of Fortress Europe. At present, these territories appear plagued of walls and fences –higher and higher, and more and more electrified day after day–, and confinement and/or expulsion camps that bring us back to the memoirs of the description of that "concentrationary universe" that David Rousset (1965) made for ever as an example of mind insanity in the times of the Nazi Holocaust. Therefore, in Europe the expression "Prison Europe": prisons, confinement camps for migrants, fences and new borders that bring into question that Enlightened Europe characteristic of human liberty.

The issue of migrations outlines a new type of subjectivities in the "developed world", which sometimes are considered as "extraordinary" elements of the penal system, and in not so few occasions as tools that do not belong to this system and pertaining to the warlike logics. Two examples illustrate the aforementioned fact. At first: in the month of October 2005, from the border cities of Ceuta and Melilla thousands of African people decided to start a human rush –their bodies are their weapons– in order to jump over the walls and fences built up as a restriction to enter the European Continent. There were several hurt and dead people, torture denunciations, and in the end, the Spanish Government decided to send Army troops with the objective of "preserving the security". On second: in the month of November 2005, in most of the French poorest suburbs and neighbourhoods all over the country, there was a bloody riot carried out by young immigrants and immigrants' sons who are continuously suffering from the effects of non-existent social policies during the last four decades. The answer did not wait a moment: In the heart of Enlightenment, it was imposed a curfew. From the Rule of Law to the State of Exception.

In the meanwhile, we have all witnessed, as mere spectators, the disclosure of new horrifying episodes about the Iraq War: torture practices, bombings over civic populations, use of chemical weapons in Faluja battle –the post-modern napalm–, denunciations about secret prisons in different countries with the aim of practising torture without bothering interference, and so on. Up to what point of involution will we reach? What will be the limit? Is there a limit?

Once and again, the works by Carl Schmitt are remembered. In fact, maybe nowadays is more necessary than ever to remember the ideologists of the National Socialism and those ones who, such as the quoted author, situated politics inside the sphere of the "friend-enemy" relationship. Therefore, and as

it is well known, an extremely dangerous doctrine arose in Penal Sciences: "the enemy in the Penal Law". At present, it is necessary to consider it again: the enemy does not need to be re-adapted, reformed, re-socialized, re-educated, or corrected. The correctionism theories, along with their rhetoric, belong to the past. The enemy is combated, smashed, become innocuous, killed; there is no other option.

Besides this, I would add, sharing the opinion of Salvatore Palidda that global war, military fights against new enemies –terrorist, migrants, poor people, and socially excluded persons…–, as well as every war presented in the past, and this is not an exception, showed a new functionality for the economic systems, a functionality that is hidden and disguised in the visible irrationality that characterises it. As follows, we will see this last point in detail.

- War against migrants is completely useful for keeping and reproducing a rightless labour force.
- Moreover, global war is useful for deploying every necessary conservative and authoritarian thought trying to establish repressive policies, such as the "zero-tolerance" or "broken-windows" ones, or the antiterrorist and/ or exception legislations.
- War generates important business, regarding not only weapons traffic, control of oilfields and the private sub-hiring of new armies, but also juicy business among the huge net of enterprises, companies, non-governmental organizations and other *promoters* of these great events.
- In sum, all of this has provoked the *banalization*, in terms of normalization and acceptance lacking criticism, of ill-treatment, torture, and other flagrant violations of the most elementary human rights, generating a "consensus" through terror and, as a consequence, a social docility and obedience that is completely functional for the unique and global market that they are trying to impose us.

Finally, the catalogue of horror is too wide to from a quantitative point of view in order to give an exhaustive enumeration. From a qualitative point of view, as Roberto Bergalli asks, what is the difference between an Iraqi peasant who dies as a victim of an American air raid when going out to cultivate his land and the urban inhabitant of our cities who dies due to a bomb attack when going shopping or travelling on the Underground to get to work? (2005:14).

That is the "coming back-war", going from one point to the other in the planet. As I mentioned at the beginning of this paper, to replevy a knowledge that may concern about State crimes and terrorism, genocide, people traffic, weapon traffic –as well as this organized business by part of the State–, and war crimes, implies to situate that mentioned knowledge inside the elementary global and political dimension that supports it. To desert and abandon war and demand an immediate ceasefire constitutes at present tasks belonging to an engaged and very concerned knowledge. The work is tremendous, but it implies, now more than ever, a challenge for a real civilization model –or the resignation in the face of barbarism's triumph–.

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-PART II-

EVERYDAY LIFE CONTROL: BACKGROUNDS, LOGICS AND BODIES

Policy of fear and decline of political sphere

SALVATORE PALIDDA

> "There will be, in the next generation or so, a pharmacological method of making people love their servitude, and producing dictatorship without tears, so to speak, producing a kind of painless concentration camp for entire societies, so that people will in fact have their liberties taken away from them, but will rather enjoy it (…)"
>
> Aldous Huxley

1. Introduction*

During the Eighties and Nineties, and even more after 9/11 terrorist attacks, in Madrid and London, two major phenomena have been developing in symbiosis: the rise of fear and the success of "zero tolerance" reaction –both at local and world levels– up to permanent war. The obvious consequences are the huge inflation of "post-modern" controls, the constant reproduction of fear and the claim of the need to sacrifice freedom and rights in the name of security. The most important political outcome, even if less evident, is the erosion in the possibility of political action by subordinates and dissidents, as well as the success of military-police choices in spite of politics and diplomacy, or rather than the peaceful and negotiated management of conflicts and disorders.

In the following pages I will demonstrate how the superposition of the above-mentioned phenomena corresponds to a political situation characterized by constant coexistence of order and disorder, war and peace, conflict and mediation, and how this is a consequence of the political dismantlement triggered by neo-liberalist development. Contrary to the idea of "creative destruction" by Schumpeter, political situation nowadays does not seem to lead towards a new order, a "big brother", or else an effective "post-modern panopticon", but rather to a variety of powers that can abuse all kind of control and violence on subordinates or competitors. Practice and abuse of espionage activities have always been operating to give advantage to strongest actors.

* This text is a revisited version of the article published in *Un mondo di controlli*, *Conflitti Globali*, 5/2007, pp.13-22; that book includes the contributions of D. Bigo, G.T. Marx, B. Harcourt, E. Heilmann, R. Ciccarelli, L. Sebesta and A. Giannuli.

This is due to the consequences of the neo-conservative revolution, which reinforces the asymmetry between the powerful and the excluded from the power, and imposed the change from the government identified with the liberal-democratic myth of the government that takes care of the people, described by Foucault (1998/2005a/2005b/2008) to a liberal management that aims only the prosperity *hic et nunc* of the strongest actors. The exasperation of criminalization, of zero tolerance and the experiments to eliminate the "human surplus" correspond, in fact, to a management of the society which excludes the recovery, rehabilitation or social reintegration just because it tends to maximize the benefits of strong players. Therefore, social control has been transformed: from discipline and punishment, inside the framework of a political organization that sought a balance between social prevention, police prevention, repression, penalties and social reintegration, to a way of control led only to law enforcement, punishment and neutralization of human excess, followed by actuarial practices, racial profiling and mass incarceration (Mathiesen 1997; Garland 2001; Harcourt 2005/2007). The stable, peaceful and smooth integration of immigrants and the growing mass of workers in precarious and informal economy do not care anymore because the growth of profits comes from the erosion of the rights of subordinates, by their reduction almost to neo-slaves that can be easily to dispose before the first wave of claims, or when they are not profitable enough and can be easily replaced by other "without rights" or "non-persons".

The people's government, which takes good care of its inhabitants in order to build a stable, peaceful and regulated society, well ordered according to an universal Rule of Law, seeking to provide happiness to all[1], has not ever existed. Until the beginning of the '70 –the famous thirty "glorious" years–, political organizations of the rich societies of the second post-war had nurtured the illusion that the development of the Welfare State, would bring the softening of the penalties, even the democratization of repression, and the search for balance between prevention and rehabilitation, with increased political participation. By contrast, the arrival of the neo-conservative global revolution –the financial, technological, military and police network imposed mainly due to the accentuation of the asymmetries of power and wealth– gradually dissolved this illusion, humiliated and crashes the resistance and phagocytes the intellectuals and leaders. It is therefore natural that the government is rediscovered trough the manipulation of fear and zero tolerance, which becomes a source of benefits and consensus, which further weakens the ability of political action of the weak[2]. During the last twenty years, thanks to the government based on fear and securitarism, some people have profited in unprecedented proportions. The post-modern controls are configured as devices and instruments intended to be a way of managing the ongoing turmoil,

1. As it has been observed by Foucault (2005a) this has been theorized also by the thinkers of the police science as Turquet de la Mayenne, von Justi, Delamare and Guillauté.

2. Regarding the exasperation of the fear and how these benefits the permanent war in all levels, see Dal Lago (1999a); B. Glassner (2000); C. Robin (2004); D. Bigo (2005); Palidda (2000); J. Simon (2007).

which actually aims to reproduce insecurity, instability and new demands for "zero tolerance"[3]. The consequences are significant: the boom of the penalty next to the enormous growth of military-police spending, and the increasingly frequent abuse, violence and even torture by the police officers.

Technological innovations have enabled new possibilities of espionage, political and social control, and generally any form of exercise of power or fighting or competing for its conquest. Inflation in the many forms of control and its abuses cannot be explained only by the arise of new technologies, but to its accessibility for multiple actors, public and private. The development of the security industry has also created a real market of information on individuals, organizations and all sorts of activities and businesses. With the development of espionage and surveillance the hybridization between public and private has increased, between the internal and external, between the licit and the illicit. According to the authors of a well known report, the "surveillance society" has finally triumphed.[4]

2. From participation to subalternity

The development of "post-modern" controls goes back to the early Eighties. Gilles Deleuze (1997) was one of those who sense the upheaval that would follow. Some French architects and city planners, known as left-wingers, contributed those years to create a whole neighbourhood equipped with the latest communication technology: the *minitel* –a sort of computer equipped with phone connection linked to sites and services– was adopted in France far before Internet and it was also used for experiments on "shared" CCTV –a technology close to the *gated community* in the USA–. The truth is that all the inhabitants –of *respectable* neighbourhoods– were called to act as "cops": in a rota each building was in charge for cameras system and alerting police. In the "shared projects" people are nowadays involved in the elaboration and implementation of architectural and planning innovations within the frame of a new management of security that becomes the key element, incorporating every aspect of social life. The "post-modern" police is the result of cooperation between zealous citizens and public or private police in a process that transforms any active element of local society into a potential police officer. This leads to "scanorama" and hyper-secured areas (Davis, 1999) so popular among the upper class in the rich countries, while in the poor areas, slums o *banlieues*, post-modern controls are more like watchtowers that keep guard in order to prevent the rebellions of "extremist minorities", outcasts and "inopportune posterity". During the Eighties, USA

3. The continuum from war to terrorism, to the so called clandestine/illegal immigration and to urban/citizen security appears clearly visible from the '90. See the first numbers of "*Conflitti globali*" review; Palidda (2007b/2007c/2008a/2008b).

4. *A Report on the Surveillance Society* (Full Report), http://www.ico.gov.uk/about_us/news_and_views/current_topics/Surveillance_society_report.aspx.

experienced the privatization of public spaces, the fortification of blocks or whole neighbourhoods with the consequent effect of *gentrification* and social Darwinism (Sorkin, 1992).

The first and most famous case in Europe, since the Eighties, has been the installation of CCTV and wire tapping of public phones in London, where, someone is filmed an average of 300 times a day and where the installation of "undressing" scanners for passers-by (Goombridge 2002)[5] has been recently proposed. In 1983, astonished by the reality of a London becoming the first CCTV-and-tapping-controlled city, P. Birnbaum (1985) dubbed the project "Bentham's revenge" even if the concept of "post-modern panopticon" was yet to come. In USA, the spread of control systems induced Gary T.Marx (1984) to introduce the definition of "maximum security society". As for them, Zygmunt Bauman and Ülrich Beck started to talk of *Unsicherheit* and risk. At the same time the debate about privacy soared, as mirror pretence to the abuse of control. By the end of the Nineties, after the "scanorama" described by Mike Davis, Echelon (Campbell 2002; Temporary Committee of Echelon 2001) was discovered, and the securitarian model spread all over the world wide, joined to the concept of glorification of total post-modern control, that seduced both opponents and supporters. Together with the proliferation of TV series, *reality shows* and films, modern art was also very keen on the phenomenon: an exhibition by Thomas Y. Levin involved more than 60 artists in a performance that tried to re-trace steps from Bentham's Panopticon to Big Brother by Orwell, from the disciplinary society described by Foucault to the most sophisticated and invisible technologies[6]. At the same time, critique literature was being developed on controls and post-modern security-ism (Christie 1997/ 2005; Glassner 1999; Wacquant 1999; Mucchielli 2002/2008).

5. According to data published by "The Independent" in November 2006, in the UK there are over 4 million active CCTVs and, potentially, an average citizen can be filmed about 300 times. As pointed out by Steve Watson (http://www.radiokcentrale.it/articolinuovaera/itapiece212.htm) London Metropolitan Police and some other districts would like to install in the streets powerful microphones linked to CCTVs. The DNA archive of British police (much envied and sought after by the ROS [Special Operations group] of *Carabinieri* in Italy) should contain the genetic data of over three and a half million citizens, while the fingerprints archive gets to a staggering 6 million people. According to the last report issued by the Privacy Authority, the control level is bound to increase in the next ten years, resulting in more and more cases of discrimination or exclusion. A story about "X rays" used to "undress" the passers-by was uncovered by The Sun: they entered into possession of a "secret" document by the Home Secretary dated 17th January 2007 (http://www.thesun.co.uk/article/0,,2-2007040610,00.html*).*

6. The exhibition was held during October 2001 in the new media art centre Zkm-Ctrl Space in Karlsruhe with the title *Rhetoric of surveillance from Bentham to Big Brother*. British magazine *Metamute* sponsored a literary competition dedicated to Echelon. The life_*sharing* of 0100101110101101.org spread like a sort public hacking. Heath Bunting created a website where he invited people to fax the police all the crime offences observed through the 4 webcams of his home page (Surveillance and Dataveillance, CCTV1). The project "meta4walls" by Lucas Bambozzi suggests a series of links to "illicit" pages or containing confidential information, giving the impression of being controlled while the user simulates the intrusion in his/her personal data. (http://www.exibart.com/notizia.asp?IDCAtegoria=69&IDNotizia=3410 and also *http://www.artic.edu/~tholme/surveillance_course/index.html).*

This process primed a series of projects on local, national, continental and global level: the creation of special police[7] units, the capillary distribution of CCTV and sophisticated systems (with the Councils never questioning their effectiveness)[8], the proliferation of private police and the creation of strong security structures by big companies[9]. In his effort to amaze even the most conservative, Blair proposed re-introducing corporal punishment for unruly children as well as methodical recording of all youth gangs. As a consequence, British police can boast today the presence of a staggering 500,000 "yobs" while Italian police –as stated in a report by minister for Home Affairs Amato, on 15th August 2006– eager not to be left behind, had already created the Italian *baby gangs* by criminalizing a few dozen young *Latinos*, and feeding the subject through talk show psychologists, criminologists and other media inclined to alarmism. First targets to extend new methods to whole country are animals experiments and defenceless individuals –such as compulsory

7. The Italian case is undoubtedly the most sensational concerning inflation and overlapping of activities by public and private police, on local and national levels; a phenomenon that, since the Nineties, has been affected by the emulation of violent and racist practices, as those of the anti-gypsies or "*negroe-hunting*" units but also against "*no global*" groups no matter the political orientation of the city government. (M. Maneri 1996; A. Dal Lago 1999b; Palidda 2000).

8. The adoption of video-surveillance is one of the most disconcerting aspects of the high diffusion of post-modern controls. The effectiveness of these systems is rather insignificant from the point of view of prevention and repression; a CCTV can't prevent the crime, although public opinion widely supports video-surveillance on the belief systems successfully prevent the crimes. Several events proofs how weak are such beliefs; the only condition to get real repression would be the recognizability of the subjects filmed. A simple example: the presence of CCTV in a city area considered potentially at risk or dangerous will only witness the occurrence of crimes and people involved. Prevention and clearance of deviant phenomena could only be faced and solved by means of an adequate and effective intervention by street social workers. But, of course, such intervention –especially in case of "damage reduction"– does not produce any advantage on economics and consensus terms -today consensus is only measured through the parameters of the security-ism frame - while video-surveillance business is safe and easily proposal to local and private administrators. According to a survey in the UK, the cost of a CCTV camera -connected to a network- is equal to a year's wages of a street social worker.

9. The last sensational case in France is about two children of 8 and 11 that risk to be subject to DNA recording because they tried to steal a couple of tamagotchi toys and two bouncing balls in a supermarket (*Le Monde*, 5th May 2007). The national computer based register for genetic imprint (FNAEG) was only addressed to sexual crimes perpetrated by adults. It was created by the Sarkozy Law on national security in 203; the compulsory filing of DNA relates to about a hundred crimes, among them sexual assault, murder, robbery but also minor ones such as theft, graffiti art or vandalism and urban damage and not only those convicted with the charges but also simple suspects. From 2003 to 2006 the number of profiles recorded by FNAEG increased from 2,807 to more than 330,000. Such a system helped solve some 5,000 cases. Whoever refuses DNA filing can be subject to one year of detention in jail and a fine of 15,000 Euros. In August 2006 a trade unionist was sentenced to one month jail and probation after he uprooted transgenic beet-roots in 2001: he refused the compulsory DNA test and he will lose the probation (http://www.humanite.fr/journal/2006-08-26/2006-08-26-835494). In UK such archive was created in 1995 and according to the "*Genewatch UK submission: Home Affairs Committee Inquiry - A surveillance society?-*" report, which was published on April 2007, it's the widest in the world with over 4 million profiles, than 6% of population (in the USA the same archive contains 0,5% of the population). (*http://www.genewatch.org/#page*).

chip for dogs, fingerprints records for immigrants, DNA records for criminals, suspects and then for everyone–.[10]

The connection among technological, financial and military revolution (Joxe 2004; 2005) triggered a process that revealed itself in the hybridization of power practice (between internal and external security, i.e. police and military, public and private) and in the constant anamorphosis of order and disorder, war and peace, authoritarianism and democracy too. It is significant, in such a context, evolution of military industry towards creation of "intelligent" weapons dedicated to warfare and, at the same time, to peace-keeping, peace-enforcing and activity of NGOs, public or private police and business security (Renou 2006). Synergy between university research and this kind of development are nowadays more frequent, promoting partnership among academic areas, military force and police.

3. The neo-liberalist turn

From Plato and Aristotle to Durkheim and other modern authors' writings, order and peace have always been considered as equivalent of normality. On their opposites, war and disorder, were just temporary horrors to be sorted by the reinstatement of order. This led to the idea that all the processes of political evolution (as well as economical, social and cultural) always follow the same trend order-disorder-order, or rather *organization-disorganization-new society* readjustment. The use of two opposite terms with the same root is representative of a preconceived vision that leads sociology (classical and contemporary, with some exceptions) to prescriptivism, typical feature of State thinking devoted to justify its order, peace and social cohesion. On the opposite, as written on our magazine since the first issue[11], order, peace or stand-by on conflicts (economic, social, political and military) are always temporary, while disorder and war are constantly reproducing. Order and disorder, war and peace, conflict and mediation always coexist: that dichotomy results by human limitation on rational capacity (all this elements are mentioned by Weber and Simmel) and over all of the manifold clashes of interests and power asymmetries between ruling bodies and dominated. So, there isn't (unfortunately) an effective rotation between authoritarism and democracy, from "state of exception" and "state of democratic law", but there is a permanent possibility of transition or anamorphosis from one to the other way and practice of government of the society.[12]

10. According to some reports the RIS (Scientific Investigation Department of the Carabinieri) illegally collected 15,000 DNA obtained while they were conducting investigations. This information should have been destroyed once such investigations ended (http://www.uonna. it/dna-schedature-genetiche.htm). See also S. Rodotà (2005).

11. See "*Conflitti Globali*", issue 1/2006 and Dal Lago (2005).

12. It is in this sense that we could criticise Agamben's thesis that makes absolute the concept of "state of exception" which could also become permanent, while it seems more correct to think that it could be emergencies and situations which continuously alternate.

Development of a globalized liberalist structure reinforced all these aspects because it cannot support the reconstruction of a stable and peaceful order (as dreamt by somebody with the advent of industrialization-led modernity within the frame of state-nations). Capitalism success shown refuse of such auspices (according to the liberal-democrats of 19th and 20th century this process needed peace and stability) feeding wars and also by discipline required by economic development, as Foucault demonstrated, that could not but be obtained through subjugation. On the contrary, today, the neoconservative management of the society aims at reducing every time more the margins of the pacific negotiation in all levels. It is neither interested in disciplining and it seems pointed only to the "throwaway" of physical and intellectual human energies as they were natural resources: the immediate prosperity at all costs and ever for less expenses –as it is shown also by the present-day crisis.[13]

One of the most glaring examples of enslavement of scientific research and new technologies to the development of post-modern controls is the production of a bracelet to monitor work performances –even for "intangible" work, thanks to the contribution of biologists, doctors, etc.–[14], a sort of hi-tech substitute of a supervisor. The liberalist approach aims today at maximum profit with minimum expenditure; the latter often "forced" to guarantee immediate profit –as in public and private armed-police sector, one of the most important businesses of the 21st century–. Such approach includes now the excuse of war on terror, which has extended to the fight against insecurity, illegal migration and mafias –whenever they are not useful to big financial groups or tend to be too independent–. The reconstruction of a stable and peaceful order –be it reactionary or "democratic"– implies expenses that, even if inferior to those of security-ism and permanent war, are not guaranteed to produce profit –as instead on video-surveillance ground, where new equipment and gadgets constantly replace "obsolete" production–.

Inflation of controls and security "measures" –zero tolerance, more police, more repression, more penalties, etc.– is constantly nourished by the exaggeration of fear and insecurity, real or invented, either local and national or on a global scale. The dismantling of political organization triggered by neo-liberalist development creates anguish and insecurity among that part of population more affected by the threat of those processes (Bourdieu 1993; R. Castel; 1999; Bauman 2005; Beck 1999). On the opposite, fears of ruling class are combined with concern of a power that does not rely anymore on a formally negotiated social regulation –sanctioned by the contract– and it results in almost permanent disorder. The devices of neo-liberalist securitism are not addressed to the disciplined creation of a stable and peaceful order, but rather to the often violent imposition of a power which does not acknowledge

13. Also Obama has openly attacked the barefaced abnormal "awards" that the general managers of the financial companies responsible of today's crisis have auto-given to themselves; as it is shown in a cartoon, while in 1929 it were, in fact, the bankers who jumped through the windows, today the bankers throw away the clients and the employees.

14. See the site: http://www.3eyeinc.com/products.htm and F. Piccioni (2007).

subordinates. Thus, it must be able to get rid of all those who do not conform, do not submit, or worse, dare revolting against it, dealing with them as "human waste".

Public opinion is pressed on believes that its fears and insecurities are based on the rise of crime and terrorism, thus giving consent to the counter-measures of security. Any non-passive behaviour is described as a subversive action that creates agitation –from bullying to urban barbarity, to the "next-door-terrorist": anything can feed the anguish of the population, roused by power oligarchies that dread that same asymmetry of power and wealth they benefit from–. A power is asserted that exploits fear in order to stop any claim by subordinates. It is not a coincidence that many democratic intellectuals add their voice to the chorus of any cost security supports, to the point of creating new oxymorons, while no survey can prove how denying democratic guarantees only matches security feelings of an authoritarian power that does not reassure its subordinates (Baratta 2002).

Nevertheless, as some surveys show, imagining the existence of a coherent neo-liberalist power, i.e. the "post-modern big brother", can be misleading[15]. The approach and practice of the dominant class are manifold and at times in deep conflict among them. The global liberalist development supports the proliferation of powers and corresponding social segments though it is always the case of unstable creations within the whirl of constant destruction that, unlike the theory of Schumpeter, keeps on producing ephemeral assets in the attempt to ensure immediate profit. The power exerted on any segment of society, in its role of post-modern corporal, always produces violence –on the opposite, the activities with strategic long-term prospects, high structural capital and quality productions always long for stability and social peace– in obvious contrast with shadow economies and chaotic liberalism. Talking of "single post-modern liberalist thought" is definitely arbitrary as liberalism itself is characterized by a constant tendency to fragment, to be unstable and discontinuous. Let's, for instance, focus on an area of neo-conservative dominants on the global level: a detailed analysis of its interests and behaviour of its components would immediately show agreement at summit level to be partial and short-term. Clearly, according to Foucault, there are analogies among the practices of power, but they do not lead to a single and absolute power. Hybridization of public and private, internal and external, formal and

15. The idea is debatable of a continuous and linear development of incarceration as a sort of unlimited projection of Foucault's model: the latter corresponded to the industrial society disciplined by the national state. It is of course important to highlight the huge increase of repression, penalty and imprisonment (and the business connected to these), but it is also evident that all the misery in the world will never be subject to incarceration, nor the complete passage from welfare to workfare will take place: present liberalism is not interested in saving all the potential forces for its development: it is rather a problem concerning the elimination of "human waste". CPTs (temporary holding centers), as all internment places, can be considered like experiments for liberalist practices of punishment and disposal of undesirable humanity, as much as inopportune posterity (the young people of French banlieues "programmed" to be labour suppliers, and the nation-state in need of military force or "animals for slaughter" (Palidda 2008c).

informal or even criminal, in several activities on a local, national and global scale, clearly holds in check all those who still fight to maintain the state subject to the rule of law and economic agents who still practice a peaceful and regular development[16]. A system in need of an hybrid in all sectors is actually antithetic to liberal-democratic rhetoric and any defence of universal rights[17].

The re-appraisal of Hobbes against Locke, and of Bentham against Beccaria, with the evolution of security in a sort of totalitarian (almost ontological) concept, can be considered as the theorization of the process that created consensus towards a neo-authoritarianism thought layered by new oxymorons[18]. The *Unsicherheit* as insecurity due to crime and terrorism recreates the Hobbesian framework of total delegation of power, which always feeds on the breeding of fear suffered by subordinates. Furthermore, fear is used to characterize the –unstable– political organization of post-modern society. The abolition of any form of Peaceful negotiation and social contract crisis, in post-modernity, leads to a non-evident submission, mystified by the involvement in security-ism practices that are actually the assent to neo-authoritarianism.

Italy is the most evident case –as it is the most affected by proliferation of competing powers–: the inflation of post-modern controls corresponds to the splitting of public power in groups and alliances, sometimes opposing each other but occasionally joining.

It results on a subalternity of public to private even in those areas that should be exclusively operated by the state –Telecom security team employs operators from public agencies and hires national and international intelligence for investigations. It also plays on the mingling of business, financial and political espionage and is believed to guarantee unclear services and transactions in official balance sheets–.

The proliferation of particularistic powers, yet producing a huge inflation of controls, seems to be leading to a sensational and disastrous implosion.

16. Even more than other examples, the Telecom affair (cfr. Giannuli in *Conflitti globali* 1/2007) revealed as non-existent the market imagined by the last liberal-democrats, among them Guido Rossi, who described the behaviour of some of the managers as "Chicago gangsters in the Twenties". It is interesting to notice his complaint about the "lack of representation and defence of the scattered and silent majority of shareholders", appropriately defined as "animals for slaughter": this conforms to the erosion in the chances of political action by subordinates.

17. Idem for top level organised crime, like "*cosa nostra*", which hits and disappears, merging into a universe of hybridisation between formal, informal and criminal, or rather legal and illegal; the same universe where many big, medium and small economic groups dwell.

18. I think that it could be useful to observe the antithesis between democratic-liberalism (among others Schumpeter, Keynes, Galbraith, Mills) and today's neoconservative-liberalism. The first one, contrary to what the European Social Democracies, also in favour of colonialism, lasted supporting, deluded that the capitalist development would be not able to conciliate with war and social struggle, The contemporary thinkers that today justify the war in Afghanistan, Iraq or against Serbia, the so called "humanitarian wars" and even tortures (think about Ignatieff, Waltzer, Habermas and others) they seem proper the worthy heir of Tocqueville who venerates the democracy in America by criticizing racism but then he legitimates the extermination of the Algerian who were against the colonization (cfr. Le Cour Grandmaison, 2005).

The present situation does not employ a super-control on everyone: a typical example is the failure of Echelon and other, less ambitious, systems. It is more realistic then to consider how anyone can be subject to control abuse. Before any recent court cases in Italy –scandals on Telecom, show girls, football, or the shady business of Vittorio Emanuele di Savoia–, other facts were proofing how, for quite a while now, we have entered the era of wire-tapping and all sorts of espionage –for example, Cirio, Parmalat, Fiorani-Fazio, Laziogate, etc–. That's a trend all countries are experiencing –Sarkozy-de Villepin case, ELF, etc–. The NSA, in US, was reported for wire-tapping, in particular financial transactions, not long after the Enron scandal, in the name of war against terrorism. In 2005, the New York Times accused Bush government of using war against terrorism to extend powers that were already been widely extended –which in fact often covered mingling of private and public interests–. The "backstage power" –so useful to cover up dirty business– seems now to be undermined by the liberalist globalization that erodes the last bulwarks of –limited– supremacy of the first eight world powers.

4. The simulacrum (or pretence) of privacy

In an era of business power rules, it seems obvious that no paper would refuse the publication of wire-tapping, turning it into a best-seller –why not? It has been used during the French Revolution or with Daumier's sketches, and he was taking a huge risk...–. Although today many people can access private communications between powerful men, having the chance to read the transcriptions is always a revelation. So, is the King naked? Or are we all naked in front of somebody who can manipulate confidential information? Do we need a new legislation for this sector?

Leaving aside all the exploitable reasoning by those who appeal to whatever authority and new laws, it is important to remind that convenient authorities and laws are already in force (Rodotà 2005a/2006; Lyon 2003). The real issue is about their fair application. Privacy protection appears as a tedious disquisition and it is often greeted with grotesque amazement by authorities and leaders who perfectly know that abuse is a consequence of the inflation of control[19]. What is the authority body in charge of privacy protection for, if it never prosecutes public and private police illegally accessing databases? Can by any chance be possible to imagine a body seriously engaged on "control

19. The privacy authority knows perfectly well that since the Eighties police officers have been able to access any database: some of them can even violate confidential databases. There is an informal market among officers and private police, bank operators, insurance agents and all sorts of sneaks (Palidda 2000). Evidence from a local police officer: "Even council police can access data banks: they can easily check financial statements (tax returns, etc.), legal transactions, fiscal codes, VAT numbers, registered offices, etc. I know what I am talking about, because I can access this data bank and I know how easily you can obtain confidential data with the approval of managers who grant access to several people, sometime with incredible carelessness".

of the controllers" –the CED of Viminale[20], databases of private and public police, insurance companies, banks, local authorities, etc?– Why is there no restraint towards the huge investments for post-modern controls, databases and record filing? What kind of profit is guaranteed by an expensive security system, like that of Telecom, or the local bodies and police? What is the use for privacy protection regulations for if any user of whatever online service is compelled to register personal details before accessing the latter?

The inflation of any type of espionage and control device appears as the inevitable consequence of the ascent of liberalist securitism, supported by the European left and the majority of public opinion. Even so, twenty-five years of development of post-modern controls demonstrate that security-ism does not give security. The terrorist attack in London is an important example: identification of terrorists has only been possible thanks to the collaboration of one of them, while police was struggling, scanning thousands of hours of CCTV footage filmed. At the same time the "neo-liberalism war", as Alain Joxe defined it, is able to transform sophisticated control technologies in direct support to population massacres in Iraq, Afghanistan, Lebanon, Palestine and other places –"intelligent missiles" are examples on use of such technology, the Stealth aircraft, also used on Mexican border against illegal immigrants, the smart dust[21], etc.–.

5. Erosion of political action

According to some authors, fear leads to security-ism power that in response produces fear (Escobar 1997 and 2001; Altheide 2003; Robin 2004; Simon 2008). All the fears that arose due to the process started in the Seventies covered all areas –energy and economic crises, redundancy, public debt, urban criminality, exclusion threats, welfare reform, the need for sacrifices by the population, mafias, terrorism, immigration, epidemics and all sorts of diseases, etc.–. Citizens have no power to face indecipherable threats. Before and especially after 9/11 the alerts for terrorist attacks have been periodically divulged by means of leaflets in the entire world. At the same time alarms concerning contagious diseases were foretelling disastrous effects, even worse than the Spanish fever that caused millions of deaths at the beginning of the 20th century.

What if "there is going to be an attack on the underground, at the football match or in St. Peter's Square"? What is the ordinary citizen supposed to do? Stay at home? Going to visit some friends or relatives in the country? If he has to go to work, he can only pray it to happen to somebody else! Above all he

20. [E.N: CDP: Center of Data processing of the Italian Department of the Interior. Center created by the Italian Government in 1997 by means of decree which target was to control all the persons who were using the telematic services, from Internet to the cards of phone of prepayment.]

21. http://it.wikipedia.org/wiki/Smart_Dust

has to hope our amazing intelligence services, our super-equipped police and extraordinary control systems will be capable to foil all terrorist plans, as much as they do with street crime. Power delegation is stronger and stronger while the chance to get involved in the administration of public welfare is thinning. Here lies the erosion of political action in favour of strong powers. Among them, the entrepreneurs of security often mingle with state and political authorities. One of the most impressive aspects of twenty-five years of security-ism is the huge rise of military-police business and the increase of controls without any corresponding decrease in fears and insecurities. No equipment whatsoever can avoid attacks like those in Madrid or London… It is clear that terrorism, in spite of its pretence to reverse the asymmetry of power, is contributing to this erosion process, where the subordinates have less and less opportunities to act politically. It is typical how some of the actions ascribed to terrorists can be the direct or indirect result of anti-terrorism forces: such has been in Algeria –and probably still is– and in all areas of conflict. In Iraq, the number of contractors comes up to about half the regular soldiers (Bulgarelli 2006), while in the so called "dominant" countries private police is proliferating –example: Telecom–. More and more frequent is the use of espionage in the fight for economic or political power, thanks also to the almost total symbiosis between politics and business –it is not necessary here to mention various characters of USA government, Mr Blair, Mr Berlusconi and others...–. It is possible to imagine close collaboration, short or medium term, between factions of secret services, private espionage firms and financial gamblers, as well as, on a lower level, the market thrives on exchange of information between police officers, insurance agents, bank directors, small businessmen and politicians, sometimes even crime bosses. The liberal marriage between business and security-ism generates monstrosities that we are not able to imagine, but that are already affecting the victims of repression in prisons and countries assaulted by the hybrid forces of dominating states.

The allegation of violating freedom and privacy makes it look like the modern panopticon triumphed. Opinion polls guarantee its approval by the majority of the population in dominant countries: people swap their privacy on a hope of protection. Privacy has not actually been infringed, but rather the chance of affecting the practice of power –regular trials against abuse and offence are often ascribed to private interest–. The rule of fear and security-ism broaden the gap among strong, public and private, powers and citizens just calling them to consensus while preventing from any form of dissent, –unforgettable example are clashes on Genoa in July 2001–. Any survey and action supporting of the governing power is unfailingly praised; any dissent displayed is deemed irrelevant: it was the case of public opinion about military missions abroad, PACS –civil unions– or economy policies. On a local, national or global level oligarchies are the only one in charge of decisions, no matter what political side they belong to, all of them share the same imperatives: the security of the global neo-liberalistic development cannot accept concessions or peaceful negotiation. Here is the point of the interest that links all powers.

Debate on legal and ethical matters about the "post-human" seem to be oriented on hiding what is at stake in politics[22].

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Everyday life control and liberal governmentality in the 21ˢᵗ century: reading Foucault thirty years later*

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1. Introduction

On the first fifty years of the XX century, Europe witnessed within its boundaries the birth of totalitarist governments as well as representative democracies including women and labour workers as political actors. As they began to get involved on public affaires, the "masses" became a control target that were no longer considered as a sum of individuals but as a whole, that should be treated according to its own profile.

From 1920 to 1945, the totalitarian governments showed that human beings could be reduced to a number of biological coordinates in the nazi camps as well as in factories and jails. On the following years, constitutional texts and international conventions were developed in order to answer juridically to these situations; it was the "guarantee systems" birth, trying to avoid such practices with social and economic rights, besides political[1]. At the time, it seemed clear enough that the task was not only at the great political levels, but at the citizens daily life, assuring your develop possibilities[2]. It was from this guarantee on daily life -whorty conditions of survival, plus social stability- that public life was able to be shared. The law as a juridical tool to prevent human alienation –humans used as things- has though failed.

1. The strained relation between democratic and totalitarian control views has had literary expression at those years. George Orwell´s distopic novel *1984*, for instance, shows the consternation about an oppressive control system, which going through all territorial dimensions (world, state, city, home), was capable of disciplination, regulation and normalization of the citizen´s daily life, using either local and global strategies.

2. The possibility of another totalitarian phenomenon was already present on Hans Kelsen´s juridical-political thought –who had been dismissed from the university by Nazism– (Melossi 1992:106), as well as on J. M. Keynes´s economical work, that took promotion measures as a guarantee, within liberal system, against great leaders popularity. Same fears were growing among the bourgeoisie and have made acceptable the early measures of the pre and post-war wellfare state (Williams 2001).

Within an accelerated process after September 11th 2001, but already working before, daily citizen´s life throughout the world, tends much more to a legalized existence, disciplined and regulated on its necessities, rather than an *agora*, where above those needs, a simbolic construction could be arised. On the following text, we go over this tendency and try to show that not just economical emigrators, rebel youth and ethnic minorities are affected by it, but all human beings in this planet are concerned too.

2. The everyday control origins

The everyday life had become a matter of political and administration concern before the 20th century. Treaties on police affaires, dating on the 17th century and early 19[th3], targeted citizen´s behaviour as a state matter, who intended –the state– to create obedient subjets, fit for industrial labour, by regulating thoughtfully the common inhabitated time and space.

Anticipating the illustrated encyclopedians, those treaties writers tried to work out a "science on proper government" which included all sorts of everyday behaviours, from the sidewalk cleaning and the streets size, to the citizen personal registration, from public and private sanitary measures to the punishment of small infractions. They aimed to be specific, avoiding onthological power theories and abstract rules that may be the object of lawsuits. It is in this way that they discover daily life as the key, and everyday details as the base for a proper administration.

Untill 17th century, the main tool serving sovereign´s power (centralized power oposed to feudalist power) was the law. Nicolás Delamare and his followers discovered then that it wasn´t law who decides about order and disorder in the city, but detail regulations that turned into a routine the citizen´s life on large cities. What appeared now to be important for the state was no longer the power to create laws –banning or allowing behaviours[4]– but small regulations that compelled to act in the proper way (Foucault, 2004b:68).

3. Nicolás Delamare published his famous police treatises in France between 1705 and 1738; Bielfeld in Germany, Foronda or Bails in Spain, and Colquhoun in England published several works on the subject, but they did it in the early 19th century, when liberal governamentality had already been developed. Further descriptions and comments on Delamare´s work could be founded on Foucault´s last class of the 1977/1978 course (2004b:379) and also on Fraile (1997:19), who works on the relationship between Spanish treatise writers and on the closed spaces distribution before Bentham´s panoptical, and related to it (Fraile 2005). For other foucaultian analysis, see Vazquez García, quoted at the index (2005); for differences between German and French treatise writers, Foucault (2004b:363).

4. Sovereign-power was born in opposition to feudal lords (who shared with the church the "pastoral power", the care of oneself and others) in part because the King´s court could be biased in favour to the people who complained about the lord´s arbitrary decisions. Law at the Nation-State births, was a tool to fight feudal power. Nevertheless, when the cities started concentrating the large part of the population, and became much more productive than the countryside (with the *bourgeoisie*), those same courts was used against the King, generating an important obstacle for its power (Foucault, 2009:20). Delamare says "... What we call police, having no other object

As Foucault explains on *Surveiller et punir* (2002), discipline was a sistem by which hospital and jail techniques came out from closed institutions and settled on the city space**.** Bentham's panoptical gave its name to what we call panoptism: a *dispositif*[6] to classify people from an ideal point of view, according to the role they play. This hightened view (the awarenessful guard whose constant presence or absence can never be guessed by the guarded) allows distribution logic within a closed space, with its boundaries and a core, whether we refer to a country, a city, a factory or a jail. This guarding *dispositif* had become possible after a large number of processes and relationships between the social actors appearing in the early 17th century[6], who would develop during the next two centuries unlikely in each country.

Following Foucault, the *Raison d'Etat*, the "national interest" purpose –a space and power rationality quite independent from the king and the power groups– and its view as a "rational machine" dictating what and how to do must not be taken as an intervening factor, but as a working logic of order at the capilar social, economic and political levels: a sort of autonomous and heteronomous government[7].

The "discipline's *dispositif*", serving and served by the national interest´s governmentality, became the core around which public and private life was organizing. The difference between these was over at the 18th century for those who belonged to the lower classes, the private dimension had changed to a public administration affaire (Foucault 2004, Fraile 1997, Arendt 2002, Agamben 2007).

than the service of the Prince and order, is incompatible with the obstacles and the subtleties of the issues in dispute and involved more into the functions of government rather than into those of the judiciary. (…) past experiences has clearly shown how necessary was the spirit and behaviour unified in a large city to gain the proper order and the public discipline…" (Delamare, Treatise; on Fraile -1997:19-).

5. What does *dispositifs* means in Foucault? It is probably one the most used words in his work and other texts based on him, and the difference between the several uses, very relevant. We could see this at two texts with the same title –What´s a *dispositif*?– with different uses. An interpretation that tries to be close to the Foucauldian toolbox is Deleuze´s (1999); however, and despite he starts quoting a text in which Foucault defines the term as a complexity, the homonym article of Agamben (2007) makes an reified use of the concept, that leads him to confuse the device and the tool. We think this is important because the way Agamben uses this concept, allows him to claim his biopolitical control explanation is based on Foucault, when this is at least arguable for us (see Bigó 2008).

6. Just some of them: urbanization, industrialization, educational extension, social laicization, poor/rich interaction at public spaces, plagues and diseases, medicine development as experimental science, popular resistance to mechanical development, beginning of syndical movements, etc. For further analysis on this, from different points of view, Foucault (2004a/2004b) and Fraile (1990/1997/2005).

7. In other words –outside Foucault´s language– we could say that State was standing as the "motive-why"(Schutz 1993) of the citizen behavior, being them politics, public workers, technicians or traders. The State worked as a centripetal force (now, in Foucault´s words, 2004b:66) who did a distribution and was at the same time, watched by those objects of his distribution.

3. Society or State (the fisrt liberalism years)

In the second 18th century half, a new way of understanding social facts was growing strong: liberalism, clearly separating the Society from the State. The first one engaged the natural phenomena to respect and take care, while the second was taken as an artificial construction, whose legitimacy and pertinence was always questioned.

The change of the point of view, from a State to a Social rationality (and the further change of the reality) had begun as a resistance to over-regulation in the commercial life. Little by little, this view generated strategies, alliances and ideas to question the interventionism in the productive dimension (industry and market) by the non productive part (the administration).

Gradually, this rationality was being aware that the difficulties in social city life (scarced food and goods, plagues, riots and crimes) where not a problem of a State (un)skillfulness. The idea of a self-regulation logic with natural laws, similar to physical science laws, made those difficulties look like "normal"[8] phenomenoms, just to be touched when they distanced from a statistic medium[9]. Clearly, the "normality" concept changed too: it´s no longer an example for the subjects to fit in; it started to work as a statistic medium to be reached, and as the point from which prevent deviation (Foucault 2004b:83). It was within this context that the inhabitant groups –to be disciplined- turned to "populations" –to intervene for their approach to the medium rule. The early problem was the existance of those who broke the rule (social, economical or political behaviour) and the answer to that. Afterwards, the goal was to avoid a large number of infractors, sickened or speculators, a number beyond normal[10]. Oftenly, crimes, illness causing death or hunger will not be a reason to intervene, but to "respect" nature laws. Liberal control is less re-active than sovereign control (based on the infraction, spectacular, discontinous and selective) and more productive than disciplinary control. It doesn't work on

8. The idea of normality as coincidence with a statistic medium rule, and its use on crime affaires was already present in *Social division of work*, Emile Durkheim (Monclús 2004:133). We remind that he was one of the "structuralism-functionalism" fathers, and one of the first to use the "anomie" notion as a lack of organization (Melossi 1992:189). Merton´s anomie, developed in the XXth century, tried to explain the reasons of the crime level growth, beyond acceptable, in a certain society.

9. Statistics in particular and positivism in a general way were two of the most powerful parts of the liberal *dispositif*: the social and natural or physical world approach is the reason for which we know liberal economists (who didn´t work only on goods trading conditions) as 'physiocrats'.

10. Immediately we ask: what about "less" than normal? There could also exist interventions there, maybe not only by the State. Within economical studies, XIXth century liberals thought that if the grain price was too low the answer should be to promote exportation, because an "unnatural" low price could retract farming interest. Proactive interventions by powerful actors to produce missing goods, to help short-term interested groups, or starting a "creative crisis" would later arrive, in the late XXth and early XXIth century. The idea "the worse, the better" usually taken as a maoist statement, was also the statement of Milton Friedman´s followers, prophets of the "shock doctrine" (Klein, 2008).

individual behaviour, but on preventing collective threats in the metropolis[11]. These risks were understood as the deviation from the statistic average. In other way, but working at everyday life too, 19th century liberalism was a sistem to check and balance[12] those deviations.

The main question –State existance: why and what for– lead to change the intervention over daily habits. The *superanthropos* would act over individual behaviour only when the incident couldn't be useful –from organic depuration during illness to emigration from poor places to richer ones in the same country–, and only according to this need. If people in their social life, act "naturally" according to their interests, the State must stay aside and only appear when important transgressions to this natural interest principle are made and only over the people that don't follow it[13].

It seemed that some groups didn´t require a strong surveillance on behalf of the State, while others needed preventive performances, as they represented danger to the society and its natural interest drive. It wasn´t about stopping transgression, but about putting out the possibility they had to threat social stability. It´s not anymore about allow or forbid –sovereign domination times–, neither about discipline on individual behaviour, but of regulate the population, and in the first place, to regulate the "risky population"[14]. Statistics –already well developed at the late 19th century– worked to identify who belonged to this cathegory, who appeared as threats to the social balance. At this point, the interrogative form beggins to change: from "What have you done?" to "Who are you?" (Foucault 2009:45).

As we said, the change from the *Raison d'Etat* to the 19th century liberal governmentality was not sudden. Neither absolute: the State and its discipline

11. In the metropolis and also "for" it. As discipline, the liberal logic of natural in the XIXth century works within defined geographic boundaries that, paradoxically, are able to work from the moment that an inner and external reference exist for them: colonies –inner reference– as a subordinated space where domination is still working, provide primary goods and cheap hand-work when necessary. Other countries with same domination principles –external reference– provide the goods trading possibility, and also give the chance of a population flux to regulate local prices. This logic does not disregard the "hard" control matters: between the XVIIIth and early XX century, a large part of the jailed population in central countries had been sent to serve their sentence at the colonies, getting rid of the risk (see Matthews 2003:30).

12. By the system of "chech and balance", the political Montesquieu formula, the XVIIIth century liberalism established the interdependence between the different powers of the State (legislative, executive and judicial). In this system of reciprocal control stood up the hope to avoid the monarchical absolutism for the liberal political theory.

13. On the selective character of the liberal proceedings, see at *Birth of biopolitics* (Foucault 2009:38), the Walter Benajmin´s quotation, about the low cost on the government of hard-worker and virtuous societies: and generally, the Foucault´s own summary of the 2978/1979 lessons (2009:311and following).

14. Michel Foucault names differently the typical liberal control way. In ' Il faut defendre la societé' (1976) he talks about a 'regulation' *dispositif*, as he does in 'Naissance de la biopolitique' (1979). In 'Securité, territoire, population' he seems to prefer 'security *dispositif*', even when talking about politics and mechanisms of regulation. Following Rose (2006) we prefered the 1976 and 1979 use.

had to live among the new social interventionism methods up to our days, when the liberal ideal scheme has changed. Nowadays, as before, it is about meassuring and emphazising in combination strategies. We´ll see how domination, discipline and regulation combine today in a new governmentality model: neoliberalism.

4. Control *dispositif* in the 21st century

Between the Second World War and the late 1970´s liberal governamentality as a whole had gone back. Keynesianism, legislations inspired in Hans Kelsen's ideas and the attempt to create guarantees to fast away new holocausts, made the disciplinary dispositif take back its place (with some domination moments). Simbolic menace between nordamericans and sovietics and a real war having place, gave a chance for the inter-territorial views of the world to come back again, and they re-organized it on differenciated spaces[15]. It was a time where the economies grew in aswer to State plannification, and a time of conflicts too, between countries, within their boundaries and between regulation types: Milton Friedman´s extreme liberalism and the wellfare national projects. In this conflict situation, "normal" interests and citizen´s slight guarding were not trustable enough. Among other reasons, because youth political riots (in Europe and also in Latinamerica and Africa) and syndical struggles lead everyone to think the possibility of a left political turn, that could crumble the liberal regulation project.

Afterwards we had the tax crisis in the 70´s - 80´s (O'Connor, cited in Rivera 2004:294) also called "oil crisis". From this point on, the liberal logic of reducing state's deficit[16] and the incentive to the activity of entrepreneurs returned to the spotlight; with it, the assumption of individual risk and the ability of its management passed to be a "normal element" of the liberal discourse[17].

In the last 25 years, risk management is the main idea when debating about security and control in cities, streets and houses. Even when this idea was already present two centuries ago, the risk logic has lately gained a new strength, within a new and bigger frame known as "neoliberalism". It is a new page in the liberal logic: after sleeping for almost post-war 40 years, now is

15. One of the distinctive characteristics of statal governamentality was the political division between States, which aims to gain an international equilibrium by the territorial integrity respect and the non intervention principle (Foucault 2009:18 and 27, for example). On the other hand, liberal governamentality was already characterized in the XIXth century for thinking at a 'world-scale' (Foucault 2009:62), however, not in the nowadays hegemonical way.

16. In our field, the reduccion of social spenses brought the slowly disappearing of reeducating social programs and in a more general sense, all the institutional re-socializing ideology (Matthews 2003/Lea 2006).

17. As Bauman paraphrases Beck, this ethos means for an individual to 'look for biographical solutions to sistematical contradictions' (2005:91).

living a new cycle since the terrorist attacks in the western metropolis (11-S in New York, 11-M in Madrid and 7-J in London).

Nowadays, the use of technology and communications for population control has modified the way (a distant control, with fingerprints or biological-prints, microchips and databases) and the space of control. Besides, it has changed the themes in the control logic debates, the controlled subjects and the controllers. However, this process belongs to a 200 years logic, the liberal governmentality, which suffers now new changes.

In the control theory, the ideas of Beck and Giddens in the 90´s, Agamben´s work on exception as a daily space and the english studies on Foucault within the "History of the present" current (Rose, O´Malley, etc), have shown that risk studies had lead to a change on the security concept, and this change has visible results in our everyday life management.

The ethos of "living in danger" as freedom (Foucault 2009:74) and as a superior morality (Lakoff 2007) –the one of the businessman who bets everything and wins or looses, accepting the game rules without complaint– lead to the acceptability of flexibility at work and at the financial, productive, political and familiar fields. At the same time, the "deslocalization" of capital and industries and even the living areas (Rodríguez Fernández 2008a) has contributed to the social acceptability of speeches on these aspects. This speech at individual level –people reached by the flexibility-deslocalization couple– creates the feeling of loss of the most immediate security: the awareness of who I am and how I'll live tomorrow, in a scene where the others are replaced before getting to know them, and before knowing how to treat each other. (Bauman, 2005:142, Rodriguez Fernandez, 2008b).

Faced with this fear to the future and the stranger, risk management appears as the insecurity opponent: everyday security is to be protected against the elements of uncertainty and against those who bring to my door –all-risk assurances, retirement plans, health plans, alarms, surveillance video-cameras, ID devices, etc.–. To be secure is no more a status, but a profile linked to an activity: it means being a part of the normalized consumers of security devices –alarms, surveillance services, gps, etc.

In the insecure side of this relation remain those who don´t belong to the consumer's group. They´re not part of the market –away of the statistic medium rule, they are hungry, they don´t travel legally, don´t buy regularly– and they are not an active part of the control database activities. They represent "the threatening thing", because they belong to risk groups created according to statistic indicators. Its presence in a place –a neighborhood in Barcelona, Perpignan or Naples– just becomes a community, city or national worry when it goes beyond a "normal" rate, getting disfunctional, and becomes an obstacle instead of serving to a characteristic strategic logic[18] –a comercial

18. Even when joung, immigrates, gipsies, women and structural poor people usually are within the definition *targets,* the massive re(action) –with different tactics, dispersiveness, repatriotation, punishment or assistential enclosure- does not beggin until the 'market' –as *orgaine de veridiction* (Foucault 2009)- declares saturated and uncapable to 'absorve' the riskful

function, as a "cool" and multicultural space, with a flexible market, or as an open museum[19]–.

The control-chase logic is related to the numbers in two ways: first, the statistics point the risk subjects and in the second place, somebody is chased when the line of a presence\absence useful medium average is exceeded.

Some of the analyses on the control of the twenty-first century have pointed to such groups as the target of the new type of control. Whether from the perspective of a new form of selective monitoring by administrative staff that carry out illiberal practices –the *ban-opticon* (Bigo 2008)– or with reference to concentration camp as a "no-law" space (Agamben 1998), the idea that a set of policies carried out by the State label and marginalize groups and condemn them to be non-persons, seem to be the center of criticism which make use of some of the conceptual tools introduced by Foucault. Both lines of analysis seem to support the key role of the State in this type of control, although with different nuances, and to put those defined as dangers as object of preference. It would be, in both cases, the policies applied in discontinuity –in the *ban-opticon* case, only as an exception to a general consensus on the law, and in the case of the camp only within a certain physical spaces–, more or less related to exceptions, to the rule in the first case and to the territory in the second[20].

This is not the place to analyze the two theories, but as we understand both of them, they are useful to think what happens to inmigrants, gipsies and suspects of terrorism while they don´t seem to work enough on the totalizing character of control in the liberal governmentality. As Foucault claimed in *Birth of biopolitics* (2009), it´s the freedom "production" logic associated to the risk we´ve already explained, that co-working with the discipline, has changed a regulation control meant in the 19th century to work among the dangerous groups in a generalized security control. On his words "…it´s about the mistake in all those *dispositifs*… meant to produce freedom and in spite of it, they risk to produce exactly the opposite" (Foucault 2009:78). Those *dispositifs* impel to know how and where are the integrated ones that can move, an also the excluded, that remain still. Moreover, they create the needs of integrated ones –the need to move within a territory, phone and web conections, the need of speed in the air or earth, quick check-in– in the airports, instant identification

ones. As this doesn´t happen, the *rapper* is customer and model of a sports-wear brand (Klein 2008 :126 and following), the 'chilaba del inmigrante' is an excentric thing, Gipsy Kings music at the disco, sexual workers are part of a city´s potencial to hold congresses and the presence of a 'clochard' is sinonimous of toleration. For the ways of control and repression of parking-workers and windshield-cleaners in three Portuguese cities, see Peixoto (2006); about Law and order politics on sexual workers in Barcelona, see Arella and Fernandez (2007); about the social alarm generated with inmigrants, joung and gipsies in Lérida, Catalunya, see Rodriguez Fernandez (2008c/2009); and about french young citizens, see Bonelli (2005) -all of them at the Índex-.

19. For commercial use of public spaces and their presence and abscense, see Naomi Klein 'No Logo' (2008); about the cities-as-museums logic, and its connections with law & order, we recommend Frias and Peixoto (2002).

20. In the same way, see San Martín Segura (2007).

at the highway toll, at the stores, in electronic purchasing, etc.- that make that control possible.

The double control that Foucault had named as biopolitical, has gained the main importance in these 19st century years. The selection of economical, biological and social characters of the people who belong to the masses has led to profiling practices based on databases. These are used to control the consumers' integration level by both public and private security management.

In this framework, business activity has founded a new space, mostly at the services area, bringing to life what the latest theories call "security industry" (San Martín Segura 2007, Klein 2009, Bigo 2008). This services (that don´t always include citizen rights in their *ethos*) contain a wide range of activities as surveillance in shopping malls, food quality control, machinery and software logisctics for airports security, VIP security, people personal databases, the risk qualification of frequent transgressors, the integration probabilities of inmigrants or the prison managements.

A large part of these activities are sustained on the capacity to pick, store and process everyday data; frequently, people are not aware of this when they access web pages, libraries, credit cards, automatic paying sistems at highways or cellular phones; whether illegaly, because they are not notified, whether forced to accept it as a condition of the required service. The obtained information is exchanged between companies[21], and sometimes shared with the public administration for control purposes. As Stefano Rodotà (2003) says, personal data has turned a product; in this context, data protection[22] has become a citizen fundamental right, as it is recognized on the 8th article of the European Convention of Human Rights. And not only when information is collected by public agencies, but also when it´s done by a private subject.

Deficient protection in data matters can turn into important human rights violations. The Sirian/Canadian citizen Maher Arar was kidnapped in New York in 2002, taken to Siria and tortured in an American detention center from the CIA. A year later he was returned and free in Canada; the accusations against him were based on incorrect information by the Canadian intelligence

21. The so called 'Telecom case' in Italy, with consequences in a large number of european and american countries, is an example. See about at http://espresso.repubblica.it/dettaglio/007%20 Operazione%20Corriere/1300368//0.

22. In Spain ruled by Organic Law 15/1999 of 13th desembre; in France by the Act n°78-17 of 6 January 1978 on Data Processing, Data Files and Individual Liberties , amended by the Act of 6 August 2004 relating to the protection of individuals with regard to the processing of personal data; in Italy by legislative decree n. 196 of 30 June 2003 –Data Protection Code–, in Greece by Law No. 2472 on the Protection of individuals with regard to the processing of Personal Data, 1997 –amended by Law 3471 of 2006–, and in Portugal in 67/98 Act on the Protection of Personal Data. At European level, the **Directive 95/46/EC On the protection of individuals with regard to the processing of personal data and on the free movement of such data –of the European Parliament and of the Council of 24 October 1995-** it's the most important legal text. All this legislation can be found at http://www.coe.int/t/e/legal_affairs/ legal_co-operation/data_protection/

agency who suspected he belonged to a terrorist group. In September 2008, the Canadian government paid a 10 million dollar indemnization to Mr. Arar.

6. The beggining of a conclusion

The technological aptitude to know what is doing, where is, what she/he feels[23], and to get data about his social and family history, usually fascinates us, as well as the ability to do complex operations in little time, or the possibility of an intensive and expansive communication beyond distances. It's partially in this fascination that stands the possibility of an invisible and methodical control, encouraging the technological routines of the integrated ones and "producing" behaviours (purchase, comunication and other common control activities). This is a new kind of discipline, not centripetal but centrifugal. It doesn´t try to keep people in their places, within a territory and with a central power as organizer, but stimulates them to move in a world-space with changing meanings. It´s not a body where the core gives the sense to the whole system, it´s a web where meanings have to be founded once and again in contradictory and ephemeral referents. That´s why it is not a panoptical: the guard is not in his place, we have all become distrustful guardians.

Domination's *dispositif* have found their space at the new XXIst century liberal governmentality too: always somebody is international kidnapped, tortured and later returned[24] to your country, the global and the local logic get together.

Behind this, the narrative of the fear where the enemy could be anyone is used to justify spectacular actions based on the division of demons (the others) and democrats (us). This argument also justifies a discriminatory behaviour against groups (inmigrates, gipsies, young) that are alternatively desired –as clients or workers– and at the same time, undesired –when a changing context expels them out of the market–. This way, the regulation's *dispositif* has their place in the 21st century too.

23. The guarding is already reaching the feelings space: 'sensible' technology is able to analize differences in body temperature, heart-beat rhythm or voice variations. This data is used in a feeling interpretation to control workers and customers at computer points, to know if they do a proper work and to influence their answer to the customers demands according to their feelings. We could see for example the '3rd eye' products (http://www.3eyeinc.com/), for employees control, as well as the videogames interface created by "Emotiv Sytems" (http://www.emotiv.com/). This extension in the guarding capacities has two faces: industry possibilities of 'emotional generation' by the same technology developed to control them, is part of the human transformation tools, the 'trans-humanism', that were already in Huxleys 'Brave new world' too.

24. Same thing happened to Winston Smith, main character in Orwell´s *1984*. He was kidnapped and tortured not for information, but as a routine thing, by a State logic that prevails over individual existence. His tortures, his dialogues with the kidnappers and the fact of being "returned" to the kidnap scene, recall the Guantanamo type of interrogation methods recently used (Klein 2008b).

Twenty-five years later, the advices of George Orwell in 1984 could have new sense if we put the Big Brother –just a moment– aside[25]. We could accept the invitation of Foucault (2009:81) and Melossi (1999): their call for stopping the search of a unique conspirator group with the same permanent project[26]; in that case, we could find a new perspective. If we are able to find a relationship between the application of different control strategies (discipline and regulation mainly, with domination's moments) and one same normalization logic (the "statistic normality"), we may see that the neo-liberal governmentality scene is nowadays local and global at the same time. Then we´ll understand it´s not the exception to the rule, but a bigger logic that covers all these elements and has in us the main (re)producers.

If as in the English studies, we emphasize the experience of the individual dually controlled, with the city as local frame and the world as the global one, we see that beyond the large segregations and hegemonic projects, it is in the everyone´s daily activities that resistance could be held. A good starting point for that resistance would be to understand that besides raising our voice for jailed inmigrants, tortured people in Guantánamo and for those countries who are bombed because they are "the evil", we also have to resist in our name.

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25. Inside the neo-liberal gobernmentality, the state is not a quiet witness of the market -as in the XVIII's century formulations-; it's a tool of the market to do possible its ideal condition of functioning (Foucault 2009:147); it's a part of the network, not the core.

26. As Bigó alerts (2008:13), it´s no good to try to find absolute coherence in the plan, but to perceive the existance of crossed practices, that could later be seen as contributions to a same working logic. The difference between his and our view, is that we don´t think this coincidences are due to bureaucratical logics of spontaneous associations with authoritarian behaviour, opposed to democratical thoughts. We think that both are complements of a bigger logic that, after giving a new sense to the freedom and security ideas, gains its power from both of them.

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The body and the post-human*

STEFANO RODOTÀ

-I-

The human body, by definition the place for that which is human, has recently emerged as the object where a transition has been manifesting, a transition that seems to be divesting man from his territory, precisely the physical one, to make him "fall within the virtual" (Krocker 1995:11) or modify his character so that –and this is not precisely new– one can talk about trans-human or post-human. Is this a new and extreme version of the "machine man"?[1]; a new version of ancient utopias, hopes, anguishes?

If one were to wonder through the infinite paths of the Internet, we would find definitions to what trans-humanism is, such as: "the cultural and intellectual movement which states that there is a possibility and a will to improve in a substantial manner the human condition through the applied reason, using technology in particular to eliminate ageing and enhance the intellectual, physical and psychological capacity". At the same time we can find charts that compare the human body in the 20th century and the human body in the 21st century. The last one would be seen not only as a body free of the effects of ageing and the limits imposed by its actual structure, but also absolutely disconnected from the "corrosion caused by edginess, envy and depression"[2], and projected towards a "turbocharged optimism". Consequently, it is convenient to broaden the area of references and reflections, as well as to recall what Bacon pointed out (in 1627) as *Magnalia naturae*, in the appendix for "New Atlantis": "to prolong life, to delay ageing; to cure diseases considered incurable; to ease pain; to transform the temperament, height, physical appearances, to reinforce and exalt the intellectual capacity; to turn one body into another; to manufacture new species; to carry out transplants from one species to another; to create new food using substances that had never been used before" (Hottois, 2006:69). Is it safe to say that the whole prospective had already been outlined in these words, as well as the new questions?[3]

* Translation from the Spanish versión by Alejandro Piombo.
1. A clear example of this renovated concern in Punzi (2003).
2. [E.N.:The expressions "edginess, envy and depression" are used by Natasha Vita-More (author of the *Transhman Manifest and of the Declaration of transhumanists arts*)].
3. For a synthetic version of this issue Bostrom (2005); the definition aforementioned belongs to him.

Within the issues that arise, we need to emphasise the question of grasp and destiny of some of the fundamentals rights, that not by chance have been historically defined as the rights "of man" or "human" rights; these rights precisely find their fundamentals in the human nature. In the first place those who refer to the "physical and psychical integrity", which are mentioned with particular emphasis in the Article 3 of the Charter of Fundamental Rights of the European Union. Will the transition towards a post-human or trans-human condition cause these rights to progressively become hazy?

Facing the issue of integrity, the Charter points out four principles of reference that would reflect the widely spread orientations: consent from those concerned, the prohibition to use the body as an object through which one could obtain profits, the prohibition of massive eugenic practices, the prohibition of reproductive cloning. Consequently, according to these premises, that which is human would be incompatible with mass production, irreducible to the market logic and most of all it would require full self-decision of the interested ones. This is a conclusion similar to the one that scholars have come to, showing an almost unlimited confidence in the new opportunities offered by science and technology, but pointing out, nevertheless, that the social acceptation of trans-humanism –in the democratic context– depends on the ability to guarantee the safe use of technology, equality of access to everyone, and respecting the right that everyone has to make decisions freely when it comes to their own body (Hughes 2004). On the other hand, Julian Huxley, whom is attributed with the introduction of the term "trans-humanism", had already described this scenario. In 1927, he wrote that "maybe the trans-humanism will work: man will still be man, transcending himself nevertheless, and reaching new possibilities for his own human nature" (Huxley 1927)[4].

We can also find a more simple definition for post-human, described as the "technology that allows us to exceed the limitations of the human form"(Nayar 2004:71). In more general and simple terms, this definition presents the amount of issues that might arise when the subject is considered in its legal dimension. In short, we are facing the radicalization of a well-known issue, that appears every time the artificial suppresses the natural, giving the opportunity to choose where before there was only need or eventuality. But does the end of the natural boundaries also imply the inadmissibility of any other kind of boundary? In other words, does the arrival of the post-human subtract itself from the legal assessment?

The answers to these open questions are very different. There are those who fearful of that which is new consider that the only possible rule is prohibition. The regulation should reconstruct an "artificial" situation when faced with the impossibility of a "natural" one, swept away by the scientific progress. But is it possible for the law to turn into the guardian of backward thinking and fear?

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4. It is useful to remember that Julian is Aldous' brother, who five years later would publish the dystopia *Il mondo nuovo* (1993), tr. it. di L. Gigli, Mondadori, Milano.

On the other hand, the responsibility to guarantee the possibility of access to the great amount of opportunities offered by scientific innovation and technology falls into the hands of the Law. After a juridical battle before the Court of Arbitration for Sports, the South African runner Oscar Pistorius, who had lost the lower part of his legs and had substitute them with a carbon-fibre prostheses, gained the right to participate in the Olympic Games, given to him by the same Court –Resolution of May 2008–. With this, the barrier between "normally gifted" and prostheses users falls, giving way to a new notion of normal. Aimée Mullins, another paralympic athlete, referred to this case when she stated that "modifying your own body with technology is not an advantage, it's your right. This applies to the professional sportsman as well as to an average man". The new dimension of human requires a new legal measure, which must broaden the scope of the fundamental rights of a person.

This perspective is completely opposite to that of those who see the transformations to the body as a crime against humanity, when they are manifested in the form of cloning or transmissible genetic modifications[5]. A matter posed with such emphasis may lead to distort the analysis, given the fact that it transfers the issue to the problematic field of crimes against humanity, making it even harder to discuss in a legitimate way the indispensable limits that refer to the interventions on the body. Furthermore, it puts in this same level the reproductive cloning and transmissible modifications of the genome, transforming the issue into an ideological one when –on the contrary– it demands distinctions and a particular attention when it comes to the fundamental right to health.

-II-

The weakness of the conclusive proclaims is revealed precisely in the institutional discussion about rights pertaining to genetic patrimony that can be considered as a case particularly capable of clarifying some of these issued. The fear of inadequate interventions upon the genome explains why some people speak about a "right to inherit genetic characteristics that has not experienced any manipulation", as a fundamental right of humans since 1982, the year in which the European Council adopts de 934 Recommendation (82). The same concern can be found in the origins of the formula included in the article N° 1 of the UNESCO's Universal Declaration of Human Genome and Human Rights in December 1997: "in a symbolic way the human genome is human patrimony".

The categorical of these statements is mitigated from the beginning by the Recommendation mentioned before, when it states that "the explicit acknowledgment" of a right to a non manipulated genetic patrimony "should not oppose to the development of therapeutic applications in Genetic Engineering

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5. In the same sense but referring to cloning, Delmas-Marty (1999).

–genetic therapy–, a discipline that is very promising for the treatment and eradication of certain genetically transmitted diseases". Consequently, it outlines the right to resort to techniques that prevent children from inheriting this type of diseases, and at the same time clearly acknowledges it in the article 3 of the law that, for certain, is the strictest in the matter, the German *Embryonenschutzgesetz* of 1990. This Law legitimises the selection of spermatozoids when the procedure makes it possible to avoid the appearance of a disease linked to the gender of the person about to be born –limited to cases related to muscular dystrophy or other genetic diseases recognized as "serious conditions by the competent authority assigned by the *Länder* Act".

A subsequent confirmation comes from France, where the legitimization of the "pre-implant diagnosis" has been explicitly recognized, one of the main purposes of this procedure is to make it possible to verify the implant to avoid the transmission of genetic diseases. Also in other countries –such as Great Britain–, the gender selection of the person about to be born has been allowed starting from this premise, following the same logic that aims to give assurance to the future parents, eradicating the distress about possible malformations of the foetus that frequently ends in an interrupted pregnancy.

In this instance obvious questions arise, regarding the possibility to deduce the right to be born healthy from the availability of techniques to recognize on an early stage the risks of a genetic disease transmission, through prenatal and pre-implant diagnosis. Are we facing a "positive manipulation" as a right pertinent to the person to be born? Is it the parent's responsibility to comply with every possible verification? Or should this type of issue be resolved from the beginning by specific rules, attributing decisive importance to birth and excluding, in consequence, a right of action of the new born in relation to the parents?

The concern started by the Declaration of the Genome is even more complex. Resorting to a formula such as "human patrimony" –although it may be mitigated by the emphasis on its symbolic meaning–, cannot be interpreted as a confirmation of some sort of right attributed to a collective individual so he can have the genome at his disposal, different from the concerned individuals. It is not the first time that "human patrimony" or –subsequently but with no definitive specification– "common human patrimony" has been mentioned. Using this expression is an attempt to exclude the goods that constitute such "patrimony" from any possible appropriation[6].

Within the context considered here, such reference has the purpose of avoiding the legitimization of any possible authoritarian intervention on the human genome by anybody, a genome that assumes a value of foundation of the person, with an explicit association between "genome" and "humanity".

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6. See, for example, the Treaty of Extra Atmospheric Space (1967), the Agreement on the Moon and other Stars (1979), the Convention on the Rights of the Sea (1982), the Agreement on Biological Diversity (1992). For a joined frame, Abikhzer (2005) or Kiss (1982).

Even though it arises the consequent issue of knowing who is the legitimate subject that can speak on behalf of, precisely, the entire humanity.

This issue can be clarified if we go back to the indications outlined by the 934 Recommendation (82), when it legitimates the interventions which purpose is to avoid genetic diseases, but without leaving aside the just cause related to the right to inherit non manipulated genetic characteristics. We encounter once again a formula that protects the individual from massive eugenic practices, and the complete instrumentalisation of the person this would imply. The article N° 3.2 of the Charter of Fundamental Rights of the European Union contemplates this issue, it foresees "the prohibition of eugenic practices, specially those that have as a main purpose the selection of people", even with a more clear reference than any other policy in the subject; in consequence, including those that are beyond the genetic interventions in the strict sense, with a background of racist programming[7].

We can also add to this dilemma the issue of determining within what boundaries the individual eugenics can be allowed. It seems that we can find a relevant indication of interpretation in the 934 Recommendation (82) when it refers to the concept of "disease". Nevertheless, on one hand, this is a sensitive cultural notion; therefore it is not only variable but also subject to certain historic assessments, and some subjective perceptions. On the other hand, turning to it may lead to unexpected effects, which must be carefully evaluated.

Article 3 of the aforementioned *Embryonenschutzgesetz* outlines in detail –in a direct way or *per relationem*– the genetic diseases that make the gender selection for an unborn child acceptable. This technique is used to strictly limit the hypothesis in which the exercise of the right to selection can be legitimized. Such is the case that in 1988 the European Parliament approved a resolution that referred to the ethical and legal issues of genetic manipulation (Doc. A 2-327/88) in which it was declared the desire to "elaborate a catalogue of indications, detailed and legally regulated, about the possible diseases that may justify this type of procedure, a catalogue that would be revised periodically in accordance with the developments in medical science" (n. 24). It also encouraged "reconsidering the definitions of disease and genetic defect to avoid the definition in medical terms of simple deviations of normal genetic as diseases or genetic defects" (n. 25).

The technique of a detailed list has been substantially abandoned. We can take as an example the Convention of the European Council about the protection of human rights and human dignity regarding the implementation of biology and medicine (Convention on Human Rights and Biomedicine) which

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7. In the comment regarding art. 3 (document Charter 4473/00 Convent 49) it outlines that "the reference to eugenics practices, indicates those that have as a purpose the selection of people, in reference to the hypothesis in which the new selection programmes are organized, for example, sterilization campaigns, forced pregnancies, obligatory ethnic marriages, etc., all acts considered illegal by the Statute of the International Penal Court adopted in Rome, July 17th 1998 (cuff art. 7.1.g)".

stated that "no techniques of gender selection will be allowed in medically assisted procreations except in those cases where it is absolutely necessary to avoid a serious hereditary disease related to gender" (Article 14). Such technique can produce the exact opposite effect to that which justified the implementation. In fact, adding a disease to a list that indicates when it is legitimate to resort to genetic engineering, produces a double effect: one of legitimization/prohibition and another one of stigmatization.

Actually, what comes out of the list is an assessment of the legitimacy of the intervention for some specific diseases, and in consequence the illicit status of all the rest. A catalogue of diseases, with the purpose of avoiding purely eugenics interventions, may be perceived by the community as individualization of the cases in which is socially understood as necessary –or at least appropriate– to intervene, turning it into an incentive to resort to eugenics when it is allowed, but not with the intention of eliminating the risk factor but mainly because it could be an element that may produce a social stigmatization.

According to what was previously stated, a list may therefore substantially gain a prescriptive value, asserting a model of regular genetics and investing its ordinary function, which would be to reject every temptation in this sense. Transformed into cultural model for those cases that would justify intervention, it may found –consciously or nor– a discrimination or social stigmatization of those carrying the diseases[8].

Once the listing technique was dropped, those issues trying to be resolved were still unanswered. In fact, the opportunities offered by genetics should be assessed from the point of view of the definition of health provided by the World Health Organization that describes it as "the complete physical, psychical and social well-being". A definition that agrees with article 3.1 of the Charter of fundamental rights that talks about "physical and psychical integrity" just as a fundamental right of the person. So, how do we approach the subject of individual eugenics from the point of view of these definitions and principles?[9]

To answer these open questions we can mention a case that occurred a while ago, when the attention on these issues was not as intense as it is today and therefore substantially overlooked. A black woman in Italy decided to resort to fertilization with gametes from a donor, even though she was fertile. The ovules donated by a white woman were fertilized with semen from the black woman's partner, implanted in the latter's womb who carried out the pregnancy. The explanation to this decision has a tragic tone: the mother had relinquished her biological bond with her own son in order to assure him a better acceptance in a white society.

To place the attention on the cultural models is not something unknown to the legal analysis. Its consideration brings light into how inadequate the

8. The issue has been developed in Rodotà (1993).
9. About this issue see Heyd (1992), Chadwick (1992), Kevles & Hood (1992), Dyson & Harris (1994). For extreme positions, Harris (1993), Stock (2004). There are some considerations in my paper *La vita e le regole. Tra diritto e non diritto* (2006).

distinction between massive eugenics and individual eugenics is, from the moment when the issue of if and how to draw the line between forbidden interventions and licit interventions start. The existence of widespread, and prescriptive in its way, cultural models, may produce general effects sometimes assimilated to those of the massive eugenics, when they turn out to be decisive because they condition the total of individual decisions which contribute to identify the social organization in its whole.

The increased amount of models, due to publicity and strong influence by the market, determines the intense social penetration, creating the right conditions to a progressive restriction in those areas where the "genetic lottery" is still operating, while at the same time the instruments that make the intervention of genetic practices possible are being spread and trivialised. On the other hand, the increasing resort to genetic tests makes unavoidable the question about a possible and inevitable frontier beyond which the individual election must only let fatality do its work. Now the issue presents itself in the individualization of the necessary techniques to draw a very distinctive limit.

To sum up, from an objective point of view, the mere oneness of the person is a limit that appears as insuperable, with the consequent prohibition of reproductive cloning outlined by –an in an international scale– the Additional Protocol of the European Convention on Biomedicine and article Nº3 of the Charter of Fundamental Rights of the European Union. Every massive eugenics practice has been regarded as illicit, from the point of view of those who can perform them in the aforementioned sense. Ambiguous and inconclusive, because of its cultural connotation, the resort is presented to the concept of disease.

An institutional context seems to be outlined, characterized by the possibility to regulate in its whole only those situations considered extreme –reproductive cloning, massive eugenics–, and leaving the rest of the hypothesis to a major case load evaluation, therefore making it culturally determined. This implies that the legal techniques that prohibit specific behaviours start to be considered as inconvenient, ineffective or socially rejected, moreover if they do not integrate with the appropriate cultural and institutional context.

An analysis of the social reactions to some of the possibilities offered by the technology has led to optimistic conclusions, such as it happens with the early knowledge of the gender of the person to be born. This has not proved to go hand in hand with a reinforcement of the negative stereotypes with regard to women, as the election to abort does not show, in our culture, any significant motivation from the fact that the child is a girl. It is true that in India it is forbidden to let the parents know what the gender is going to be, precisely to avoid the selective abortion of females. In this case, it is evident that the resort to legal regulation and the prohibition techniques are kept as the necessary means to get rid of a cultural model, a model which definite suppression should come with a change in women's condition in that society.

If we take into account that we are dealing with cultural models that are not confined to the past, and are constantly changing, the legal strategy should

be to create a socio-institutional environment with the ability to neutralize, or reduce to its minimum, negative relapses to resort to the use of genetics. This implies a radical rejection to any parameter of regular genetics, the need to adjust legal models that accept diversity, as well as a strong statute about genetic information.

We can reduce the amount of cultural models that entail certain physical characteristics if we foresee specific guarantees regarding the recollection of genetic data, its circulation –moreover about the communication to those involved–, as well as the use of subjects that only pursue an economic purpose. What needs to be specifically guaranteed is that there will be no discrimination or stigmatization resulting from certain genetic characteristics. Here the definitions found in "privacy" gain relevance, when they put the accent in the "protection of the life choices against all forms of public control and social stigmatization" (Friedman 1990:184), in a context characterized by the "freedom of existential choice" (Rigaux 1990:167).

We are facing a characterization of the legal field of action and the person's rights that involves, at the same time, the definition of its identity and the category of its personal and social relations.

-III-

The reference to what is normal raises another unavoidable issue when it comes to discusse the post-human, together with the idea of equality and dignity. As it has been stated before, the acceptance of a transition towards the post-human is subordinated to the respect of equality and the autonomy of the person, conditions that cannot be removed from any system funded on the principles of democracy and respect for fundamental rights. That is to say, dignity, equality, autonomy, normality are connected: neither of them can be ignored or sacrificed.

Taking up some of the definitions we have been discussing, it is fair to say that in them we can see the manifestation of certain fears and anguishes that, in an extreme way, have gone hand in hand with the dystopias regarding the body, as well as the individual and collective destinies associated to them. Going from Brave New World by Aldous Huxley to Never let me go by Kazuo Ishiguro. But we are dealing with concerns that, stripped from their extreme considerations, cannot be avoided; so much so, that there are contributions from scholars that work on the subject of the post-human.

"When I saw you dancing, I also saw something else. I saw a brand new world approaching rapidly. More scientific, more efficient. Yes. More cures for old diseases. Very nice. But a lot harder. More cruel. And I saw a little girl, with her eyes wide shut, she was holding the old and kind world against her chest, it was hers, a world that she knew from the bottom of her heart that it would not last, and she would hold it tighter praying that it will never ever let her go" (Ishiguro 2006:276). The conflict between old and new world re-emerges, one

that tinges with the colour of nostalgia, the other one that carries progress that seems to once and for all let go of that which is human.

But, is this the only presentation possible or the more accurate one? A lot of the things that we categorize as post-human have their origin in the necessity to get rid of an old narrow world where nature was also a "step mother", a world condemn to sickness, suffering, and harmful heritage. We are not only facing the attempt to acquire new abilities, or to improve the ones we already have, but also "re-accept" some sort of natural normality for the people that have been, or may be, excluded. The experimentation with implants in the human body to recover sight or hearing, to manage prostheses, to control the manifestations of Alzheimer, they must be regarded form this point of view, as well as the opportunities offered by genetics to avoid the transmission of certain diseases. It is common knowledge that the "slippery slope" argument hides the inability or lack of will to face, with the appropriate tools, the challenges of the future. Also that locking oneself into a tight conservatism can cause reactions that can legitimise, together with positive innovations, also those that through rational argumentation could have been properly limited or excluded altogether.

The real cultural and institutional issue is to evaluate to what extent we are facing discontinuities, that set the passage from one world to another one; and when, however, is possible and necessary to keep the continuity that allows the human to transcend like Julian Huxley mentioned, thus avoiding the birth of a "double standard" in account of the human and post-human. It is correct to be concerned about the higher valuation of the post-human causing a devaluation of the human, hence initializing a conflict, even a "war", between humans and post-humans (Bostrom 2005b). A conflict that, evidently, develops in the field of the reference values and it can be avoided if we have the ability to preserve, and project to the future, the principles aforementioned: dignity, equality, autonomy. A strong continuity can, and must, be built.

Therefore, in order to translate this general indications into concrete propositions, it is useful to make a quick review of the Opinion N. 20 –of March 16, 2005– approved by the European Group on Ethics in Science and New Technologies, dedicated to the "ethical aspects of the ICT devices implantable in the human body", which elaborates a detailed recollection of the different types of interventions[10]. In fact, it questions "in what way these devices can be

10. There are different categories: "ICT Devices: devices that use information and communication technologies, based solely on silicon chips. Active medical device: any medical device that needs an internal or independent energy source in order to work, or another energy source that is different from the one generated by the human body or gravity. Active medical device implant: any active medical device destined to be implanted entirely or partially through surgery in the human body, or through medical intervention in a natural orifice, and destined to stay there after intervention. Implant ICT passive devices: ICT devices implantable in the human body that need an external electromagnetic field in order to work (see example, section 3.1.1 regarding "Verichip"). Implantable online ICT devices: Implantable ICT devices that use an online connection to an external computer or an interconnected from an external computer (see example, section 3.1.2 regarding biosensors). Off line implantable ICT devices: Implantable ICT

considered part of what may be called "physical project", comprehending once again the personal and free projections of our own physical and intellectual abilities –eventually improved–". In order to answer this question, an analytical chart was designed with the principles of reference, taking into account the principle of concern and articulating the main ones –dignity, no discrimination, autonomy, incorruptible body, privacy– together with others that, once the general intervention is assured, makes the valuation of their admissibility possible in concrete cases –necessity, purpose, proportionality, pertinence–. Principles, the latter, that represent at the same time the experience drawn from a history of acceptance of scientific and technical innovations.

Together with the legal principles and rules we can generally find the principle that not everything that is technically possible is ethically admissible, socially accepted and legally legitimate, which serves as a restrain to technological drift. On the other hand, the force of the technology that manifests itself as an unlimited production of applications cannot be opposed by a weak law, "mutilated from its final cause". This implies a constant reference to strong values, capable of giving consistency to the "constitutionalisation of the person", which is the result of a long historical process and emerges with clarity in the Charter of Fundamental Rights of the European Union, from the introduction on, which states precisely that the Union "places the person in the centre of the action".

"We will not lay a hand on you". This was the promise made by the Magna Charta: to respect the integrity of the body: Habeas Corpus. This promise has outlived the technological changes. Every intervention on the body, every operation regarding the handling of personal data, in short, must be considered as if it was referring to the body in its whole, to a person whose physical and psychical integrity must be respected. A new comprehensive concept of subject is born, subject that while it is projected into the world receives the right to get complete respect for his body; that is today –at the same time– "physical" and "electronic". In the presence of this situation, the protection of the data has the purpose of guaranteeing the habeas data needed due to the changing circumstances, turning in this sense into an inalienable component of civility, such as it has been the case with the habeas corpus.

At the same time, we are talking about a body that is constantly "incomplete". It is possible to intervene on it to reintegrate lost functions or functions that were never there –amputations, blindness, deafness–, or project it beyond its anthropological normality, reinforcing the functions or adding them again, always on behalf of the person's well-being, or his social competitiveness –an increase of sports attitudes, "prosthesis" to increase intelligence, etc.–. We are facing "repairing and capacity enhancing technologies", an increase of the "body-friendly" technologies, which expands and modifies the concept of healing, announces the arrival of the "cyborg", of the post-human body. "In

devices that do not depend on external ICT devices in order to work (eventually after an initial configuration procedure, such is the case of the profound cerebral stimulation).

our society the body tends to transform into prime matter malleable according to the environment it is on at the time". Thus, the possibilities of an individual intervention increase, but so do the opportunities for political interventions to control the body through technology.

The reduction of the body to a mere machine not only feeds the weakness of transforming it more and more into an instrument that allows the continuous control of the person but it also expropriates it from the body and its own autonomy. It starts to be available to different subjects. So, what can the destiny of an individual dispossessed from his body be? (Rodotà 2006).

Going through this problematic subject, the Opinion aforementioned individualises each parameter that is meaningful to the evaluation of the admissibility of implants that should be taken into account in every case:

"a) The existence of risks, known so far as elevated risks, although not real, regarding even the most simple forms of ICT devices to implant on the body, demands a principle of precaution. In particular, we must pay special attention to active and passive implants, reversible and irreversible, the ones that are online and the offline.

b) The principle of purpose imposes at least one distinction between the sanitary purpose and the other kind. Even the medical use must be evaluated strictly and selectively, to avoid the fact that they may be appeal to in order to legitimize other ways of use;

c) The principle of necessity excludes de legitimacy of ICT device implants with the only purpose of identifying patients when they can be substituted with less invasive and equally safe instruments;

d) The principle of proportionality excludes the legitimacy of the implants like those uses, for example, with the sole purpose of making the access to public places easier;

e) the principle of integrity and inviolability of the body excludes the possibility that the mere consent of the person involved is enough to make possible any type of implant; and

f) The principle of dignity opposes to the transformation of the body in a manipulative object that can be controlled from a distance, into a pure source of information".

However, what happens when you go from an improvement that has the purpose of recovering lost functions or functions that were never there, to improving the "regular" abilities of the body? This is, for example, the case of doping in sports, which is penalized by national and international laws because it puts the life of athletes in risk and alters loyalty in competitions. Nevertheless, the historic acceptation of the use of drugs as far as writers, musicians, painters, etc goes, has never created a legal reaction of the prohibition type for the mere fact of altering the natural and normal procedure of artistic creation. The eventual prohibitions, that would also include artists, come from rules of general character about the use of narcotic substances, in any event attenuated by the recognition of some legitimacy when they are use for personal consumption in small quantities. Are sports related to restrictions that artists can avoid?

The new opportunities offered by genetics to the human being are, qualitatively, very different. Here, the detachment from the past acquires radical characteristics, and its upkeep is shown as the path to be followed in order not to fall in a scientificism that would sweep away human dignity and would lead to seeing the person as an instrument.

As oppose to the reality of punctual interventions and individual choices, a perspective that mixes realism and potential has been developing, it suggests "re-projecting human beings" (Stock 2004), to establish "rules for the human park" (Sloterdijk 2001). We are going to bypass "the last man"[11], and go to "an explicit planning of the individual characteristics" thanks to an "anthropotechnique" that "will have the ability to elaborate on the same level as every human species the passage from the fatalism of birth to the option of prenatal and birth selection" (Sloterdijk 2001). We can thus locate the issue of an improved massive eugenics, although it moves in different contexts, given the fact that within Stock's analysis the project of "raising" a race of superman more capable of ruling the human genre is strange, but it is not so for Sloterdijk.

These are extreme points of view, reminiscence of an unsettling past, which simplifies the arguments in an unacceptable manner and, in consequence, must go through a strict scientific analysis. There is still one unavoidable issue, like Stock (2004:233) himself questions, whether the request to make pharmaceutical and genetic improvements would actually find any possibility of resistance in the "real and turbulent world". The issue of boundaries turns out to be essential and it is not only the law's job to establish these boundaries.

By indicating the risks of liberal eugenics practices in order to clear any dangers from the view aforementioned (Habermas 2002), the attention is again brought to the necessity of respecting the naturalness of the processes that for some time now have been the object of several and conscious interventions by man. Precisely, due to this opposition between dominated nature –in which one should not interfere–, and a human world established by relations of communication, it does not offer a solid foundation to a theoretical position that wants to put an obstacle to positive eugenics. So much so that even Habermas (2002:45/70) himself ends up recognizing the legitimization of interventions, like genetic therapy to avoid the transmission of hereditary diseases, although later on he declines towards the admissibility of a political imposition through list of diseases to cure (Habermas 2002:46)[12].

If followed correctly, the analytical point of view can lead to confront this undoubtedly drastic issue that cannot be solved neither by resorting to artificial prohibitionism nor to give in to the logic of those who state that the force of the facts will lead irresistibly to a generalized genetic programming.

11. This is the title of the first chapter of the book by G Stock that was cited.
12. For a better discussion on Habermas thesis, among others see Viano (2004) and Hottois (2006: 76/81)

It is possible to enumerate cases in which it presents itself as an instrument that nowadays allows us to eliminate serious pathologies, conditions of great disability, and will continue to do so even more in the future. At the same time, such is the case of cloning, this type of analysis demands to stay away from arguments regarding genetic reductionism, and moves to reflect about the way in which the free development of the personality should happen, recognized as a constitutional fundamental right. The possibility to freely construct our own private sphere comes, in fact, from the scenario of not having a program imposed to individuals.

From this inversion of the start up point, we must proceed to identify the situation that the legal rule needs to use to sanction the illegitimacy, bearing in mind the principle of dignity and the rejection to a prospective of a life being "designed" based purely in cultural values –for example, a request for a deaf child because his parents are deaf–. But facing an idea strongly realistic, it is urgent and essential to adjust the rules about equality of access to genetic techniques, facing the risk of a thoroughbred society.

-IV-

The body, hence, turns into the main character. This is confirmed by data coming from our daily reality, which shows what direction is being followed not so much to enrich the human but to consolidate the opportunity of the post-human in order to increase the dependency forms. A manipulated body is being born, predispose to control, traceable. In this, technology intervenes in a direct way. It does not just control from the outside, like for instance video surveillance. It does not limit itself to use the natural characteristics, like it happens when you turn to biometric data; it is accompanied, on the contrary, by electronic devices, in the first place those related to the RFID technology. It transforms and modifies the body with the insertion of electronic implants and, in prospective, with nanotechnology. It is transformed in its whole, not only making it turn into post-human or trans-human, but affecting the mere autonomy of the person, that can be controlled from a distance.

The passing of time from a distant past to a present that it is already a future, can be proved by the fact that the effective external conditioners and controllers are accompanied today by a construction of the same body, so that it can make it compatible with the surveillance society. All this results in a new and different controlled social object that imposes at the same time a new reflection about what personal data is today, so that the protection already designed can continue to operate.

In front of us we have changes that affect the mere anthropology of the person. We are in front of progressive movements: from the person meticulously studied through video surveillance and biometric techniques, we can jump to a "modified" person by the insertion of a chip and "smart" tags, in a context where we are being identified more and more every day as "networked

persons". People continuously connected to a network, configured in such a way so they can receive and issue impulses that permit the possibility to track and reconstruct movements, habits, contacts, modifying the senses and contents of the person's autonomy[13].

This tendency has had an explicit confirmation in declarations made by the Primer Minister of Great Britain on July 19th 2004, stating the wish to "tag and control" via satellite the five thousand most dangerous English criminals. Many people have pointed out the technical difficulties of this project. But it is the symbolic force of the message what needs to be taken into consideration.

This has as a premise a profound change of the legal and social regimen of the person. Having completed the punishment will not be enough to regain freedom. If a person is classified "highly prone to commit crimes", he will lose his freedom of circulation and everything related to the forms of individual autonomy, because he will be forced to use an electronic device that will make him traceable at any moment. And this "tagging" of dangerous people could be done by inserting a microchip underneath their skin. It would change the nature itself of the human body, which would transform into "post-human" through technological manipulation. But, can this line be considered compatible with the principles of dignity that the Chart of Fundamental Rights of the European Union outlines? Can we accept Blair's semantics jolt that has renamed the "society of respect" with an ulterior version of "society of surveillance"?

This is far from being futuristic shenanigans or alarmism. About the same time Blair announced his proposal it was made public that in Mexico, with a cost of 150 dollars per person, a microchip had been "injected" into the arms of the General Prosecutor and another 160 employees, to track their entrance to a very important centre of documentation and, eventually, track them down in case of kidnapping. The Prosecutor's only comment: "the implant has made me feel a bit sick". An evident publicity stunt from a disco in Barcelona, the Baja Beach Club, and later on some other clubs in Holland and England, have suggested their members to accept the implantation of a chip to access the premises without formalities and pay the drinks automatically thanks to identification from distance. An American company is putting on the market weapons that can only be operated by the person that has a chip implanted in his hand so that the weapon recognizes him as the owner. In a hospital in Rome they have experimented with the insertion of a microchip underneath the skin to identify patients with specific pathologies.

In March 2005 the news came out that in a school in California kids were forced to carry a medallion around their necks with a tiny electronic chip that would allow them to track their every move, through sensors strategically placed around the entire school, even in the bathrooms. The transformation tends to be transferred from the "exterior" –the surrounding world–, to the "interior"

13. About the increasing sense and value in the use of the category of the person I have dedicated *Dal soggetto alla persona* (2007).

of each and every one of us. It is not enough to modify the environment, for example, with instruments of video surveillance, it is necessary to modify people. The (irresistible?) course of technology seems to be demanding a new anthropology.

It has been perfectly illustrated by a little girl from that school, who after coming home from being "tagged" at school, told her parent: "I am not a cereal box". There is no better description of what is happening: the progressive reduction of people into objects, continuously controllable from a distance through various technologies, implacably tied to an invisible and tenacious electronic necklace.

The concrete examples are in front of us, and the numbers grow every day. The known cases of workers that have been forced to carry a small wearable computer, that allows the boss to rule –via satellite– his employees, indicate them what products to buy, show them what route to take or the activities they have to do, control their employee's every move and thus individualize where they are at every moment. In a report from 2005 elaborated by Michael Blackmore of the University Of Durham requested by the English syndicate GMB, it is outlined that this system includes ten thousand people, transforming the work place into battery farms and recreating the conditions of prison surveillance. We are facing a Panoptic at a reduce scale, that anticipates and announces the possibility of spreading to forms of social surveillance even bigger. Similar results, also referring to the localization within the workplace, are already possible thanks to the insertion of legible chips with RFID technology in the identification credentials of the employees.

A society in Ohio, City Watcher, has gone even further in the manipulation of their employees, forcing some of them to implant a microchip in their backs in order to be identified at the entrance to private rooms. Thus the body is modified in its physicality and predisposed to be controlled. The technique of implanting microchips in the body that are legible from distance is spreading to diverse areas, from clubs and hospitals, to opening the door in your house or your personal computer, at decreasing prices and increasing easiness to implant them.

In some countries, like Italy, the application of this technology is forbidden in the cases were it allows a control of the employees from distance. It is not enough, however, to suggest that this prohibition be generalized and turns into a common rule for those countries in the European Union, since these technologies are used by people and activities different from the labour ones. The issue must be addressed directly to the question of legitimacy in the use of these resources, of instruments that imply the manipulation of the body. In the Opinion of the European Group, aforementioned, it was concluded that there will only be admissible certain limited forms of this use of microchips and with the purpose of monitoring the person's health. It has been estimated that the use should be considered conflicting with the dignity of the person, declared inviolable by article Nº 1 of the Chart of the European Union, and by the principles that referred to the protection of personal data.

What would become of a society in which there were an increasing number of people tagged and tracked? Social surveillance is entrusted to an electronic necklace. The human body is compared to any other object that moves, controllable from a distance through satellite technology or using radiofrequency. If the body can turn into a password, the localization technologies are definitely creating a networked person.

The subsequent technologies assume a particularly disturbing treatment. Can the purpose of identification, verification, surveillance and certainty in a transaction really justify any type of use of the human body by means of the possibility of technological innovations?

These considerations, obviously, also comprehend those cases were the RFID technology does not imply a physical modification of the person. To examine this type of issues we need to distinguish between a tag that is used as an instrument directly linked to the subject –for example, placed in an identification card– and those where the relation is through an object, labelled as well. In the first case we are facing a similar situation to that of direct implants on the body, even though the person can always detach himself from the tagged object, thus avoiding the control –something that is impossible when it comes to implants on the body, even with those that are reversible–. In the second scenario, we need to adapt the current rules regarding data protection that need to contemplate in detail the capillary nature of the control and the classification that this type of data recollection makes possible. This implies at the same time, on the one hand a reassessment of the definition of personal data to contrast with the dangerous tendency to adopt simplified and formal interpretations that may prejudge the concrete protection of the person, precisely in front of the application of RFID technologies –but not the only one–. On the other hand, we need to take seriously into consideration the risk of the normalization procedures, which would make the access to the data inside the chip possible to a number of people as well as an active intervention on that data, determine controls and identity mani-pulations.

In the less distressing cases of direct implants on the body, the smart tags –on the contrary– seem to be related to a much more vague use, and in consequence could cause more profound social and personal effects. Meanwhile, it is impossible to think about a massive use of microchip implants, according to what was outlined by new legal instruments. It is known that, in Great Britain, the new identity card has a legible chip with radiofrequency technology. If we compare this with, for example, the use of small planes without pilots in its experimental stage (UAV: Unmanned Aerial Vehicle) it would be possible for police forces to identify people partaking in a protest or located anywhere, making one of the UAV fly over the area –this was put in evidence by George Monbiot in "The Guardian" February 21st 2006–. This affects the fundamental constitutional liberties, such as the right to freely circulate or manifest in public, making it necessary to protect even more the personal data in this new dimension.

By the way, the same advantages coming from this new technologies for specific categories of subjects –kids, sick people, elderly people, handicapped, disabled– may induce insurance companies to subordinate the signing of a contract, or the price to pay, to the fact that these people are "subjected" to these technologies, so they can lower the risks for the company. It is what is already happening with cars and trucks; they are more favourably insured against robbery when they are equipped with some sort of satellite tracking device. But, can a person be compared to a moving object with an extreme modification? Can a form of protection of personal data, that prevents this sort of procedure, represent a more suitable instrument to guarantee freedom and dignity? To leave the assistance to these subjects aforementioned in the hands of technology can be considered as a form of social neglect, considering control from a distance cheaper than the periodical visits from the social services.

This dangerous reductionism of the person into object is strongly favoured by the norms that talk about security and aim to fight terrorism. A reaction against this is in evidence in a ruling from the Federal Constitutional Court of Germany in 2006[14], declaring as unconstitutional the law about security for air transportation that states that it is allowed to bring down commercial airplanes if there was a suspicion that it had been high jacked by terrorists and there was no other way to prevent this act of terrorism. The lack of consideration for human lives and dignities, in short the reduction to object and hence to mere components of the airplane, has determined the intervention of the German constitutional judges to avoid the denial of men, the "degradation of the individual", something that has been demanded by the Italian constitutional judges so many times.

-V-

The human frontiers are constantly moving and being crossed in the search of a more perfect human body to make it exceed nature's limits or the accidents that are imposed by it. "The man is obsolete" wrote Günter Anders in 1956 (2005). Television shows in the 80's had popularized the image of the "bionic man", a human being that had both artificial and biological organs, modifying the human nature and taking on a cyborg structure. Today this model has materialized in front of the eyes of the entire world and has the face of the well-known Oscar Pistorius.

The world not only questions the admissible degree of artificiality in sport competitions, but also in the general sense of the increasingly intense union between biology and technology, about the post-human. "Like a pioneer, man leaves his own limits behind, moving further away from himself; he "transcends" himself more and more –even if he does not reach the supernatural, yet, he

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14. About this issue read the essay by Marella (2007:69/73).

trespasses the limits of his congenital nature–, he reaches a sphere that is no longer natural, the realm of the hybrid and the artificial". The words of Anders describe an ambition, dissatisfaction, but also a concern. Detach from the physical limits, from its fatality, from the body's mortality, in order to project oneself to a dimension that defies death heading towards a "turbocharged optimism". We are in the presence of the infinite desertion of the threshold, towards the "beyond" of a physical body that knows no definitions, no boundaries. This brings up again a question that was there all along. Should everything that is technologically possible be considered ethically admissible, socially acceptable and legal? What are the judgment criteria and the principles to appeal to?

The International Association of Athletic Federations, regarding the exclusion of the athlete from the Olympics, unifies the criteria of normality and loyalty to the competition, giving its interpretation of what is human as a measurement of sport legitimacy. It must be established whether the prosthesis, far from being a disability, gives the athlete an advantage in the competition (more strength, less air resistance) and, precisely due to the fact that they found there was no advantage, they decided to allow Pistorius' petition. In the long and busy road of scientific manipulation of the athlete's body –and leaving doping aside–, many interventions are considered licit today. On the other hand, a increasing amount of artificiality is accepted today for each and every one of us through transplants, pacemakers, insertions of metallic plates. It is indisputable, in these cases, the purpose of all this: the protection of health, the reestablishment of lost functions. If we leave aside the sport function, who would condemn in the name of the intangibility of the human being, the prosthetic implants that allow Pistorius to walk and move freely in the world? Under this light, normality and humanity assume a new meaning.

Where should we find a sign of unacceptable discontinuity as a result of the human being subjugated ad cancelled by the technological tide? The description of the future, presented in a great number of investigations that are being held, shows Pistorius' case as peripheral. The post-human is associated to transformations a lot deeper than that. Talks about the birth of a new species, an entity elaborated from a hybrid between the biological event and the work of the technology, where it would be difficult to find what is properly human, and the new way to understand what human is would imply at the same time the redefinition of the relation with other species[15].

An emphatic representation of the world to come? It is unquestionable that we are facing radical changes in the relation between nature and culture, between biological and cultural components, abandoning a dimension where biology also had the function of setting the boundaries. This task cannot be

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15. This is a different point of view of the post-human found in investigations such as the one from Marchesini (2002).

recovered just by invoking the past. It is the cultural fact the one that needs to capture the attention once again, for example reflecting regarding the meaning that the reference to the person's dignity assumes in this scenario. Here, and not in the materialization of the biological data, is where the boundaries must be found, the judgment of criteria.

-VI-

One of the major effects of technological innovations on the human body is represented today by the experimentation and hypothesis about the nanotechnology in general and the nanobiotechnology in particular. Penetrated through the endlessly small, the body can suffer a radical metamorphosis, turning into a "nanomachine", a sophisticated informative system that constantly produces analytical data about its condition. The protection of this type of data demands special attention. It is a current issue that needs the attention of all of those that handle the protection of personal data in a "vision assessment" work.

The nanobiotechnologies are destined to produce relevant innovations regarding the person data field. The miniaturization of diagnostic instruments, its direct presence in the body of whoever is involved, the increase of the parameters that can be use nowadays, the expansion of the diagnostic spectrum and the immense acceleration of the diagnostic, will determine a huge increase on the data available. It is important to start participating in the individualization of the issues associated to the creation of this new "internal space", where we can place unprecedented characteristics together with traditional issues: the right to know or not know, the individual and massive screening; the subject that can have access to the data produced by nanotechnologies; the mere nature of the data, that may present a degree of "sensitivity" even higher than that of the genetic data, introducing even more incisive issues about possible discriminations. The social and ethical acceptation of the nanotechnology is going to depend on the ability to accompany its production with the guarantee that the personal data will be protected.

The integrity of the body is not an external notion. It depends on the way we think about it, the way we define the relation with ourselves. If it is questioned then it definitely determines an impoverishment of the concept of life.

The most radical representation of this tendency, that turns the socialization of the body into appropriation or expropriation, can be appreciated when you look at "the human body as a machine that transmits energy and information". These are words that were use to describe the object of the patent 6.754.472, given to Microsoft in the United States in the year 2004. Thus, not only the body becomes an instrument to link directly to a series of portable devices -mobile phone, portable computer, music player-The current technologies are exceeded and –together with the current forms of connection– a "personal

area network" is created, a personal net constantly covering our skin, our tissue. A new instrument comes along in which the free availability is not private, given the fact that this new form of use is subordinated to the patent rights, consequently to the economic pretensions of Microsoft.

The image of the human body as an entity controlled only by the interested party turns hazy, until it disappears.

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PART III-

LEGAL OBSTACLES, INTERNMENT AND EXPULSION

Migration controls in the Euro-Mediterranean border: a critical analysis from the human rights overview*

CRISTINA FERNÁNDEZ BESSA AND ALEJANDRA MANAVELLA SUÁREZ

Euro-Mediterranean borders are internationally known, specially in Europe, for the causalities and the violation of Human Rights of migrant people trying to reach the European shores of Andalusia, Sicily, Lampedusa, the Spanish cities of Ceuta and Melilla and, later, the shores of the Canary Islands[1]. These events drew the attention of the media and politicians and have made border controls, even pre-border controls, become a policy priority for the European Union [EU] during the last years.

The management of migrations is a key topic of the contemporary national and European policies, mainly for the Euro-Mediterranean countries. These countries are characterized by their short history as destination of migration flows; however, nowadays their geopolitical situation gives them an outstanding role regarding the sea border control and the containment of immigration from northern Africa. Despite of the fact that the total amount of migrants arriving through these routes is very little among the totality of migrants arriving in Europe through other ways (by air, or by land), a great amount of resources is earmarked to prevent their arrival.

Restrictive migratory policies are configured and migration controls have increased both inside and outside the EU. They go beyond the surveillance of border posts; they are externalized and arrive to the countries of transit or origin of migrations. The so-called "integrated management" of the common European external borders and the cooperation with third countries[2] have

1. For press references of a great part of the people died since 1988 along European frontiers, see the Pres review made by Gabrielle del Grande http://fortresseurope.blogspot.com.

2. In the framework of the EU the Non Member States are usually referred as "third countries".

turned essential elements for the prevention of "illegal migrants"[3] arriving through the Mediterranean –and Atlantic– sea border.

Migration controls and border management are fields in which the deprivations of fundamental rights are not isolated or accidental cases. The EU model of management of migratory flows has turned the casualties, the deprivation of freedom and other violations of human rights in something that happens once and again, mainly in the operations of surveillance and control of illegal migration that take place beyond the EU borders.

This paper begins with an approach to the logics of European migration policies and its border management. It continues showing the implementation of these policies in the Mediterranean and Atlantic southern sea-border. And then, it goes to analyze the consequences of these policies from a right-based approach, paying special attention to the situation of the human rights of people who have experienced the consequences of "control measures" of the border management carried out by the EU.

1. The borders (limits) of the European migration policies

Processes such as European unification are reframing the meaning and the concept of contemporary borders. Progressively, the borders, initially linked to the territorial sovereignty of the States, are not (only) placed in their geographic and administrative boundaries, but they are dispersed everywhere and are present where the selective controls take place. Therefore, we should take into account the distinction between borders as a line that separates territories (*boundary*) and borders as controlling zones (borders) (Guild & Bigo 2005:70).

1.1. An approach to European migration policies
The signing of Schengen Agreements (1985) established structural changes in border control in the framework of the EU. They allowed the free movement of people within the EU but they set in motion a series of measures designed to **compensate the abolition of internal border controls** by tightening the security at the Union's external frontiers, according to the treaties, in order to stop illegal immigration, drug smuggling and other unlawful activities. They

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3. With several NGOs, professionals from diverse fields, and undocumented migrants themselves we consider that both from a juridical and an ethical point of view, no human being can be considered illegal. According the Platform for International Cooperation on undocumented migrants (PICUM), the use of the term "illegal" can be criticized for three reasons: 1) due to its connotation with criminality; 2) defining people as "illegal" can be regarded as denying them their humanity; and 3) labelling "illegal" asylum seekers who find themselves in an irregular situation may further jeopardize their asylum claims. (From www.picum.org). In this sense, Balzacq and Carrera (2006) also criticise the use of expressions such 'illegal immigration', the 'fight against' and 'combat' when the EU deals with this phenomenon and its negative implications for the person concerned because it links them with suspicion and criminality.

also established a system of common conditions of entry and exclusion of third country nationals into the combined territory. All this rules are collected in the so-called Schengen Border Code.[4]

The enforcement of the Treaty of Amsterdam (1999) and the creation of the area of "Freedom, Security and Justice" meant the origin of the common European external border. It also transferred the competence in the domains of immigration, asylum and borders to the European Community (Title IV of the Treaty Establishing the European Community on "Visas, Asylum, Immigration and Other Policies related to the Free Movement of Persons"). Because of this reason, from that moment, the Community started the development of common policies and rules on these fields.

The bases of work, objectives and timetables regarding the area of "Freedom, Security and Justice" are organized in the form of multi-annual (five-year) programmes. The first is the Tampere Programme (1999-2004), adopted by the European Council meeting of 15-16 October, 1999. And the second one (2005-2010) is the Hague Programme adopted by the Brussels European Council held on 4 and 5 November 2004. The Hague Programme was developed in a context deeply influenced by the terrorist attacks of 9/11 2001 in New York and 3/11 2004 in Madrid, so the security of the EU has been established as a priority for this 5-year programme over the liberties and security of individuals. Moreover, the security dimension of borders and migrations management has acquired a highlighted position. Since then, "illegal immigration" has been dealt as a security matter along with terrorism and organized crime, as they were represented the two faces of the same coin.[5]

Actually, this should not be considered as a new tendency, because it rather means a reinforcement of the "securitarian" dynamics that have accompanied the construction of the EU. From the beginning, the Schengen agreements have associated the regulation of EU's external borders with "security": most of their rules are measures to guarantee internal security at the Schengen space, protecting the community from external threats, such as terrorism, cross-border crime or "illegal immigration". The abolition of border controls inside the Schengen States has represented a hardening of the tools of control of third country nationals because EU considers them as potential risks for its security.

The progressive construction of migration as a threat (Guild, Balzacq, Carrera 2008) is making the EU strengthen its external borders in order to

4. Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), which deals in detail with border controls and the prerequisites for entry by third-country nationals.

5. The political process of linking migrations with terrorism and criminality (very frequent from some EU institutions), could be associated with a wider political process in which immigrants and asylum seekers are seen as a threat against the protection of national identity and welfare state's provisions. Cfr. Huysmans (2000).

face security demands. New regulations and agencies have been introduced in order to control migrants and restrict the possibilities of migration from certain countries.

On the other hand, return and readmission policies are a crucial part of the fight against illegal immigration, as it is understood that the effectiveness of these policies constitutes a very important dissuasion technique for current and future migrants. In order to fulfil that policy, the EU member States try to celebrate new readmission agreements; to harmonise the laws regarding return, joint expulsions, the usage of coercive measures, the temporary detention, and so on.[6]

Assessing illegal immigration has been a central part of the EU's common immigration policy since its inception in 1999, but at the same time the EU recognises the need of migrants (specifically workers) for the economic and demographic development of certain sectors and regions.[7]

Thus, it seems that common immigration policies are based upon a utilitarian criterion related to the need of (cheap) labour of the EU member States,[8] and it has been never approached from the perspective of the exercise of the fundamental right to emigrate (article 13 of the Universal declaration of Human Rights). In this sense, migration controls and measures to "fight" illegal migrants seem to have an instrumental sense. Moreover, according to the EU Commission "illegal entry, transit and stay of third-country nationals who are not in need of international protection undermine the credibility of the common immigration policy". Therefore, "a firm policy to prevent and reduce illegal immigration could strengthen the credibility of clear and transparent EU rules on legal migration".[9]

As we have seen, contemporary European migration policies are deeply influenced not only by the requirements of security, but also by the market ones. They are simultaneously focussed on the fight against "illegal" immigration and on the promotion and facilitation of regular, temporary migration related to the needs of the European labour market.

1.2. New actors, new stages

The borders of the new political-economical institutions in which State's sovereign functions try to be preserved, are not located anymore in the limits of their territories: they are disseminated all around, where the flow

6. European Parliament and Council Directive on common standards and procedures in Member States for returning illegally staying third-country nationals".

7. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 5 December 2007 –"Towards a Common Immigration Policy" [COM(2007) 780 final].

8. "The EU needs to deal with migration in the overall socio-economic context of Europe that is increasingly characterized by skill and labour shortages, competition for the highly skilled in an ever more globalized economy and accelerating demographic ageing of the European population" (MEMO/07/188, Brussels, 14 May 2007).

9. Communication from the Commission "on Policy priorities in the fight against illegal immigration of third-country nationals", Brussels, 19.7.2006.

of information, persons and things takes place or where it can be controlled (Balibar 2003). The creation of new European agencies that have assumed border controls and the role played by their neighbours and third countries contribute to transforming the traditional borders.

Through the implementation of Schengen *aquis,* the EU is moving offshore a great part of the management of its borders to other countries. It is also externalizing the responsibility for migration controls to new (public or private) actors. The mechanisms to do so are, for example through the Visa policy[10]; the role played by the carriers companies which have to require the passenger's travel documents[11] or through the liaison officials posted in non-Member States.[12]

The implementation of such measures sets off several controls "*à distance"*, even before the would-be migrant has crossed physically any frontier (at embassies, travel agencies or the airports of their origin countries). In this case, the effects of the "border" take place in the same origin country and from the moment that the individual decide to start a migratory experience (Bigo & Guild, 2003).

The EU also externalizes its migration policies through the transfer of the responsibility to control and manage migrant people to third countries. Specifically, European Neighbourhood Policies (ENP)[13] have imposed the management of migration as a determining condition for further (economic and commercial) cooperation with the EU. Besides this, the EU or its member States are also negotiating operational cooperation and readmission agreements with the countries of origin and transit of migrants. This kind of agreements is becoming a key element of the EU migration policies because they allow to undertake surveillance and control operations beyond the EU territory and force the signatory countries to readmit the migrants expelled

10. Among other regulations see: Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (consolidated version of 19 January 2007); Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (not published yet); there is also a proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas.

11. According to the Council Directive (EC) 2001/51 supplementing the provisions of Art. 26 of the Convention implementing the Schengen Agreement OJ L187 (10 July 2001) and the Council Directive (EC) 2004/82 on the obligation of carriers to communicate passenger data OJ L261 (6 August 2004) the private transport companies that carry persons who do not hold the necessary visas and/or travel documents to enter the territory of the EU must be fined, which means the privatization of functions in the field of migration control to non-state agents.

12. Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network. They are representative of a Member State posted abroad by the immigration service in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of illegal immigration.

13. The ENP covers Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Republic of Moldova, Morocco, the Palestinian Authority, Syria, Tunisia and Ukraine but not the EEA, the candidate and potential candidate countries or Russia.

from the EU, whether the expelled people are nationals of the given country or they have transited its territory on their journey to Europe. In the case of the agreements signed by Spain with some Sub-Saharan countries, in "compensation" Spain has established the so-called "migration quota" which allows a number of people of the country to (legally) migrate to Spain with a temporary labour contract and commits to donate funds for the development of the countries (usually for the police and military development in order to strengthen the migratory controls) (Fernandez 2008a).

Technology is also an important factor to carry out the management of borders and to prevent irregular migration. Borderlands have been equipped with high technology for controls at sea, infra-red cameras radars, etc. and other kind of military equipment such as sea, air and land border patrols. These border patrols are integrated by police officers of different EU countries and coordinated through FRONTEX, the European Agency for the Management of External Borders.[14] These patrols and the installation of control devices in the Euro-Mediterranean coats are transforming the territories and their life style and they are also moving the traditional "clandestine" migratory routs from the north of Africa to Europe.[15]

Nevertheless, migration controls do not finish at the external borders, they go on with different internal controls deployed to identify and detain undocumented migrants that are living in the EU without the legal permits. Police controls that take place everyday in the streets or at public transport stations or the arrest in a detention centre for migrants[16] could imply the same consequences of external borders control for migrant people: the exclusion of society through their deportation/expulsion to another country, or through the deprivation of their fundamental rights, being unavoidably condemned to the clandestine life and the "a-legality".[17] These kind of controls, hardly noticeable for most of the citizenship, determine the everyday life of migrant people, mainly of those without papers, because it means a continuous threat of being detained or expelled (Fernandez 2008a:10/11; De Genova 2006).

Within this new framework we can observe how borders cannot be considered just as a geographical issue anymore. The current EU borders

14. European Agency for the Management of External Borders of the Member States of the European Union: Council Regulation (EC) 2007/2004/ (26.10.2004, OJ L 349/25.11.2004).

15. For instance this is the case of migratory flows arriving to Spain from Northern Africa. Since 2002 a sophisticated technological system (named SIVE, for Integral System of Outer Surveillance) has been progressively implemented in the Andalusian coast and then in nearly all the Spanish southern coast, to improve the surveillance of the sea and detect small boats (*pateras*). According to official figures, SIVE had drastically restrained the arrival of boats on the Spanish coasts, diverting thereby the immigration flows toward alternative (longer and more dangerous) routes. SOS Racismo (2006) says that the "sealing" of Spanish borders of Ceuta, Melilla and the Strait of Gibraltar implies a diminishing of the entrance of migrant people by these ways, but it implies an increase in the casualties.

16. See N. Fischer in this publication.

17. Regarding the a-legal status of undocumented migrants, see H. Silveira in this publication.

are located where the management strategy begins. Decisions and measures adopted by the EU affect and also transform zones that are really far from the area –geographically, culturally and politically– where the political decision is taken. Therefore, borders do not fix with national states anymore, they are not useful to define their sovereignty, either, but could they avoid their responsibility for the consequences of the implementation of their policies?

2. Strategies of migration control at the Euro-Mediterranean border

The key policy priorities to manage contemporary European borders (that is to say, to secure them from the clandestine arrival of migrants) are the so-called "integrated management" and the "global approach".[18] The first one highlights the "common responsibility" and "solidarity" among member States regarding the control of external borders and the management of migration; and the second one is focused on the external dimension of migration policies and the relationship between the EU and its member States with third countries regarding the dialogue and cooperation with them in order to face the causes of migration (but also to deploy pre-border controls in their territories).

2.1. Dialogue and cooperation with third countries

In December 2005, the European Council adopted the "Global Approach to Migration: Priority actions in Africa and the Mediterranean".[19] Its objective is making migration a shared priority for political dialogue between the EU and the African countries. The "Global Approach" formulates "comprehensive and coherent action on migration", addressing a vast array of migration issues and bringing together the various relevant policy areas including external relations, development, employment, and justice, freedom and security.[20]

2006 was a year of agenda setting with Africa. A ministerial conference on migration and development was held in Rabat at 10th-11th July bringing together 60 countries along West and Central Africa's migration routes. They adopted proposals for concrete cooperation between countries of origin, transit and destination along specific migration routes[21]. African countries

18. See European Commission, Communication on Policy Priorities in the Fight against Illegal Immigration of Third-Country Nationals, COM(2006) 402 final, Brussels, 19 July 2006.

19. In October 2006 the Heads of State and Government met at Hampton Court and discussed the challenges of migration after the events occurred on September 2005 when over just four days hundreds of sub-Saharan migrants tried to enter Ceuta and Melilla (and the 14 people were killed by border guards). In their conclusions they established the bases of the "global approach" stating that there was an urgent need for concerted action, both among Member States and in partnership with countries of origin and transit.

20. Presidency conclusions of the Brussels European Council (15/16 December 2005).

21. The Foreign Ministers agreed to sign an Action Plan for Africa based on a new approach to the migration phenomenon and with concrete measures: the promotion of economic

and EU member states also participated in the UN High Level Dialogue on Migration and Development in September. And on the 23rd November an EU-Africa Ministerial Conference on Migration and Development was also held in Tripoli (Libya) to formulate a joint approach to migration between the EU and the entire Africa for the first time.[22]

Furthermore, in May 2006, also in the framework of the "Global Approach" the Commission opened a bilateral dialogue with Mauritania and Senegal under Article 13 of the ACP-EC Cotonou agreement,[23] and in September with Mali. Regarding North African countries, the EU improved the dialogue and cooperation with Morocco, Algeria and Libya.[24]

Notwithstanding, this "Global Approach" should be criticized by the prioritization of security and control perspective instead of development or other dimensions mentioned in this initiative. For example, in July 2006, the Commission adopted a package of measures worth 2.45 M €, financed under the Rapid Reaction Mechanism, to help Mauritania deal with the flow of "illegal migrants" to the Canary Islands. These measures include: capacity building for detection and apprehension (e.g. by patrol vessels and staff training); human detention and return of migrants; the review of the existing law, etcetera.[25] The policy outlines do not mentions how they will protect migrants from the risks they face. The proposals contain an approach that

development in Africa to generate employment "in particular in areas with high levels of migration", the reinforcement of the national border capacity of countries of transit and departure, and the campaigns to sensitizing potential migrants on the risks of illegal immigration.

22. The Foreign Ministers agreed in a Joint Euro-Africa Declaration which establishes important issues and goals to be achieved in a short term. It recognizes that the "fundamental causes of migration within and from Africa are social and economic problems such as poverty, unemployment and "uneven impact of globalization and humanitarian disaster", and that the "well-managed migration can have a positive development impact for countries of origin, transit and destination". The Tripoli Declaration emphasizes the urgency of a common strategy policy in management of the external borders by encouraging the African countries to sign the financial programs of cooperation. The objective is to assist Africa to build capacity to develop national policies on mobility and migration including training of border guards.

23. The Cotonou Agreement (Partnership Agreement between the members of the African, Caribbean and Pacific Group of States and the European Community and its Member States) was signed on 23 June 2000 in Cotonou, Bénin. In general terms, the Cotonou Agreement which replaced the old Lomé Convention was signed between the European Union and 77 countries of Africa, Caribbean and Pacific (ACP) and has two main objectives: "reducing and eventually eradicating poverty" and the "gradual integration of the ACP countries into the world economy". The article 13 (migration) of the Agreement emphasizes the importance of migration issue as a structural problem and establishes that migration shall be the subject of in-depth dialogue in the framework of the ACP-EU Partnership. It also states compromises of the parties regarding a prevention policy against illegal immigration such as readmission of people or development of strategies to constraint migration flows. This context originates a new era in the political dialogue between with the Euro-African Conferences related to Migration and Development.

24. See Cuttitta (2008:83-108).

25. Commission Staff working document; SEC(2006) 1498: Progress report on the implementation of the Strategy for the External Dimension of JHA: Global Freedom, Security and Justice, Brussels, 16.11.2006.

combines development and migration, but the short-term aim of the proposals is to "combat" migration, while development is clearly put off to an uncertain future. Thus, while a development-focussed approach may in the long term change migration patterns such as the decrease of human costs; in the short and medium term, the European Council's proposals could probably increase human costs because of its intensified security and surveillance orientation.[26]

It is interesting to consider two cases of cooperation with third countries in order to externalize the EU border controls to prevent the arrival of, mostly Sub-Saharan, migrants: the role played by Morocco and the so-called "Plan Africa" developed by the Spanish government.

2.1.1. The relationship with Morocco

Since the last years, the relationship with Morocco has been fitted in the framework of the ENP.[27] The European Union's strategy for Morocco's migration issues is based upon the acknowledgment that this is not only a departure, but also a very important transit country for a large part of migrants that are moving towards the EU.

On the one hand, as Khachani (2006) says Morocco has been repeatedly pressed by the EU and especially by Spain to become the "gendarme" of Europe. Morocco is collaborating with the EU migration policies at two levels: on the strategic level through the control and surveillance of its borders and the expulsion of "illegal migrants" out of its territory; and on the legal level by the modification of its migratory law (*Loi marocaine du 11 novembre 2003 relative à l'entrée et au séjour des étrangers au Maroc et à l'émigration et l'immigration irrégulièrs)* in order to follow, al least partially, the requirements of the EU and its securitarian priorities (2006:47). In compensation, concrete cooperation on projects aimed at developing Morocco's ability to manage migration flows has begun in the context of the MEDA budget line. Morocco received more than €45 million to deal with two main objectives: "to strengthen borders and to foster economic development in areas which produce large numbers of migration".

26. In this sense, Spijkerboer (2007:133) says that although "the introduction to such policy proposals does refer to the human costs of border control, the concrete proposals fail to clearly follow-up on this point. The European Council proposes projects that reinforce surveillance and monitoring. This is said to have "the aim of saving lives at sea and tackling illegal immigration", but the evidence suggests that measures aimed at tackling illegal immigration greatly increase the risks to migrants, including loss of life. For another critic to the global approach strategy from the point of view of Human Rights see Peral (2006).

27. The Association Agreement was signed in 26th of February 1996 and entered into force on 1st March 2001. It replaces the 1976 co-operation Agreement. This agreement forms the legal basis for EU-Morocco co-operation. It mentions the need to ensure harmonious economic and social relation between the parties in order to foster the development and prosperity of Morocco, gradual liberalization of trade, a free movement of goods in a "transitional period lasting a maximum of 12 years starting from the date of the entry into force of this Agreement", economic cooperation, a "regular political and social dialogue" that shall cover illegal migration (ENP Strategy Plan 2007-2013 for Morocco).

In 2005, the budget from MEDA to Morocco was €217 million.[28] Following a request from the Moroccan authorities, the MEDA project for the management of border controls was largely modified in order to provide financial support for a new emergency program aimed at upgrading the migration strategy as a whole, with a budget of approximately €67 million.

On the other hand, we have to highlight that in the EU-Morocco Association Council held in Luxembourg in October 2008, the EU respond favourably to Morocco's request for an advanced status of association. At this meeting, the close and trustworthy cooperation between the European Union and Morocco was reviewed. Of course, it means the continuity of co-operation on migration issues despite the denounces of several NGOs regarding the violations of Human Rights committed by Morocco in the raids of migrants, the expulsions to the desert at Oujda, or the sinking of little boats in its coasts.[29]

2.1.2. The Plan Africa

In order to face the "massive" arrivals of sub-Saharan migrants to the Canary Islands that took place in the first half of 2006, the Spanish government has focussed on the external dimension of migratory policies in the framework of the so-called "Plan Africa" for the period of 2006-2008. It has been renewed for the period of 2009-2012. This plan is like "a diplomatic offensive" to reinforce the Spanish presence in the origin countries of sub-Saharan migrants. Behind its appearance of "Spanish solidarity", its main objective was to negotiate readmission agreements with six new countries (Senegal, Gambia, Cape Verde, Guinea Bissau, Guinea Conakry and Niger).[30]

The Plan implies a new global policy approach to Sub-Saharan Africa that is focussed on three main issues: the reinforcement of the immigrants flow control, the development of Spanish economy in Africa and the fight against terrorism.[31] The strategy of the plan could be summarized in the following words: "the help will be for those who collaborate". As Romero (2006) has said "it is an unacceptable perversion of a supposed cooperation for the development".

In this framework, the Spanish Ministry of Foreign Affairs and Co-operation is becoming a main actor of migration policies, as it is responsible for the signature of the so-called "third generation agreements" which subordinate labour quotas and co-operation aid to the acceptance of readmission clauses. The first countries to sign these agreements were Guinea Conakry and Gambia. These agreements are focussed on three different but complementary issues:

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28. ENP Strategy Plan 2007-2013.

29. Among others, see APDH (2009).

30. See Romero, 2008.

31. The objectives of this Program are: 1) To contribute to democracy consolidation, respect for Human Rights, peace and security; 2) to fight against poverty and to contribute to the African Development Agenda; 3) to promote cooperation to appropriately regulate migratory flows; 4) to participate actively in the development of the EU's strategy for Africa; 5) to promote trade and investment with special focus on fisheries and energy relationship; 6) to strengthen cultural and scientific cooperation.

repatriation of illegal immigrants, integration of immigrants and labour quotas. In January of 2008, it was signed the agreement with Guinea Bissau.

Specifically without this kind of "cooperation", Spain could not expel to Mauritania and Senegal most of the migrants who arrived to the Canary Island in summer 2006, and FRONTEX patrols could not be deployed in front of the coast of these countries. However, we have to take into account that these kind of agreements could carry out the violation of human rights in many fields, as the respect of international commitments of human rights and refugees is not ensured.[32]

As Pinyol (2007:89) argues the approach focussed on the Euro-African scenario of migration that was promoted by Spain has been introduced in the common European agenda. Therefore, Spain is playing an important role regarding the development of the externalization of EU migration policies. Despite the facts that we can find the origin of these strategies (the conditionality of the aid for the development of a country for its effective control of migrants) in the framework of the European Council of Seville (2002), during the mandate of the conservative government of J.M. Aznar, it has been under the mandate of J.L. Rodríguez Zapatero, from the Socialist Party, who under the mask of being engaged with the development of the countries of origin of migration (by International cooperation aids, establishing quotas of legal workers, etc.), has strengthened the externalization of the management of borders and the development of FRONTEX (Fernandez 2008b:142).

2.2. Operational measures at the external sea borders

In order to fight "illegal immigration" and reinforce control and surveillance of the external sea border the EU (through FRONTEX, the European Agency for External Border Management) and the member States have deployed operational measures that take place beyond their territorial waters. Under the commitments of the "integrated border management", different member states participate together in these actions. This is another aspect of the EU externalization strategy for border control.

FRONTEX emerged from the intersection between the speech of the "integrated border management" and the "Global Approach" to migration (Carrera 2007). However, we could find its precedents in the conclusions of the Seville Council (2002), where there was a proposal for the creation of a series of *ad hoc* mechanisms for the cooperation between the member States in order to carry out the control of the external borders. Later the functions of these mechanisms have been absorbed by the European agency.

FRONTEX strengthens border security by ensuring the coordination of the member States' actions in the implementation of Community measures with regard to the management of the external borders. Its tasks are: "to coordinate operational cooperation between Member States in the field of management of external borders; to assist Member States on training of national border

32. For a critical view of this plan see APDHA (2007).

guards, including establishment of common training standards; to carry our risk analyses; to follow up on the development of research relevant for control and surveillance of external borders; to assist Member States in circumstances requiring increased technical and operational assistance at external borders; and to provide Member States with necessary support in organising joint return operations" (art. 2 Regulation 2007/2004).

According to the European Commission, "FRONTEX can play a crucial role in providing technical assistance aimed at strengthening the management of operational cooperation at the external borders while bearing in mind that the responsibility for control and surveillance of the external borders remain with the Member States". Likewise, it continues saying that the participation of Member States in operational activities managed by FRONTEX is a measure of solidarity, putting the common responsibility for the management of the external borders into practice since "the Agency will be able to deliver tangible results only if Member States are committed and determined to give FRONTEX the necessary human resources and technical assets for joint operations".[33]

As well as FRONTEX carries out operations at sea, air and land external borders, according to the topic of this paper, we will pay attention to the joint operations deployed in the southern sea border. The European agency has coordinated several sea operations aimed at intercepting the arrival of migrants towards Euro-Mediterranean shores,[34] but the most important one (regarding the resources invested and its length) has been Hera.

This operation started when Spanish authorities (according to article 8 of the Regulation 2007/2004) asked for operational and technical assistance from the Agency, in order to face the migratory flows towards the Canary Islands during 2006. In this framework, the agency developed the operations Hera I, II and III.[35] This scenario was in the focus of FRONTEX activities, being a part of one of the main four routes to the EU, as identified by FRONTEX risk analysis.

The objective of Hera operation was to reinforce border surveillance to discourage the exit of *cayucos* (small, open wooden boats) with migrants from the Western Africa in order to prevent their arrival to the Canary Islands. In order to achieve this objective FRONTEX facilitated technical equipment, a plane and a vessel owned by other member States, for patrolling the territorial air and sea of the countries where the *cayucos* set sail.[36] The legal basis of

33. Communication from the Commission to the Council "Reinforcing the management of the European Union's Southern Maritime Borders", Brussels, 30.11.2006.

34. See FRONTEX joint operations at http://www.frontex.europa.eu/

35. The surveillance mission Hera III has been deployed from 15th February 2007 in Mauritanian and Senegal territorial waters with a budget of 8,5 million of euros. Hera operations continued during all 2007, 2008 and 2009. For 2009 FRONTEX has doubled the budget destined to Africa [in 2008] from 12 to 24 million of euros (*Balance de la lucha contra la inmigración ilegal* 2007 and 2008. Ministerio del Interior. Gobierno de España).

36. According the FRONTEX Executive Director (Gil Arias) "to maintain a vessel and a plane patrolling [which is indispensable as the airplane detects the *cayuco* and communicates this to the vessel which intercepts it] costs 3.700€ per tour" ("Frontex descarta una operación permanente en Canarias porque 'funde el presupuesto en cuatro meses'", *Canarias24horas.com*, 11/06/07).

FRONTEX operations outside the member States jurisdiction are in bilateral operational cooperation agreements between Spain and the third countries in Africa. They allow to carry out joint operations, to train Africa security forces and to post there liaison officials.[37] As it was aforementioned, the diplomatic strategy is absolutely necessary for the development of the integrated border management.

Carrera (2006:21) explains that "[t]his operation [Hera II] sought to dissuade the *cayucos* (…) transporting irregular immigrants to set off from the African coasts. However, if the boats were already found at sea, the goal pursued was to intercept them in the territorial waters of the third country and then the authorities of the sending country would deal with the actual handling of the immigrants and their subsequent return to their territory. According to a Press Release from the European Commission 'When a target is seen, they get in touch with the other FRONTEX means deployed and FRONTEX local coordination centre in Santa Cruz de Tenerife and prepare the interception. Normally the Senegalese boats escort the migrants inshore, start the legal procedure and try to arrest the people that were paid for organizing the journey'. Only if the vessels were intercepted outside the 24-mile zone, would they be escorted to the territory of the Canary Islands and be offered the possibility to lodge an asylum claim." Those who does not ask for asylum would be identified (their nationality) and in case there is a (formal or informal) readmission agreement with their origin country, they will be returned; if not, they would be interned in a detention centre of the Islands for a maximum of 40 days, and then, they will be transferred to the Iberian Peninsula with an order to leave the country, so, they will increase the amount of irregular migrants without rights (Fernandez 2009).

The Spanish authorities also promote their own projects of pre-border sea patrols to prevent the arrival (and the exit) of irregular migrants from the African coasts. These projects have been approved and co-financed by the EU.[38] These are the Spanish-Moroccan joint patrols*,* the "Sea Horse" and "Atlantis" Projects. The Spanish-Moroccan joint patrols, which were created in 2004, involve patrols in the Moroccan Atlantic and Mediterranean coasts.

37. On February 2008 the Spanish Ministry of Interior has signed three operational cooperation agreements with Gambia, Guinea Conakry and Guinea Bissau. They must be added to the already signed agreements with Morocco, Mauritania, Senegal and Cape Verde. These agreements, subscribed for an indefinite period, permit the Spanish Guardia Civil and other European countries sea and air patrols in the 200miles of the Exclusive Economic Zone of these African countries. (Press release 29th February 2009, Ministerio del Interior, Gobierno de España).

38. All joint operations carried out by the different countries have been co-financed by European financial programmes: for the period 2002-2006 by ARGO programme (for the administrative cooperation in the fields of external borders, visa, asylum and migration); then, by the AENEAS program; and now, also by the Border and Return Funds. We would like to highlight that now Spain is the 1st beneficiary of the EU funds regarding migration, as for the period 2009-2010 is going to receive 90millions of Euros (*Balance de la lucha contra la inmigración ilegal* 2008. Ministerio del Interior. Gobierno de España).

The "*Sea Horse"* Project falls in the framework of the priorities of the "Global Approach" and the "Migratory Routes" initiative, which tries to foster the cooperation between countries of origin, transit and destination. The objective of "Sea Horse" is to improve the actions against "illegal" migration by sea towards the Canary Islands through the involving of the Western-African countries to establish an effective prevention. This project also develops the so-called "Sea Horse-Network", a secure satellite network for the exchange of information among Spain, Portugal, Mauritania, Senegal and Cape Verde. Since 2009, it also includes Morocco, Gambia and Guinea Bissau. It is funded by the AENEAS programme[39] of the EU with more than €6 million (2006-2009).[40] And finally, the "Atlantis Project" consists of the cooperation between the Sea Service of Guardia Civil and the Gendarmerie of Mauritania, to carry out joint sea patrols (with a crew of 8 Spanish and 2 Mauritanian officers) in the territorial sea of Mauritania, in order to control the flow of vessels of clandestine migrants with destination to the Canary Islands. The material and human resources are financed by the European Commission and the Civil Guard, with a 400.000 € cost."[41]

This kind of controls at the EU's Southern border, as Parkers (2006:5) remind us, were already criticized because "they were felt to advocate an ambiguous understanding of the principle of territoriality in order to maximize the EU's capacity to block migration whilst minimizing migrants' opportunities to activate rights. The proliferation of such operations in international waters has drawn comparisons with the establishment of international zones in airports; such zones create areas in which migrants are unable to claim some or all the rights available to claimants on state territory. A lack of clarity about the immigration powers of member state officials operating in territorial, foreign and international waters has admittedly helped scupper earlier sea-bound joint operations (…), however it has also led to a diffusion of liability and responsibility for such measures; this diffusion is compounded by the complex interplay of legal regimes, the lack of judicial and public oversight, as well as by the involvement of different member states and now FRONTEX".

The extra-territorialisation of control activities also allows the politicians responsible of the implementation for the mentioned measures to avoid the legal requirements related to the migration controls that take place in the member States. This means to follow the Schengen Border Code[42] (Carrera

39. The aim of AENEAS program is to give financial and technical assistance to third countries in the area of migration and asylum.

40. *Balance de la lucha contra la inmigración ilegal* 2008. Ministerio del Interior. Gobierno de España.

41. Guardia Civil, *Proyecto para el control de la inmigración irregular*, Ministerio del Interior, Oficina de relaciones informativas y sociales, 2006, http://www.guardiacivil.es/prensa/notas/index.jsp

42. Schengen Borders Code determines how the external borders of the EU must be controlled in a detailed way setting out more clearly than any national law has done before the rules on admission (and refusal of admission) at the external borders of the EU. For those who are refused admission there is the right to a written notice of refusal; the refusal must be motivated by

2007); and as most of them are joint operations carried out by the authorities of different countries, it is also difficult to establish the responsibilities and the jurisdiction (Rijpma and Cremona, 2007:17).

With Rijpma and Cremona (2007:24), we agree that if the EU will go on using the extra-territorialisation as an instrument of its migration policy, it should address seriously the issue of ensuring a concomitant extra-territorialisation of the Rule of Law, particularly the effective judicial review of administrative actions.

Up to here, we have seen some of the devices deployed in the south-western European Border to prevent the arrival of clandestine migrants. Nevertheless, the more resources inverted, the more sophisticated surveillance equipments installed or the more border patrols deployed, the greater number of people will continue abandoning their countries looking for a better future, so people will continue migrating in a clandestine way (as their will has nothing to do with the needs of the labour of the EU) through new methods and new routes (even if it makes them take more risky strategies for their lives) (Fernández 2008b:155; Walters 2004). In the last years, the clandestine ways to arrive in Europe through its southern borders have increased and the causalities involving irregular migrants on their way to Europe have not decreased. Neither restrictive immigration policies, nor tightened and delocalized border controls result in changing this situation (Cuttitta 2008).

3. Some consequences of the Euro-Mediterranean border policies from the human rights overview

Control measures of immigration –above all at the European southern border– such as interception, devolution and repatriation actions, have provoked the violation of different fundamental rights. In many cases, it is due to the direct intervention of member States' authorities (under the coordination of European agencies or not) or to the intervention of African security forces applying assignments or measures funded by the EU or its member States.

Essential rights, as the right to physical integrity, the person's dignity, or even the right to life, have been violated (and they still are) in several opportunities while executing those policies directed to prevent irregular immigration.

Regarding this issue, *Médecins Sans Frontières* (2005:15) has stated that: "[o]f all the places, stages of journeys and times when ISSs [illegal sub-Saharan immigrants] are victims of violence, it is the Moroccan-Spanish border

clear and precise reasons; the motivation must conform with the regulation; there must be a right of appeal against the refusal; the member state must provide information on how to exercise the right of appeal and how to obtain legal assistance in order to do so. Furthermore, the exercise of border control must respect the dignity of the individual; officials carrying out the controls must not discriminate on the basis of race, religion or other grounds (other than nationality). (Guild, Carrera, Balzacq 2008: 10).

areas where the majority of incidents occur. Such incidents involve both the Spanish and Moroccan SF [Security Forces] and include arrests, excessive use of force, degrading treatment and abuse, sexual violence, extrajudicial expulsions and expulsions of persons at risk".

In the same sense the APDHA (2007) denounces that massive repatriations are not taking into account case by case separately. Moreover, there are not enough safeguards to ensure that repatriation are being made to the true country of origin, or that repatriated persons will not suffer any degrading treatment or torture, or they will not be abandoned in the middle of the desert, as it has already happened in many occasions. The APDHA also reported that many migrants returned to Senegal have been tortured, sanctioned or imprisoned, and in most of such cases the right to asylum has not been fulfilled.

In addition, the CEAR (2006:51) has asserted that Moroccan authorities, after the detention of persons returned by Spain, have taken them by buses to their southern or eastern border, –semi-desert areas where temperatures may range from -6ºC in winter to 43ºC in summer–, leaving them there without water, food, shelter and exposed to the action of criminal groups that take advantage of their situation to rob them their few possessions.

Similar abuses have been reported by *Médecins Sans Frontières* (2005:14). Some of its members "has witnessed pregnant women, juveniles and even seriously ill persons (patients with chronic pathologies such as TB or AIDS) being taken to the Moroccan-Algerian border where they are abandoned regardless of appeals made to the Moroccan authorities to release them immediately on medical and humanitarian grounds."

These denounces about the violation of persons' rights at border areas by security forces of both countries involved (in these cases, Spain and Morocco), as well as for the inhuman or degrading treatment that many repatriated or returned people have experienced, reveal patterns which do not fulfil at all the obligations assumed by the International Human Rights Conventions.

3.1. Losing life when trying to reach the border

As it has been reported by Fortress Europe at least 13,767 people have died from 1988 to 2007 along the European frontiers.[43] As it has been aforementioned, the emergence of new migratory routes, as the one from Mauritania and Senegal to Canary Islands, is closely related to the restrictive immigration policies implemented by Spain and the EU during the lasts years. Either by security, economic or market reasons, the measures that have been adopted to prevent immigration from some African countries (such as the SIVE or the joint patrols and close cooperation with neighbouring countries) are the main cause of the risky travels for thousands of migrants who try to reach the European territory.

In fact, several scholars and the civil society have pointed out the relationship between those policies and the increase of people who died on

43. See footnote No.1.

those journeys.[44] In this sense, SOS Racism (2006:140) has asserted that the policies promoted by the Spanish government, as well as by the European Union, are deeply inhuman, offensive, unfair and they contribute to harden and worsen the situation of those people who have decided to leave their country seeking for better life conditions. Talking about this matter, Khachani (2006:29) reports that, according to the Red Half Moon from Mauritania, over the 40 percent of the vessels that leaves the coast of this country towards the Canary Islands (a route that is longer than 1.000 kilometres) shipwreck during the passage, and that between 10th November 2005 and 6th March 2006, nearly 1200-1300 people would have lost their lives getting drowned while trying to reach the Islands.

On this subject, Spijkerboer (2007:13) wonders about which would be the European State's responsibility and obligations with relation to the increase of causalities of migrants in the Mediterranean Sea and the Atlantic Ocean. He also states that if "it is clear that a particular set of State policies will lead to increased fatalities, it seems reasonable to take account of this in policy debates. Until now, however, this has not happened in the debate about border control".

3.2. The deprivation of the right to freedom as one of the consequences of "emigration" control policies

In many occasions, one of the direct consequences of immigration control measures from Africa to Spain, particularly the returning, devolution or repatriation decisions, is the deprivation of freedom of those who are the objects of such acts. In some of those cases, because the very same African countries legislations[45] penalize the "illegal emigration" with imprisonment, while in others, because those people are sent to "Detention Centres" that Spain or Italy, for instance, have installed and are managing in the African territory –like in Noadhibou[46] or the several camps of Libya[47]–, and even in certain cases –as we will see later– in *ad hoc* detention places and under inadmissible conditions.

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44. For instance, among others, cfr: Amnesty International (2008); APDHA (2007/2009); CEAR (2006); Cuttitta (2008); Fernández Bessa (2008/2008b); Mazkiaran (2008), Romero (2008), SOS Racismo (2006); Spijkerboer (2007).

45. In this sense, article 50 of Moroccan Migration Law (Law 02-03), penalizes with a fine of 3000 to 10000 *dirhams* and with 1 to 6 months of imprisonment, jointly or alternatively –even though Criminal Code provisions on this subject– to those persons who illegally leave Moroccan territory using to cross one of the continental, maritime or aerial borders, an unlawful mean to avoid presenting required official documents or fulfilling the formalities established by law and other regulations in force, or using forged documents or by the usurpation of names, and to those people who enter or leave Moroccan territory through different places than the ones created with that purpose. When analysed the Moroccan Migratory Law 2003 modification and its security forces actions during the last years, different sectors emphasize not only on its repressive nature, but also the connection between these practices and the UE interests (Khachani 2006:48-50).

46. See Amnesty International (2008).

47. Cfr. Cuttitta (2008).

Criminal legislation or migratory laws passed in the last years in some African countries, characterized by being transit zones and/or departure points of migrations to Spain, have been reformed in order to expressly criminalize "illegal emigration". In some cases, despite of the fact that there is no specific information available about applicable rules, the implemented practices also reveal the progressive criminalization of emigration by irregular means, or even the attempt to do so. Therefore, the search for international protection or better living conditions by the only channels allowed by destination countries laws (plenty of national and international security elements) has been progressively turned into a "criminal" behaviour, despite the fact that we are really dealing with the exercise of fundamental rights under extremely vulnerable conditions.

To a great extent, this situation happens in different countries of the region, which are increasingly involved in EU policies to control the exit of migratory flows[48]. Different proposals made by certain EU States (jointly or separately) to African countries, the several agreements (formal and informal) recently signed, and concrete actions that have been taken place in waters and coasts of countries such as Mauritania or Senegal, are a clear proof of that. As a consequence of these measures, thousands of persons intercepted in these zones later had to face their freedom deprivation (Spijkerboer 2007:130).

Even though it might be possible that national or international courts will be the ones in determining the legitimacy and reasonableness of such measures, we could assume that in several cases it will be stated that this kind of restrictions constitutes a violation of the fundamental right to freedom, among others rights. The tendency to punish irregular migration means not only to criminalize an action that no way can be considered a crime but also to punish the exercise of a fundamental right.

3.3. Interception and devolution in the sea: a systematic denial of the right to asylum

The interceptions and devolutions carried out by the Spanish and other European authorities mean in many cases the impossibility of thousands of people to reach the European territory or, at least, to leave their countries.

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48. Considering this situation, in which thousands of people are detained after being repatriated or returned, it is relevant to observe again the decision taken by the Inter American Commission of Human rights in the "Haitians Case". There, in relation to the right to liberty of those people that had been intercepted, the Commission affirmed that "the act of interdicting the Haitians in vessels on the high seas constituted a breach of the Haitians' right to liberty within the terms of Article I of the American Declaration"70. This interpretation could be interesting for the analysis of the EU and Spanish policies in the High Sea, and especially in African countries territorial waters, which includes not only the interception and returning itself but also (in most of the cases, as we have described) the detention after that, and in many occasions could be as an accused of a crime ("illegal emigration").

In these cases, as we have seen before, FRONTEX patrols are in charge of stopping the *cayuco*s found in the territorial waters of some African countries, and returning them to the African coasts. Therefore, even the European (mainly, Spanish) authorities are those who make the decision of intercepting the boats of migrants, they do not take into account, case by case, the situation of each person. They are just left under the control of the African authorities, who will finally decide (in most of the cases) what to do with the intercepted people.

The possibility that one of these people could be an asylum seeker is not taken into account in the interception and devolution proceedings, because this kind of decision is trespassed to the African country involved in each case. It is quite paradoxical that whereas the officers do not allow them (*ipso facto*) to ask for asylum, at the same time authorities from several European countries (including Spain) do recognize refugees coming from the same countries of those intercepted and returned people.[49]

Therefore, if they reach the territory (by sea, air or land) or at least the international waters, they may have the opportunity to seek asylum in a European country, but if they are stopped before getting to the international or European (territorial) jurisdiction, they will be unable to do it. This unacceptable situation reveals the illegitimacy of the current proceedings.

In November 2006, the European Commission has asserted that, taking into account that "irregular maritime immigration at the European Union's southern maritime external borders" could imply not only migrants but also asylum seekers, "it is necessary to ensure coherent and effective application of the Member States' protection obligations in the context of measures relating to the interception and rescue at sea of persons who may be in need of international protection, as well as the prompt identification of persons with protection needs at reception sites following disembarkation. It should be underlined, that third countries are, of course, under the same obligations in this respect."[50] So far, the existing information about the interceptions would reveal that these guidelines are not being implemented yet; therefore it would be desirable that they do it with the proper urgency.

49. In 2005, Spain admitted the asylum request made by 34 people from Algeria, 38 from Cameroon, 5 from Gambia, 27 from Guinea, 6 from Guinea-Bissau, 26 from Guinea Equatorial, 19 from Liberia, 9 from Mali, 71 from Nigeria, 119 from Democratic Republic of Congo and 23 from Sierra Leone (CEAR, 2006:86). It is true that the numbers are not very high, and also that the admission of the request doesn't mean that they will finally be recognized as refugees, but it reveals that at least there are some indications that could cause that they need international protection. Those intercepted in African waters by European patrols, are not able even to present these indications (to ask for this first admission of the asylum request) before the authority that prevent them to leave their country (of origin or transit).

50. European Commission, Reinforcing the management of the European Union's Southern Maritime Borders, Communication from the Commission to the Council, COM (2006) 733 final, Brussels, 30.11.2006, paragraph. 10.

Notwithstanding, it does not seem quite coherent that member States authorities (as the Spanish ones) intercept and return people going to the Canary Islands (for example, nationals from Guinea) without considering at all if they could be asylum seekers. At the same time, the European Parliament adopted unanimously a resolution criticizing the repressive measures that had been taken by Guinea's authorities to deal with social and political unrest.[51]

Gil-Bazo (2006:577) reminds us that, in 2005, "Amnesty International reported its concern that migration control measures, including visas, carrier sanctions and immigration controls undertaken in countries of origin, were preventing refugees from accessing the protection guaranteed under international and national legislation. Many of the people who arrive to Spain via Morocco, both through the Spanish city of Ceuta and the Canary Islands, come from countries including Algeria, Cameroon, Côte d'Ivoire, Congo, Democratic Republic of Congo, Gambia, Ghana, Guinea-Bissau, Guinea Conakry, Iraq, Mali, Niger, Nigeria, Liberia, Senegal, Sierra Leone, Sudan, and Togo; many of whom have a background of serious human rights violations. The organization believes that often individuals are prevented from requesting asylum in the Canary Islands and are made to wait until they are sent to the mainland, which puts them at risk of a speedy removal before they have had the chance to formalize their asylum claim. In the case of Ceuta, the organization continues to report cases of 'disappearances' among asylum seekers who are expelled to Morocco in breach of Spanish and international law, often during the long waiting period between reporting themselves to the police and the appointment given to formalize their claims. The total number of people who have been secretly expelled is not known, nor is the presence among them of refugees fleeing human rights violations who have been deprived of the chance to seek asylum".

The contradictions and irregularities that these policies generate cannot be justified either by "legitimate objectives" as border control or international security or the so-invoked humanitarian intervention for saving lives in the high sea.

In this sense, and while they were explaining the technology elements for their challenges at the EU southern maritime border, FRONTEX representatives announced that such "system would use modern technology with the aim of saving lives at sea and tackling illegal immigration".[52] In different occasions, the reference to these savings has been done as one of the "nice" faces of immigration control and security measures. Nevertheless the issue is that within the current context in those waters, the rescues constitute a legal obligation, not a favour or a charitable attitude. The "rescues" of thousands of people that are travelling on the boats towards the Canary Islands, although they are appreciable measures, they are also part of the legal responsibilities of the States that are controlling the waters, since the International Law

51. European Union Parliament, Press Service, 15/02/2007.
52. FRONTEX, Report of Activities of FRONTEX between 1st January and 30th June, 2006.

clearly establishes the obligation to save or rescue people in danger within the sea.[53]

3.4. The violation of the principle of *non refoulement*

The available information reveals that the interventions and the returns to Africa, performed by the Spanish or other European authorities, have not ever been examined case by case. This procedure could imply the violation of the principle of *non refoulement*.

This principle, as it is known, is an imperative act (*ius cogens*) of the International Law, therefore it cannot be affected at all by any national or regional law, no matter the level of legitimacy of the aims invoked.

The due respect for the principle of *non refoulement* (or non devolution) is required in any situation where a person could be returned, deported or repatriated, whatever the status of that person (immigrant, asylum seeker, refugee, stateless, etc.) is and wherever the place in which the person is (the responsible entity is the State that exercises its jurisdiction upon such a person).

Despite of the fact that this principle aspires to protect the rights to life, liberty and physical integrity, the main idea behind it, is to avoid the trespass of a person from one country to another where his/her rights can be violated. In this sense, the UN Human Rights Committee has affirmed that "if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant [International Covenant on Civil and Political Rights] will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."[54]

It is important to notice that the European Court of Human Rights stated that "(...) the formal characterization of the act through which the individual is actually transferred to the jurisdiction of another State is without relevance for the applicability of the principle of *non refoulement*, as that principle applies equally to extradition, deportation, expulsion of illegal immigrants and irregular renditions." (Case of Chahal v. The United Kingdom).[55]

Several international decisions by organs as the European Court, the UN Human Rights Committee or the UN Committee Against Torture, also addressed the ruling of the principle of *non refoulement* to those cases in

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53. See in this sense the United Nations Convention on the Law of the Sea (UNCLOS Convention); the Convention for the Safety of Life at Sea (SOLAS Convention); the International Convention on Maritime Search and Rescue (SAR Convention); obligations of the international refugee law; IMO (Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea, IMO circular msc/circ.896/rev.1, 12th June 2001, http://www.imo.org/includes/blastdataonly.asp/data_id=3881/896rev1.pdf. Annex,paragraph. 5).

Cfr. Mazkiaran (2008: 193-206).

54. HRC, Communication No 470/1991: Canada, CCPR/C/48/D/470/1991, Jurisprudence, 18th November, 1993, para. *6.2.).*

55. *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at: http://www.unhcr.org/refworld/docid/3ae6b69920.html

which a State delivers a person to another State, and subsequently, this State transfers also to a third one where there could be risks about the breach of it fundamental rights.

In the case of intercepted and diverted people to African countries, that presumption is much more weak or even does not exist, and not only because this States are not bounded by the European Convention (they are bounded by other similar treaties) but particularly because of the amount of existing information that could legitimately generate doubts about a plenty fulfilment of the principle of *non refoulement*. The facts denounced (at the end of 2005) about the treatment given by the Moroccan government to those returned from the borders with Spain in Ceuta and Melilla, are an indicator of this concern. The detentions of returned people (*de iure* or *de facto*), and the conditions of such detention in some cases, are also elements to be taken into account.

As we have already expressed, the people intercepted at the European borders or when trying to reach them, are within the jurisdiction of the European involved authorities. Therefore, the State must take the necessary measures to fulfil the human rights requirements (including the right to seek asylum) and it is obligated to analyze, case by case, if a returning decision could breach the principle of *non refoulement*, regardless the fact that they are migrants or asylum seekers. As Peral asserts (2006:8), in the particular case of refugees, if the access to the border is blocked, those who escape from persecution will not be capable of finding international protection and, in the case of migrants without regular travel documents, to prevent them from entering, knowing that they might be abandoned in the desert, in a situation in which there is a certain risk for their life and liberty, means also a breach of such principle. In both cases, the State will not be respecting obligations that are inherent to its condition of a Rule of Law.

3.5. The right to a due process in law

In the action of intercepting and returning people, as we have already said, many fundamental human rights are under dispute. We will analyze here the issue of the right to due process of law in the control operations at the southern border.

This mentioned right, as it is well-known, has been recognized by every Human Rights Convention, and aspires to assure every person enough guarantees for the defence of their rights, and includes different elements, such as: the right to defence, the right to be heard, the right to appeal against an administrative decision (either administrative or judicial authorities, or both), the right to obtain a motivated decision, the right to be informed about the facts in which the prosecution is based, the right to an independent and impartial court, etcetera. We will not analyze in detail each one of these rights, but we will focus on some questionable aspects of southern border control policies, from the "right to due process of law" perspective.

The first aspect to be mentioned is that the interception practices in African waters that have been previously described do not only ignore the obligations

assumed in the International Human Rights Law regarding the guarantees of due process, but they also fail to fulfil the very same European Union Law, particularly established for borders control policies.[56]

The Information offered by both European and African officers that intervene in these operations, as well as the media coverage of this actions, would reveal that intercepted people cannot use their right to appeal against the decision and they are not informed about where and how could exercise that right either. The issue is that there is not even administrative act disposing, in each case and for each person, the prohibition of continuing the journey, entering the international and/or Spanish waters, and ordering the return to the departing place or to other part of African coast. This is how a first consequence of these interventions and operations is to breach Communitarian Law. Furthermore, rights and guarantees recognized at the European Union, are systematically transgressed at its borders, even despite the fact that people intercepted at sea by the EU patrols are under European jurisdiction.

The interceptions in African waters ordered by the European authorities, denies or ignores the right to a motivated (and written) decision that expresses the causes of the denial to move freely and to enter the European territory, along with the right to be informed about appeals against that decision and, consequently, to use that "right to appeal", the right to access to a legal procedure and access to justice. We are dealing with particular policies which are based in *de facto* administrative decisions, excluded of the basic and lawful procedures established in the international human rights law, European countries legal frameworks and the European Union Law.

At the Spain-Morocco border (Ceuta and Melilla) in the last years several cases in which the return of Moroccans and Sub-Saharan people took place without guaranteeing the right to appeal against the decision, the right to justice, the right to a motivated decision by public administration and even, in many cases, the right to claim for asylum has been denounced. One of the most dramatic cases of such irregular measures took place during the events between August and October 2005, when hundreds of people tried to cross the borders of Ceuta and Melilla. In this occasion, as it was questioned by different political and social actors, dozens of people were detained, deported or returned by the Spanish government through fully irregular decisions, without any respect of due process basic guarantees. Reports as those made by the APDHA (2006), SOS Racism (2006) or even by the Commissioner for Human Rights of the Council of Europe[57] describe pretty well the massive

56. See for example article 13.3 of the Schengen Borders Code, which asserts that all persons "refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national". This provision has been introduced by the European Parliament during the process of the elaboration of this regulation.

57. Report by Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Spain, Strasbourg, 9th November 2005, para. 123.

violation of human rights committed in that time, both by Spanish and Moroccan authorities.

Anyway, there have been many more cases that civil society organizations had exposed, as it was done by *Médecins Sans Frontières* (2005:16/17) and the CEAR (2006:48; 55/59) which reveal a repeated practice of devolutions or returning of migrants to Morocco, Mauritania or other countries without taking into account the essential guarantees of a due process of law, recognized in international human rights treaties, the Spanish Constitution and in the Spanish immigration law.

5. Conclusion. The requirement of a right-based approach on migration policies

Up to here, we have analysed the general framework of the European migration policies, the actors and stages where border management is implemented, the new strategies developed at the EU level to control "illegal" migration at the southern borders, and finally some of the consequences of their implementation, as a concrete example of what it is really happening at the European borders, and paying special attention to their external dimension.

As we have seen in the previous pages, the precarious conditions of migrant people coming to Europe from Africa by the new migration routes (specially from North-western Africa to the Canary Islands) and the new European instruments to prevent irregular migration, imply an important challenge for the EU in the field of Human Rights, especially in a context where borders cannot be considered anymore just a geographical issue or an issue related exclusively with the national states.

Taking into account this framework, we have shown this complex reality in detail through one of the most important (and at the same time the most absent) element in the design and the implementation of these policies: the International Law of Human Rights. We have tried to underline that, from the point of view of human rights, security issues cannot be the essential criterion to "manage" migration.

In this sense, we have seen how most of the measures implemented by the EU and Spain in order to prevent, detain and sanction migrant people coming to Europe in an irregular way, are seriously affecting many recognized fundamental rights: the right to life, liberty and physical integrity, the right to asylum, the right to a due process and, of course, the right to leave the own country.

In view of these scenario, it is essential to open a real debate for the universal recognition of freedom of movement, which implies not only the right to leave the own country but also the right to enter to another. Today, this is a right that only could be exercised depending on certain conditions of the subject, such as his/her nationality or personal assets. The recognition of this right do not necessarily mean to remove borders, neither to end up with the State sovereignty, but to face this topic from a completely different point

of view, the point of view of Human Rights, which will obligate to revise all migration laws.

The analysis of the current international human rights standards clearly reveals that migration control policies are very far from fulfilling properly the obligations committed by the countries in the different human rights treaties, in the EU law or even in the internal law of Member States.

They are practices that if they took place in any other policy field, they would be considered unacceptable or at least "exceptional", but as we have seen, some migrant people, specially those who come from the poorest places of the world, are suffering them on daily bases. In this framework, we found how the regression of the Rule of Law, one of the foundations of the European countries, allows the States reasserting their policing functions instead of guaranteeing human rights.

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The "Rule of Law" as a form of government: Internment of Illegal Immigrants in the European Union and in France

NICOLAS FISCHER

1. Introduction

The contemporary development "immigrant camps" in Europe as in the entire western world has called the attention of both law experts and social scientists. The existence of these camps indeed confronts us to an already old form of confinement (administrative detention) that is nonetheless highly problematic in the context of democratic states that claim to follow the principles of the *rule of law*. "Camps" may indeed be defined as non-penal institutions of confinement, which depend on the administrative rule of the Executive power, and which are run for most of them by the police. As such, they are not designed to only punish or rehabilitate the detainees, but to permanently set aside undesirable groups, for political, economic or security reasons (Bernardot 2008). The now classic analysis of Italian philosopher Giorgio Agamben has proposed in the 1990s a useful analysis of this logic, depicting camps as "exceptional" places where a human being may no longer be recognised as the lawful citizen of a state (Agamben 1995). The lives of the inmates is then politically and legally irrelevant and is reduced to the "bare" life of basic human beings without a status, turning camps into the very opposite of what the enforcement of legal protection should be. The visibility or the opacity of the confinement places and of the inmates themselves is essential in this denial of legal existence: bare lives are lives that leave no trace, whose treatment is not reported or supervised as it is in a legal procedure, and whose destruction itself has no witness.

While drawing on this theoretical model, this contribution will propose a progressive and "dynamic" approach of the exceptional status of immigration camps. As the distinction of legality and illegality, the opposition between exception and the rule of law should indeed not be taken as a static definition, making all camps equally exceptional while legal protection only exists for European citizens (De Genova, 2002). The denial of legal protection and the

production of a bare life exposed to any kind of mistreatment are actually part of a general scheme of government of immigration, where the rule of law is differentially enforced according to what is more efficient and cost-effective for migration control in a certain place at a certain time[1]. As stated before, this differential enforcement of Human Rights is also a differential economy of the visibility or invisibility of confined immigrants: the more visible they get (for the public or for law experts or Human Rights advocates) the more likely they are to be effectively protected. On the contrary, invisibility accentuates the risk of injury or disappearance without testimony that has just been described.

Evoking the "economy" of visibility and law enforcement implies that this differential denial of rights does not occur by chance, but is the outcome of a general government of immigration in Europe. This contribution will not draw a precise picture of this "visibility policy", but will only propose an outlook of the way it affects the treatment of immigrants. Such an analysis supposes to address the different running of camps, depending on the history of the state which runs it and on its geographic position (exposed to high levels of illegal immigration or not), and finally, on the political interest of making camps more or less formal and compliant with the rule of law – or not. Some camps may for example be kept as informal, precarious and opaque devices: this is the case of many immigrant camps at the external border of the Schengen area, as well as for a variety of provisional relocation places inside Europe, which will be shortly evoked in the first part of this contribution. The second part will address the situation of more formal, permanent and visible European camps. For these places, the more formal organisation of the centers rule of law will be at least partly enforced as a somehow "useful" contribution to the management of illegal immigration. As Foucault's analysis on "liberal governmentality" implies, the enforcement of the rule of law does not prevent the control of immigration in this case, but actually contributes to the existence of a legitimated and consolidated system of immigration management –Foucault 2008; Inda 2006–. This point will be made out using part of the ethnographical material gathered for a Phd dissertation on French immigration detention centers for deported foreigners known as *Centres de rétention* (Fischer 2007).

2. The contemporary externalisation of the confinement of immigrants: a graduated escape from the rule of law

As Didier Fassin writes, the value given to human life in the contemporary western world, and the protection it will then be granted, largely depends on the proximity of the individuals who claim it (Fassin 2005). As simple human beings, immigrants who seek protection –among which asylum seekers are the best example– are entitled to some rights once they have reached the

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1. I take the notion of "government" in the meaning it received in the works of Michel Foucault (Foucault, 2008).

European shores and have managed to draw legal attention on their situation. For more than a dozen years, it has then become a plainly assumed policy to "keep as long as possible those foreigners in the zone of the moral space where their life may be sacrificed –in countries where human rights are not respected– and to stop them from reaching that other zone where their life would become sacred –e.g. a fundamental human right which could no longer be denied to them" (Fassin 2005:45 my translation). This movement has materialized through the contemporary process of "externalisation" of border controls and of the confinement of immigrants: detention facilities have risen on the external border of the Shengen area, with the double objective to "contain" immigrants in zones were the EU rule of law is not supposed to be enforced, and to make them "invisible" by keeping them away from the press or any actor likely to bring their existence to the public.

This is why so many camps created on the external European borders are to remain emergency facilities, characterized by their precariousness and their provisional dimension –though they may actually last for a long time. In others words, the emergency situation of immigrants is seldom the result of an unanticipated influx of migrants, but is more commonly the result of a deliberate policy which aims to maintain and govern immigrant precarity. This is the case in the "official" camps currently appearing on the "exposed" Mediterranean shore of the EU. Malta, Cyprus, or the Italian island of Sicily receive a growing number of immigrants, but who above all receive and keep on their soil many asylum seekers who are now compelled by the "Dublin II" legal provisions to make their claim for asylum in the first EU member state that they reach. Designed to keep them away from central Europe, this regulation has led to the systematic detention of all immigrants (mostly asylum seekers, but including people who have actually been granted with the status of refugee) in highly "repulsive" and precarious camps (Rodier & Teule 2005; Médecins du Monde 2007). But the harshest situation is that of immigrants who are stopped before entering the EU, and therefore have to wait at the external border of the Schengen area (in North Africa or Eastern Europe) for an opportunity to "get in". Describing the situation of Senegalese migrants waiting in Morocco to enter Spain illegally, Anaik Pian shows for example how the toughened control of Mediterranean borders progressively settles them in a long-run transitional situation (Pian 2007). She first shows that immigrants are not mere victims, but are able to organise their illegal condition: they notably gathered in informal camps such as Gourougou and Bel Younès, which turned into small, self-run communities[2]. At he same time, these illegal practices remain under control of state authorities. Although they were not created or run by the Moroccan government, Gourougou and Bel Younès were tolerated until 2003-2004 and were then raided by the police and closed, forcing the immigrants to go back to an ever more precarious way of life (Valluy 2007).

2. For example, the camp of Bel Younes had an elected "President", with an informal "law" and migrants appointed as "blue helmets" to enforce it (Pian 2007).

In the case of Morocco, this precariousness may lead to exposure of immigrants to inhuman treatment or death – as for example, when migrants are abandoned by policemen in a desert area, as it has been reported various times (Migreurop 2006). This production of bare life is obviously related to the invisibility of migrants and of police action – which takes place in locations were the press and local or foreign NGO representatives are barely present. The situation is slightly different for migrants who have succeeded in entering the EU, as it is less likely they will be exposed to extreme, "exceptional" situations leading to immigrant fatalities. But all the same, a major policy will be to keep illegal immigrants invisible in the same way, in order to prevent acts of solidarity from local citizens, and to stop the migrants from formulating legal claims directed to state authorities. The best example here is probably the French camp of Sangatte (Courau 2007). This "housing and emergency reception center" was an open camp, created in 1999 in the northern region of Calais for illegal immigrants, trying to enter Great Britain in order to seek asylum there for most of them. Although undocumented in France, these immigrants could not legally be sent back to their country of origin, were their lives could be endangered. The goal of Sangatte was therefore to control a population that durably remained on French soil, by preventing the immigrants from settling in the Region of Calais into self-built housing and slums, and by regrouping them into an official location where they could receive humanitarian aid, but which above all permitted to set them apart from the population and to identify them, making their presence less obvious than in the streets of Calais. But the camp itself eventually became too visible and turned into a permanent stop for migrants going to Great Britain (Bernardot 2008). It was then closed in 2002, bringing the migrants back to their former precarious life. Local NGOs have now replaced state authorities in dealing with the sanitary consequences of this situation, notably the development of serious illnesses such as tuberculosis among immigrants (*Coordination française pour le droit d'asile* 2008).

In these cases, confinement devices are created and run as informal locations which are supposed to remain as such: the goal is for the migrants to stay precarious, prevent them from settling endurably on the land or from entering legally processed relations with state authorities, with the risk of exposing them to physical threats. This first logic contrasts with the running of other "camps" used for the enforcement of immigration control. In this case, confinement is part of the legal procedure that rules forced returns or deportations. The camp then is a formal institution, made visible and controlled in the name of the rule of law. Two remarks should however be made: first, the rule of law in this case is not a "limit" to immigration control, but part of its organisation. Second, this visibility of the treatment of immigrants does not stop opacity and the possible exposure of bare life, but modifies the social conditions in which such an exposure can occur. These points will be clarified here drawing on the example of French immigration detention centers –*Centres de rétention*.

3. Games of visibility and opacity in French *centres de rétention administrative*

The contemporary government of immigration also requires more formal "camps", taking part in an institutionalised control. In that case, the detainees themselves are provided with a formal legal status, and can therefore be processed by the State according to a judicial procedure. This goes, for example, for the official "Reception Centers", where asylum seekers wait for their claim to be processed. But I shall particularly focus here on another important category of "formal camps": the openly repressive and closed-in immigration detention devices designed to process immigrants whose entry or stay in the country is considered illegal, and who face or may face deportation to their country of origin. In this case, the camp is inserted in a legal framework, and actually communicates with the penal system, as some immigration detention centers are settled in local jails (as in Germany), while many convicted deportees are actually released from prison into immigration detention. As a result, the camp is no longer informal – which does not mean that the rule of law is systematically enforced, but that it is used as a tactical resource in the management of the camp and of deportation. The situation of those immigration detention centers is very diverse in Europe, but I will draw here on the case of French *Centres de retention administrative* –CRAs-, which may be considered highly representative of what the rule of law can "do" to a camp in a democratic context (Fischer 2007).

The recent history of *Centres de retention* has indeed everything to do with their public visibility: located in French cities, they have become more and more publicly visible, to the point where their visibility was actually institutionalised (through the permanent presence of human rights advocates inside the centers), and as result organised and, to a certain extent, ruled. In itself, the practice of confining deported foreigners (while waiting for the material and legal means to send them abroad) is probably as old as the policing of foreign populations itself. Starting in the 1900s in France, scattered traces of this particular form of control may be found, but always with very few precisions: *rétention* precisely remained at this time a mere police routine with no legal basis, and which use only depended on practical considerations on the time needed to remove the deportee. As alien's police practices in general, it was hardly recorded or monitored, and was mainly ignored by the public. It is all the more interesting to consider how *rétention* evolved when it forcibly went public in the 1970s and 1980s, and became an official institution.

In the mid-1970s, an informal "Centre" was indeed "discovered" by a journalist, and became the target of both public criticism and legal action from Human Rights advocates, as an obvious contradiction to the principles of the "rule of law". The paradoxical result of these critiques was the "legalisation" of *Centres de rétention* in the 1980s, and a major change in the distribution of power relations inside the centers that were to be built in the following

years. Until that decade, the places used for the confinement of foreigners all shared the main characteristics of emergency camps: they were settled in precarious, informal locations, usually buildings diverted from their original use (warehouses, military or factory facilities). Their legalisation then sparked off a three-faceted change in their organisation. First, *rétention* became an official institution, defined by a specific legal status gradually framed throughout the 1990s and 2000s[3]. Second, CRAs became permanent devices, settled in perennial places specifically designed for immigration detention: 24 centers are now working nationwide, most of them near the ports and airports of major French cities, and used in a ever more rationalised way[4]. Third, centers are now "specialised" institutions. While being run by the police, they now include professional medical staff and social workers. But above all, they include since 1984 the intervention of independent lawyers from the Cimade, a Human Rights organisation which has received the ability to enter the centers in order to check on the respect of detainees' rights, and to provide them with legal aid.

This triple evolution of CRAs is interesting in multiple ways. As centers went public, they progressively went out of the informality and the precariousness that characterised their status of emergency, and became more and more controlled institutions. As we have just seen, this major change has not limited the rise of immigration detention in France, and the now widespread use of CRAs for the confinement of deported immigrants: the legalisation process went with the development of their use, and actually *sustained* it. In other words, the existence and the enforcement of the "rule of law" in the case of French *Centres de retention* became part of a specific policy where it does not prevent the control and deported immigrants, but where it is itself part of a specific way of governing deportation. This is all the more true as French CRAs have been made visible as the same time to specific, non-governmental actors who act as independent supervisors of police practices and providers of legal aid inside the centers.

The presence of actors officially appointed to enforce the detainees' legal protection does not necessarily forbids the occurrence of exceptional moments where non-protected bodies are denied their rights, and possibly exposed to injury or death. But it does change the conditions of this occurrence, by generally affecting power relations inside the centre. This statement then makes it difficult to define CRAs as places entirely "legal" or "exceptional". As stated earlier, the production of bare lives should be thought of as a dynamic

3. CRAs were originally legalised by the "*Questiaux*" Act of October 29th, 1981, but remained vaguely defined as "non-penitential facilities". They where officially called *Centres de rétention* for the first time by the decree of March 19th , 2001, which also created the "rights of the detainees" -*droits des personnes retenues*-. Another decree on May 31, 2005 added particular norms for the building and organisation of the centres.

4. Each centre may receive all foreigners who await their deportation, whether undocumented foreigners or immigrants deported after a criminal conviction. In the first semester of 2008, they could receive up to 1441 detainees nationwide, and had an occupancy rate of 71,1 % (Secrétariat Général du Comité Interministériel de Contrôle de l'Immigration, 2008:92).

process, dependent on the social conditions of police intervention and the organisation of life in the centre. It is therefore difficult to give an idea of its differential dynamics without ethnographic material. This is why the series of observations carried out in a CRA for my Phd. dissertation in 2005 will be used here to shortly describe some of the "games" over law enforcement and the production and treatment of "bare life"[5].

The general economy of law enforcement and exception in this centre actually relies on the visibility of detainees and of police practices as well. As most French *Centres de rétention*, this centre is divided into two zones –a so-called "police zone", where policemen guarding the centre have their dwellings and where they process the detainees' deportation files, and a "detainees' zone", where detained foreigners have their bedrooms and have access to a recreation area, a mess room, and finally to a building regrouping the medical staff, social workers, accommodation supervisors from a private hotel company, and finally the lawyers from the Cimade. This area is also a so-called "free-circulation" zone, where the detainees are entitled to various rights, related to the non-penitentiary status of the CRA. They may for example keep their cellular phone, and walk "freely", though under a remote but constant police control[6]. In the everyday running of the centre, the rights and legal protections granted to the detainees are thus materialized into the very organisation of the centre. This particular zoning is reinforced as well by a set of conventional practices that have progressively emerged from its routine use, and traduce a general agreement of all actors on what the normal, legitimate "rule of law-compliant" enforcement of retention is supposed to be. Being daily present, independent Cimade lawyers are actually able to rely on these objective features in their common monitoring of police practices.

The stabilized organization of life in the centre and its relation to the legal, non-penitentiary status of immigration detention helps them to spot police activity that can be qualified as "obviously misplaced" (both materially and morally) and which can eventually be qualified as "unlawful". In the course of the observation, this kind of operation took place after a group of detainees coordinated their action using their personal cell phones, and set a building of the detainees' zone on fire to divert police attention while some of them evaded the centre. As punishment, policemen then confiscated the detainees' phones –causing an immediate intervention from the Cimade lawyers who demanded their restitution on explicit behalf of the detainee's right to communication. When it turned out later that policemen had as well unplugged the vending machine providing detainees with telephone cards –the last means they had to communicate with the outside–, the lawyers were then able to spot this "deviant" police behaviour, to qualify it as such and to report it in the same way[7].

5. This survey was conducted in a 140-seats *centre de retention* located in the airport of a major French city (See Fischer 2007).

6. Their moves are indeed closely watched by surveillance cameras, and watchmen at each corner of the zone.

7. Fieldnotes, 22/03/2005.

In this case, Human Rights advocates could benefit from the relative visibility of the immigration detention area: first, police activity could be seen and traced; second, it could be evaluated in contrast with what was seen as the "normal" running of the centre –which also matched the requirements of the legal status of *Centres de rétention*. This possibility to critically assess police activity however implies, as we have seen, the collective legitimization of the existence of retention administrative in itself –as long as it is a legally run order. But it also points to all the situations where such visibility is not possible. In those cases, opacious arenas emerge, where police (or detainees') abuses may not be traced and successfully sanctioned. In the surveyed CRA, the situation of women detainees is particularly representative of these failures in visibility. Originally created for an only-male population, the centre had to accept small groups of women in emergency in 2003, in order to relieve other overpopulated centers. This comeback of an emergency situation inside the centre immediately became a problem, as no efficient separation between men and women could be steadily enforced: female and male inmates where in a daily contact which could not be avoided or even checked, especially inside the detainees' rooms where no surveillance is exercised. In the same way, everyday interactions between policemen and detainees which are seen as common and cannot be constantly checked by supervisors from the Cimade, may lead to abuses when they actually involve male officers and female detainees. In all these situations, the failure of both police and Human Rights lawyers visibility re-creates opacity inside the centre, and allows illicit practices to take place without actual sanction. In most cases, abuses are actually reported, but no proof can be brought of them, or any responsibility attributed to an actor. This is for example the case for prostitution of women detainees inside "detainees' zone" of the centre I surveyed: to most official actors, its existence was an evident fact, which male detainees did not care to hide. It was however systematically denied by police officers: they asked for proofs no one could actually provide, as no permanent police surveillance of the detainees' private bedrooms could possibly be designed.

In this case, the opacity and impunity of abuses are not absolute, as accusations of police abuse are formulated –but they cannot be either proved or cleared, as no objective trace or witness are available. Such situations are typical of *Centres de rétention* as places of confinement both designed as external to the national political and judicial order, but still sufficiently close to it materially for questions to be raised on its running. A general map of the differential enforcement of exception and the rule of law therefore emerges from this general presentation. As we have seen, the notion of "exception" should be taken as a dynamic and socially-produced concept, which existence and intensity are modulated according to what the government of immigrants requires. The first type of "camps" we reviewed refers to informal devices, set in locations barely visible for the European public, and where the lives of controlled immigrants can be freely exposed to bad treatments. In the case of French *Centres de rétention* on the contrary, the treatment of immigrants is

partly visible –but this visibility is organised, with complex consequences. The presence of human rights advocates represents a true critical power facing police practices inside the centre. This critical activity has simultaneously relayed the progressive consolidation of the system of retention. Finally, we have seen that this legally managed economy of visibility also has its blind spots –where physical injuries may still occur, though in different social conditions.

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Expelling States and semi-persons in the European Union*

HÉCTOR C. SILVEIRA GORSKI

"Questi meccanismi discriminatori nell'amministrazione dei diritti fondamentali a vantaggio di cittadini 'rispettabili' e garantiti e ai costi degli esclusi –emigranti di colore, senza lavoro, senza casa, tossicodependenti…– condizionano una riduzione della sicurezza giuridica che, allo stesso tempo, alimenta il sentimento di insicurezza nell'opinione pubblica e trae alimento da esso"

Baratta, 2000:21

1. Introduction

The adoption in June 2008 by the European Parliament of the Directive on Return[1] –also called Directive of shame or Directive of expulsion– consolidates the process of involution that human rights have been suffering in the EU since the fear of illegal immigration has developed deep roots in its institutions. While the laws of the eighties regarding foreigners already contained rules governing detention and expulsion, it is not until Directive 2001/40/EC[2] that the communitarian policy focused on illegal immigration and the expulsion of migrants[3] begins to take shape. The return measures are, as the European Commission said, "a cornerstone of immigration policy in the EU".[4]

Since then, the barbarism of the internment and detention centres, the erosion of rights, the exclusion[5] and criminalization of foreign migrants, have

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* Translation from Spanish by Paula Vázquez.

1. Directive of the European Parliament and Council 2008/115/CE of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals (Official Journal of the European Union, 24.12.2008).

2. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals.

3. The legislative procedure that precedes the Return Directive is very well explained in Aguelo-Chueca (2008:121).

4. European Commission: "EU policy to fight illegal immigration". MEMO/06/296, Brussels, Brussels, 19 July 2006.

5. About the process of exclusion of migrants from the Constitutional State, see Portilla Contreras (2007/2008) and Brandariz García (2007).

become the battle flag of the associations defending human rights.[6] The erosion that these laws and expulsion measures are causing to the rights and freedoms and to the Constitutional State and its institutions is immense. This situation is reflected by Roure (2009) in his report on the implementation of the EU minimum standards for the reception of asylum seekers (Directive 2003/9/EC), which was recently approved in the European Parliament by a large majority of deputies. In the second general observation of this report it is emphasized that the rights of the person, the right to live in dignity, access to health care or protection of family life should be secured "at all times and regardless of the status of the third-country national involved", it is not acceptable that one would not be treated accordingly "*for the sole reason that he or she is an irregular immigrant*" [italics are mine].

Reading some of the regulations contained in the "Expulsion" Directive is enough to get an idea of the character of turning point that this moment means for Europe, in relation to human rights. The Directive allows, for example, that unaccompanied foreign minors and families with children could be interned and expelled –articles 10 and 1. Paradoxically, the same deputies who passed this provision, six months later stated in the above mentioned report "that the retention of minors must be forbidden" –paragraph 41. But the Directive also allows foreign citizens to be imprisoned –interned– by a simple administrative order –art. 15.2– for a period of 6 months extendable to 12 months –arts.15.5 and 15.6; they do not receive legal assistance and/or legal representation if it is not requested in advance –art. 13.4– and, in case they can not be expelled –unexpellable– they must remain in Europe as an "a-legal" within a legal limbo and precarious living conditions –considering n.12[7]. Finally, the decline and erosion in the rights and freedoms is so great that one can no longer talk about Constitutional States in the EU, but rather about administrative machineries for the internment and deportation, and in this way, about "expelling States"(2), where foreign people are treated as "semi-persons" and even as "non-persons"(3).

2. Expelling States

Expelling States are those that implement policies of expulsion and return of foreigners from its territory, or that reject them from its borders through administrative procedures that are generally accompanied by the detention and internment of migrants in administrative prisons, created especially for these cases. Year after year, thousands of third country nationals are detained,

6. See the reports of Human Rights Watch (2002/2002b/2005/2008/2009); Amnesty International (2005/2006a/2006b/2007/2008a/2008b), CEAR (2007), OSPDH (2003/2008), STEPS (2006), Guild (2005), Bietlot (2005), ACNUR (2006), ProAsyl (2007).
7. About the Directive of Shame and its effects on human rights see Aguelo-Chueca (2008); Pavón (2008), De Lucas (2008).

interned and deported from the European territory[8]. To this end States have adopted special laws, rules to sanction illegal immigration and have created administrative prisons, located at airports, borders and cities. The result is the formation of a criminal administrative subsystem specific for foreign migrants. This subsystem, ignoring the guarantees of the criminal procedure, affects fundamental rights and freedoms and establishes sanctions that are similar in spirit to the penalties. For example, the use of internment as a precautionary measure to ensure the effectiveness of the administrative sanction, has led to the deprivation of liberty become a routine administrative action, even with the possibility to escape from the judicial review –art. 15.2 "Expulsion" Directive. Moreover, paradoxically, all of this is carried out under the cloak of respect for the principle of legality and human rights.

Internment and deportation of people for not having papers is an excessive and abusive answer from a Constitutional State (OSPDH 2003)[9]. But the administrative prisons for foreigners have an important symbolic function in the EU: they symbolize the new internal borders and they mean, especially for citizens, the way to identify those who are not members and therefore should be excluded-expelled from the community. At the end of 2008 there were about 235 closed camps in the 25 EU Member States (Migreurop 2008). But in reality, there are many more if we include other retention spaces such as waiting areas of airports. Only in France there are over 200 waiting areas –*zones d'attente*–, 26 centres of administrative detention –*centres de rétention administrative*– and an indefinite number of areas of administrative detention –*locaux de rétention administrative*– (Cimade 2008). In these prisons are interned for a period of time migrants that attempt to enter the European territory through irregular means, those who are waiting to be expelled, either by being in an irregular administrative situation or because their application for asylum have been denied, or those who are refused entry at the border by police[10]. In waiting areas, in particular, one can find foreigners who have been rejected –and will be returned– at the border, or are waiting to be readmitted into their country of origin.

The expelling procedures along with administrative jails, that take shape in all types of spaces –police stations, waiting areas, retention places, internment centres– represent the last stage of a depersonalization[11] process, to which foreigner migrants are subjected in the European societies. This

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8. In 2004, the EU Member States issued 650.000 expulsion orders, 164.000 of which became forced repatriations (EMN 2008).

9. Regarding internment and its administrative procedure see OSPDH (2003).

10. About Spain´s role on migration control of population of southern countries see Fernández (2008).

11. In *Frente al Límite* (1993) Todorov uses the term "depersonalization" to refer to the transformation of people into non-persons, into "animated beings but not human beings." But he does so in connection with the techniques that the Nazis followed in order to completely dehumanize the "other" and thus make it easier to exterminate (186-206). In this text, however, we use this concept in a sense of gradual loss of individual rights.

depersonalization process has as a departure point: the recognition of foreigners' migrants as *semi-persons* by the European legal order.

3. Foreign migrant as *semi-person*

In the States of the EU the foreign migrant is included, from a legal point of view, in the category of semi-persons. The legal system does not treat them as persons with full rights, but gives a partial and differential recognition in comparison to other citizens. Foreigners are converted and are treated as semi-persons basically for two reasons: first, because the States consider that individual rights must be recognized not for any human being, but fully to its citizens –who are members of the community– and, secondly, as a result of laws and specific measures developed to control and penalize "non-citizens" (Silveira, 1998b). For most migrants the law and the decisions made by those who are in charge of applying law have become a nightmare with serious consequences for their personal and social life. For those who are in an irregular situation this is particularly sensitive because they can be easily moved from the semi-person stadium to non-persons.

3.1. The sub-status of foreign semi-persons

Modern legal systems derived from Nation-States give foreigners a specific legal status, distinct from that of other members of the community in which they live. A foreigner does not have the same rights as national citizens.

In Spain the rights and freedoms of foreigners are divided by the jurisprudence and doctrine in four groups. Based on the established legal order, particularly in the articles 13 of the Spanish Constitution [SC] and 27 of the Civil Code, the Spanish Constitutional Court, since the Sentence 107/1984, has elaborated a doctrine that distinguishes among several sorts of rights regarding their application to the foreigners (García Vázquez 2007:43). First, foreigners have seen recognized by constitutional mandate, the rights that belong to the person as such and that are considered inviolable as "indispensable for the guarantee of human dignity." Some of those rights expressly recognized by the Spanish Constitutional Court are the right to life and physical and moral integrity, to freedom of religion and worship of individuals and communities, to freedom and to security, to honour, personal and family privacy, to effective judicial protection and free legal assistance and not to be discriminated on grounds of birth, race, sex, religion or any other condition or personal or social circumstance. All of them belong to humans as such, "but they do not constitute an exhaustive and enclosed list" (3rd Legal ground, Sentence of the Spanish Constitutional Court [SSCC] 236/2007). These are rights that "belong equally to Spanish citizens and foreigners and whose regulation must be equal for both" (3rd Legal ground, SSCC 107/1984). These rights represent a minimum standard specified in international treaties and conventions to be respected when it comes to legislating on them. In

order to judge the constitutional suitability of the laws that affect these rights, the Constitutional Court considers that:

> "The degree of connection to human dignity that has a specific right, since the lawmaker has a limited freedom to regulate the configuration of the 'essential rights to guarantee human dignity'. This is because they cannot temper their content (2nd Legal ground, SSCC 99/1985, of 30th September) or deny its exercise to foreigners, whatever their legal situation is, as these rights "belong to the person as such and not as a citizen" (3rd Legal ground, SSCC 236/2007).

Secondly, in addition to the rights of the individual, foreigners have the rights that the Constitution granted and which are directly referred to in the art. 13.1 SC[12]. The lawmaker cannot deny, therefore, these rights but can "establish additional conditions regarding its exercise by them, while respecting, in any case, the constitutional grounds" (4th Legal ground SSCC 236/2007)[13]. As the fundamental rights are from the individual, legislators are obliged to respect their essential content, meaning that they can not make a regulation which deface or make them disappear completely (Pérez Tremps 1994:153). Thus, by not respecting this content the Constitutional Court declared unconstitutional several articles of the Organic Law 4/2000, including those governing the rights of assembly, association, union and strike. Regarding these rights, the problem emerged when the legislator recognized the foreigners as entitled to these rights, but limited their exercise to obtaining authorization to stay or reside in Spain. This was considered unfair by the Court, in the sense that the fact that the legislator denies the rights of foreigners without residence permit, meant a violation of the essential contents of these rights and, that the Constitution safeguards because they belong to all person." The legislator can set specific conditions for the exercise of rights recognized in the Constitution to foreigners who are in the Spanish territory, and do not have the proper authorization to stay or reside, but "only if it respects its content[14] that the Constitution safeguards because they belong to anyone, regardless of their legal situation" (6th Legal ground SSCC 236/2007).

12. "The foreigners will have in Spain the fundamental rights that guarantee the present Title as provided in the treaties and laws".

13. "Nevertheless, it means that the enjoyment of the rights and liberties recognized by the Title I of the Constitution by the foreigners (and consequently they are recognized also to them [the foreigners] with the exceptions regarding the articles 19, 23 and 29, as we can infer from their literal contents and from the same article 13 in its second paragraph) could be tempered regarding their contents according to the international treaties and the internal Spanish Law".

14. From the standpoint of constitutional doctrine, it is considered as a general rule that a regulation exceeds or does not fulfil the essential content when the right is subjected to limitations that make it unworkable, more difficult to exercise or without the necessary protection (SSCC 11/1981).

Thirdly, there are rights that are not directly attributed by the Constitution but that the legislator "can extend to non-nationals, although not necessarily in the same terms as Spaniards" (4th Legal ground, SSCC 94/1993). These rights include the right to work, right to health, unemployment benefits and, with qualifications, the right of residence and movement in Spain.[15] The treaties and laws may "modulate" or "temper" their exercise but always without setting unjustifiable differences with the Spanish people". The conditions set by the legislator to exercise the rights and freedoms by foreigners shall be valid only if they respect the essence of those, "are aimed at preserving other rights, property or interests constitutionally protected and if they maintain adequate proportionality with the purpose protected"(4th Legal ground, SSCC 236/2007). Finally, there are rights that foreigners do not have access to because they are considered alien to their non-citizen condition and inherent to the citizen condition, such as the rights of political participation and access to public functions and offices (rights linked to the art. 23 SC).

This distinction between rights and their specific regulation regarding their implementation toward foreigners is based on the Constitution, primarily in Article 14, which proclaims that only the "Spaniards are equal before the law" and at 13, which states, according to the interpretation given by the Spanish Constitutional Court, that foreigners have in Spain the rights and freedoms guaranteed by Title I of the Constitution taking into account that in terms of its content all the rights are of legal configuration (SSCC 107/1984)[16].

The Foreigners Law reflects this interpretation and states that "foreigners in Spain shall enjoy the rights and freedoms set forth in Title I of the SC in the terms set out in international treaties, in this Law and in those which regulate the exercise of each one of them" –art. 3.1. From this point, if we focus on what the law and other regulations say on the rights of foreigners, we find that despite having secured the content of individual rights, they are not recognized and treated as individuals, but as semi-persons. This is because the legislator has created a legal administrative sub-system with regulations that, beyond the regulation of rights, duties and administrative various situations, also control, suppress, punish, discriminate and exclude foreigners (Baratta 2000). In the next stage we will analyze some of these laws that, as they set up a "penal law of the exception" (Faraldo 2007), treat foreigners as semi-persons and "non-persons"[17].

15. The Constitution reserved the entitlement to some of the rights of Title I only to the Spaniards as Articles 14 (equality before the law), 19 (freedom of movement and residence), 35 (right to work), 41 (right to Social Security) and 47 (right to housing).

16. About the importance of these distinctions in order to avoid taking the migrant seriously in its condition of "subjects of right to have rights" and the impossibility of thinking the migrant as a possible citizen, see De Lucas (2002).

17. In the following ideas, I am in debt with the paper Los inmigrantes ¿ciudadanos?" [The Foreigners, citizens?] by Carlos Jiménez Villarejo, presented at the *Jornadas Inmigración y Derechos Humanos* [Immigration and Human Rights Sessions] organized by Jueces para la Democracia [Judges for Democracy] in Motril. April 9-11, 2008.

a) Control measures

On the one hand, the legislator has created a legal subsystem for the specific control of migrants. This system involves several agencies of government, as established by the Fifth Additional Provision of the Organic Law 4/2000 -hereinafter LOEx: the State Agency for Tax Administration, the General Treasury of Social Security and National Institute of Statistics. These agencies should provide "direct access to the files where foreigners' data is held, without the consent of those concerned." Also, the seventh Additional Provision of Law 7/1985 dated April 2nd, Regulating the Basis of Local System, enables the General Police Direction to access the foreigners registration data held in the municipal censuses for the sole purpose of exercising the powers set out in the Foreigners Law. This empowerment is in contradiction with article 22.2 of Law 15/99, of December 13 for the Protection of Personal Data, which states that the police can gain access to personal data but only with clear and specific purpose of preventing "a real danger to public safety and for the suppression of criminal activities" –art. 22.[18] Access to foreigners' data is, as decided by the legislator, a general mechanism and something ordinary, when, however, access to data from Spaniards are allowed only in exceptional cases and for justified reasons.

Measures of control and surveillance of migrants also extend to private actors, as carriers companies. According to article 66 of the Foreigners Law, they must provide information on passengers; check the validity of their documents and, in certain circumstances, they become responsible for foreigners, as they have to "ensure them adequate living conditions". Also, carriers must ensure that immigrants are delivered to States that would provide them a treatment "compatible with human rights". This allows that the migrant may be limited in movement by private actors, something that has no constitutional basis and that makes the foreigner remain in legal limbo, since they do not know their status and what rights they can exercise in the event that the carrier becomes responsible for them.

b) Sanctions and coercive measures

Besides setting up a control subsystem, the legislator has also created a sanction-coercion sub-system specifically for migrants. This subsystem began to be built with the first Foreigners Law, Organic Law 7/1985, which was legislated in order to have freedom enough to act in a large way on foreigners, especially to expel those in irregular situation, rather than guarantee their rights and freedoms. Articles 25 and 26 of this Law, regulating the power of sanction of the administration and the expulsions, were a set of vague definitions of sanctions, which had no precise limits and did not respect the principle of proportionality. The expulsion was, in essence, an administrative measure of an objective nature. As Solans writes, "the legislator of 1985 disguised as

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18. About the issue of the right to privacy and the access to data held in data basis, see Sánchez, Silveira, Navarro (2003:49).

infringement/penalty, a matter which in reality was due to a pattern of objective illegality/objective reinstitution of the measure, thereby avoiding the fact that we are talking about acts whose agents are human beings and whose consequences fall on individual rights and realities" (2008:605).

The current Foreigners Law is far from the previous one and establishes a clear structure of violations and penalties. But this does not mean that the spirit of the penal law, especially its expelling desire, does not remain in the new regulations. Thus, article 57.7 allows the foreigner to be expelled when a penalty of less than six years is expected, and Articles 89 and 108 of the Penal Code provide for the compulsory deportation in cases of imprisonment sentences of less than six years (Souto 207, 289). In the first case, a mere accusation for misdemeanour, even without sentence, can cause the deportation.

The legislature also facilitates deportations by other means. For example, article 53.f) LOEx is a white standard that permits the police to initiate deportation proceedings from countless actions that may be considered contrary to public order, as it is set out as offences in the Law on the Protection of Public Safety[19]. Another example of the violation of the principle of legality is article 13.2 of the Immigration Rules, which enables officials to refuse the entry of foreigners without needing a reasoned decision. But this resolution should contain, as required by art. 26.2 LOEx and the Schengen Borders Code[20], information on appeal procedure and the deadline for doing so, and the right to counsel. However, if there is a re-admission agreement it is understood that there is no need for providing reasons for refusal of entry, neither to guarantee the right to legal assistance, as it is sufficient to provide the foreigner with the information referred to in article 26.2 of the LOEx. The foreigner is definitively unprotected when he is arrested in Spanish territory and, in addition, has a deportation order issued by another EU member state. In these cases, as set out in Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on expulsion of third country nationals, deportation may be enforced immediately, regardless of the administrative status of the foreigner and without having to open another proceeding. In these cases, the law even contemplates the internment of the foreigner to ensure the execution of the measure –art. 64.3 LOEx.

Control measures and penalties established by the legislator remain incomplete unless we also consider the performance –administrative practice–

19. Art. 23 of this Law governs almost 15 situations that constitute serious offences, which range from, for example, "opening establishments and the holding of public entertainment or recreational activities without authorization or exceeding the limits of the authorization" to "the tolerance for illegal consumption or trafficking of toxic drugs, narcotics or psychotropic substances on public premises or a lack of diligence in order to prevent them by the owners, administrators or managers of these", in addition to a concept so indeterminate as the "provocation of the audience reactions that can alter or impair public safety."

20. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

of the various agencies, especially the security forces, when implementing this legislation. Spanish police, for example, has been following a regular practice since 1985: the initiation of deportation proceedings for illegal residence in the territory, when the law provides that in such cases the punishment should be a fine –art. 57.1 LOEx. The eagerness for deportation has been corrected in recent years by the Supreme Court's doctrine. This court has reaffirmed the interpretation of the law under which the main penalty in cases of illegal stay is the fine, and that in cases in which the police chooses to implement the sanction of expulsion must give explicit reasons[21]. The numerous judgments of this Court that reverse invalid implementations of the law have led to the Police Headquarters to issue the circular 8/07 with new instructions for the preparation of prosecution of penalties for irregular residence. It makes explicit that when there is only "illegal stay" officials should proceed with fine proposals, postponing in these cases the deportation for the case of a second detention, as punishment for not complying the administrative order of abandonment of the territory contained in the first case.

The repressive measures on foreigners reach their maximum expression in the "Protocol of Safety Standards at the collective deportations by air and/or sea" of July 20, 2007, where the Spanish Ministry of Interior regulates, among other things, the use of a series of "elements of containment" -security ties, helmets, immobilizing approved garments, handcuffs or similar) on deportation procedures (Silveira & Rivera 2007).

c) Discriminatory Measures

Along with the regulatory provisions that establish specific monitoring and sanctions over the foreigner, we find also others that provide them a discriminatory treatment. For example, the foreigner may find that the administration does not accept his applications if he is under certain circumstances, such as lacking legitimacy; be affected by an administrative penalty, to be in an irregular situation, etc. In such cases the competent authority "would not admit the applications for regulated procedures" on LOEx (4th Additional Provision). This applies to foreigners but not to the Spanish citizen as the general administrative procedure does not include the refusal of admission of an application as a way to complete the procedure. The general principle in any rule of law is that the administration is obliged to resolve the proceedings, with the stated exceptions -Article 42 Law 30/1992.

Also, the LOEx 3rd Additional Provision prevents foreigners to act through representatives when they apply for residence and work permits, both in Spain and abroad. This prohibition is also clearly discriminatory, it does not affect the Spaniards who, in contrast, can act through their legal representatives –art. 32.1 Law 30/1992. Another case of discrimination, with serious effects on the fundamental rights and guarantees of the foreigner, is produced because of

21. See Appeal 9787/2003 and 10273/2003, January 18, 2007; Appeal 8735/2003, January 25, 2007, Appeal 7986/2003, March 9, 2007.

the authority given by the legislator to the police in order to use preferential proceedings in cases of deportation -art. 63.1 LOEx. Before these proceedings, the foreigner has only 48 hours to present his arguments against the written and caused proposal of deportation. This preferential procedure with a so short defence period is only the "consequence of the notion of expulsion as an objective and necessary administrative measure to respond to irregular residence" (Solans 2008:617). The foreigners become more unprotected with the automatic transformation of the proposition of deportation into a deportation order if no allegations are presented to the first one –LOEx art. 63.2. With these measures, the legislature expressly and consciously lowers the rights to the legal defence of the foreigner. Discrimination is also evident here when compared with the situation of the Spaniards rights before the administration –articles 35, 79 and 80 of Law 30/1992.

Another important discrimination faced by foreigners is that they cannot participate in the public sphere and influence the affairs of the community in which they live. The fact that the foreigner can not participate in matters affecting the common life and governing the rights and duties of all residents like any other citizen, as he just settles in his new home, may be understandable. To do this it requires a minimum period of residence. However, it is not understandable that after this period, a reasonable time of residence, he still is unable to do so. Since that time the community is transformed into a non-democratic society as a part of its members, to whom the rules and obligations are addressed to, cannot participate in developing them. If after at least two years of residence, the foreigner continues to have vetoed his participation in the public sphere, we should talk of a breach of the democratic principle in the sense that all those subject to laws should have been involved in its sanction.

In the EU the public sphere is reserved only for citizens of different national communities. In the EU Treaty [EUT] it is established for the first time a citizenship of the Union, which is complementary and not substitute for national citizenship. At the same time, it is considered "citizen of the Union, every person holding the nationality of a Member State" –art. 17.1 EUT. And the declaration number 2 attached to the EU Treaty stipulates that nationality is determined only in accordance with the rules of nationality of the concerned Member State. The European Court of Justice [ECJ], for whom the acquisition and loss of nationality are powers of the EU Member States, has confirmed this. We can now confirm the situation that once Balibar described as "apartheid" in flagrant contradiction with a democratic model of society (2003:87).

4. From *semi-persons* to "non-persons"

The conversion of the European States into a machinery of foreigner's expulsion has required that a punitive administrative sub-system was brought to life in the interior of the structures of the Constitutional State, with specific rules for arrest, internment and expulsion of foreigners. Under this system a

penal-administrative culture that makes irregular immigration a "quasi-crime" and that does not hesitate to use the detention and expulsion as an instrument for social control, has born. In this new imprisonment system, the deprivation of freedom is no longer produced by the imposition of punishment as a consequence of the commission of a crime, but because the migrant does not meet some requirements. Thus, the normative subsystem of the expelling State breaks the couple guilty-innocent, described by doctrine as one of the main legal reasons for the Constitutional State (Ferrajoli 1995, 368).

Within the legal structure the foreigner is first treated as a semi-person. But it is also a structure that allows foreigners to enter in the process of legal depersonalization, as it happens in cases of unenforceable deportations. The deportation order cannot be executed, for example, when the police do not know the country of origin of the foreigner, or because there is a readmission agreement with the country they come from. In Spain, as elsewhere in Europe, each year thousands of foreigners are in this situation[22]. The foreigner cannot be deported or remain confined, but cannot regularize his legal status because the law does not allow such possibility. The unexpellable foreigner is legally excluded from the legal system to be placed under a special legal status: the "administrative a-legality". This happens because the law considers that the foreigner should not be in the territory, and in this sense he should not be treated as if it were: he should not be recognized. From a semi-person, he quickly becomes a non-person: he has no right to have rights, but it is potentially a deportable foreigner.

In Spain, the "administrative a-legality" exists, with the exception that unexpellable foreigners retain some of the individual rights, such as the right to health care if it is registered in a municipality –art. 12.1 LOEx. However, the logical order of action does not change: the foreigner cannot be recognized and, consequently, their demands, from a formal point of view, cannot be met. The system gives them some rights, but does not recognize them as a legal subject, it excludes them from its ordinary functioning. The foreigner, as Dal Lago says, becomes a non-person when the legal system expels it and begins to deal with him only to place him outside the a-legality, to "punish 'legally' his non-existence and expel him" (2000:141-142). When this happens there is, in Agamben's words, an "inclusion through exclusion."

It is in the administrative procedures for deportation and internment centres where it is more clearly shown the loss of recognition of foreigners' rights and freedoms (Silveira 2006). These procedures materialize the transit of semi-person to non-person. This does not mean, however, that we can say that the internment centres are the "camps" of contemporary societies, as Agamben argues in his latest works. This author defines the "camp" as the space emerged from the normalized emergency state, where there are no standard legal subjects but "mere existences" without mediating institutions, where the sovereign has no limits and therefore is no longer possible to differentiate

22. In Spain, within the year 2001 and 2005, 122.000 foreigners were under this situation.

between bare life and the rule (Agamben 1998: 215-223). The Italian philosopher turns the "camp" into a paradigm through which to examine the functioning of modern political system. The "camp" is for him "the new hidden regulator of the inscription of life in the legal system." And this new space, is introduced within the political system when, as we said, the instruments of government of the emergency state become ordinary mechanisms of government (Silveira 1998). This creates in the State a "*dislocating location*" in which there are no rules and the way of life can be any. A mechanism that belongs to the normalized state of emergency is, as we saw above, the inclusion through exclusion (Agamben 1998: 216).

However, the analysis of modernity done by Agamben through the prism of the "camp" comes to a point where it becomes too rigid and, in turn, inconsistent. Because not everything that happens in the political system has, or is based on the "camp", even though the facts tell us that the exception has become the rule. There are other realities, options and alternatives that are beyond the camp. This is what Laclau criticized. For this author, with the paradigm of the "camp" Agamben performs an "essentialist unification" of the processes of modernization, which, besides giving a distorted view of reality, ends up on the "political nihilism." The interpretation of modernity made by Agamben does not help, Laclau writes, to "deconstruct the logic of political institutions" and to build new forms of struggle and resistance. On the contrary, it becomes an obstacle to "any exploration of the empowering possibilities created by our modern heritage" (Laclau 2008: 122-123).

However, this does not mean that we cannot say that some of the internment and detention centres in European countries are "camps" in the sense that Agamben uses this term. But not all of them are. The internment centres are administrative prisons where foreigners are treated as non-persons, but this does not mean that they are lawless areas, where the foreigner has no right and is at the expense of the State decisions. In Spain, like France or Germany, different types of administrative prisons, both open and closed, are governed by regulations that limit, with more or less intensity, the discretionary power of the administration, and recognize also rights and duties of foreigners[23]. In these cases, administrative prisons are a subsystem of the administrative structure of the State[24]. Therefore, from the moment that there is a regulation, procedures standards and the rule serves as an instrument of mediation, we can not say with Agamben (1998: 215-223), that internment centres are under the category of the camp and that in the contemporary State there is "a legal order without localization -the concentration camp as a permanent space of exception)."

Only in cases where the foreigner is treated as a bare-life –mere existence– and is exposed to the arbitrary, ill treatment and to the factual powers of the State, then we could call the internment centres "camps". The internment

23. About the internment and the Spanish legal system see Requejo (2006).
24. Art. 63 and 62 bis LOEx, provision of February 22, 1999, on internal regime of internment centres for foreigners.

centres are converted into camps where, beyond what the laws says, foreign migrants, especially irregular, are held prisoners in inhumane conditions and with no respect for the most fundamental rights. These would be the cases of detention centres and internment in the Greek islands of Lesbos, Chios and Samos, as well as in Malta, that have become true "camps" because of the unacceptable situation in which are held hundreds of foreigners, including children and women (ProAsyl 2007).

The existence of internment and detention centres is a serious violation of the rights of people and puts into question the Constitutional State. Inside the State, a penal-administrative subsystem has been formed, specifically for foreigners, that breaks basic constitutional principles. Moreover, this subsystem has shown that what should be an exception -the arrest and detention of the foreigner by means of norms applicable under exceptional circumstances- has become the rule in the democratic Constitutional State. The normalization of the exception has now become part of the legal reasoning, proper of the Constitutional State, when before this, it was strictly determined by the reason of State[25]. Unlike what happened in the past, where the state of exception invalidated the law, now the exception has become a form of government and has come to integrate the structure of the State. The normalized exception does not require to nullify the law, but rather to make an ordinary use of it. In sum, in the democratic Constitutional State a part of the reason of state -not all of it- has been integrated and has become a sub-system of the legal reason, as a mean to govern immigration.

The paradox is that in the Spanish legal system –although this assertion can be extended to other European countries– both the contamination of the legal reason by the reason of State as the process of depersonalization of migrants, are based on the Constitution and in the classification of the rights of foreigners into three groups made by the jurisprudence and doctrine[26]. It is the Constitution which permits that migrants could be regulated by a legal-administrative subsystem with more restrictive rules, many of them discriminatory and unfair, different from those addressed to the Spanish and European citizens. This legislation is not likely to change; on the contrary, it has been affirmed with the approval of the Directive of "Expulsion". The reason of State has not only been dovetailed into the legal reason, but it is also legitimated trough the democratic principle.

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25. About the primacy of the reason of State over the legal reason and the incompatibility among them see Ferrajoli (1995: 808-816).
26. In this sense, De Lucas (2002).

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EPILOGUE

As a conclusion to *Warlike outlines of the securitarian State*

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Some years ago, in relation to a conference on the subject "Internal Freedom versus External Security?" held at Brussels (on 3rd. June 205) and convoked by the Centre for European Policy Studies (CEPS), within the framework of the Challenge Project, I submitted a paper trying to explain how Spain had begun to employ in those times the discussion about immigration just an excuse to justify measures which could assure higher levels of both internal and external security.

I think that five years later the situation which I described in that paper became worst. And particularly worse is the exploitation of penal resources with the aim to diminish unsuccessfully the number of migrants who try to reach the Mediterranean coasts Spain's, by all means of transportation. This situation has shown in last years, the determined decision of people who do not find means or resource to survive in his own country in one hand, and the persistent criminalisation of migrants who were able to enter in Spanish territory without any permission of the authorities (migrants *sans papier*), in the other hand

I would briefly summarize some indications I gave in that paper five years ago, which could be useful to come at a Conclusion in this volume. In this respect, let me please take those indications again:

-I-

The Spanish transition to democracy, from 1978, has produced a huge number of changes either within the civil society or also inside the political system. It is absolute true that most of theses changes can be seen as completely positive and because this reason Spain is nowadays considered as one of the main members of the European Union. But, in spite of this, geographically speaking Spain belongs to the Euro Mediterranean area which

has a particular significance regarding its competences in certain activities concerning the whole Union[1].

On the other hand, some very frequent social phenomena in democratized and developed societies, especially those strong rooted within post industrialized economies, had not yet being considered as important for the Spanish transformation by public opinion up to recent times. Immigration is certainly one of these phenomena and it can be said that it was "discovered" by the Spaniards only recently, which is really astonishing because the Spanish society has being, particularly during and after Civil War an expelling one. During the middle of last Century, in fact, hundred of thousands Spaniards went to exile particularly towards American countries and on the other side another hundreds went as migrant workers to other European countries. Therefore, former Spanish generations have had the experience of leaving their homes and receiving hospitality elsewhere in the World. But, the arrival of people particularly coming from Latin American countries and the Maghreb from some years ago, and more recently from Eastern European countries, has provoked a sudden awake of new reactions in front of this unexpected presence. Speaking from an anthropological point of view it could be said that this unforeseen appearance has produced the emergence of rejection sentiments and exclusion demonstrations from local communities regarding those just arrived. Problems of otherness, differentness or alterity gave birth to particular attitudes in front of these arrivals which in certain rural areas of mono farming have degenerated in clear xenophobes reactions (Can Anglada, December 1999; Ejido, January 2000).

1.) From 1984 the Spanish State has consequently shown a clear concern regarding the requirement to establish an integrated regulation for different immigration situations inside its own borders (see Organic Law from July 1. of 1985). But, in any case these rules were approved under the title of Organic Law on Rights and Liberties of Foreigners *(Ley Orgánica de Derechos y Libertades de los Extranjeros)* which it does not translate the real meaning for a Law which has to rule different situations provoked by various problems related to migration processes. Actually, the Spanish word *extranjero/extranjería* is much more related to the English concept of estranger or extraneous than to immigrate/immigration or migrant/migration. This last pair of words corresponds to technical and legal terms usually applied to define or to mention different aspects of the social phenomena regarding a human action when a person moves from one place to settle in another. This last activity is the same that during millenniums has being the same for thousands of people who has been removed or they have decided to move from their birth places or from the lands where they have being working during long time. Immigration waves have produced big and positive

1. Barcelona, capital city of the Autonomous Community of Catalonia, has recently (on 2008) being appointed as the main capital city of the Mediterranean area.

transformations within societies which have received, taken in, gave refuge or welcome these hundred of thousands or millions of migrants, refugees or people looking for a new settlement. There are a number of historical cases which can be shown as examples of these situations, particularly along the nineteenth Century as consequences of industrialization. Despite conflicts between the new arrived and the local inhabitants or specially those named as second generation conflicts, integration of immigrants have always produced interesting results, on the work market and on multicultural combinations. The cases of Canada or the United States and of Argentina, in the northern and the southern part of America, are surely the more expressive ones of positive migrations, although subsequent but different developments.

But these examples belong to a certain and older kind of economical development, linked to the industrial capitalism era. When, after the disappearance of one of the two main representatives of the world divided in two blocks and global economy has became the only way to accumulate richness, then market strengths and its rules have substituted the State legal norms provoking a much more unbalanced system of social relationships. Consequent effects of globalization, like outsourcing and resettlement of labour resources, have produced on one hand the impoverishment of dependent economies and on the other the unemployment of millions of workers. These are the big consequences of the "new economy" and the fundamental structure for the philosophy of new liberalism.

2). Nowadays, social exclusion is also globalized and it is a clear feature of post-industrialized societies but also of those which have not yet reached this sort of development. Immigrants are particularly one of the social categories much more excluded as a group, because social exclusion has at the present a big impact on a number of people characterized by some special and common trace than it was before when people excluded were individuals dropped out from society because their own isolated social location. This exclusion of immigrants it is also attached to refuse or reject demonstrations, like intolerance, chauvinism, xenophobic, or simply racial discrimination and in recent times when exclusion is also grounded in a deep religious membership (fundamentalism), either of the immigrants or of the local residents as a vice versa movement. Muslims in the whole western world are at the present those more excluded than other believers or no believers and there are at least two principal reasons for it: one is related to their ancient struggle against Jews people and at present to the Israel State, linked today to the Palestine situation, and the other reason is regarding to their land property of the main oil resources almost around the East part of world. But, from September eleventh 2001, Muslims are surely the fiercest symbolic enemies of western World, although a small and militarized group of them (Al Qaeda) without any special representation of the Islamic culture, have assumed the responsibility of the Twin Towers attack.

This last event, beside its criminal methods and course of actions, with the tragic consequences of more than three thousands peoples dead, have triggered the most irrational punitive reactions from the Governments, and not only from that of the United States of America but also from other, European also. The so called "Patriot Act" from the American Congress, although it was a law addressed towards protections of insecurity in front of terrorism, in general terms, it had also pointed out the way which must be followed by those friend governments of the United States in order to assure safety to their populations.

Starting from this point we can now consider how immigration, particularly of those people from Islam but not only, have being fairly large understood as a problem of insecurity. Clandestinization, illegalization and criminalization are almost logical consequences of these processes in order to download over immigrants all the blames of insecurity.

3.) Coming to our Spanish perspective it must be here remember that already at the so known as the Meeting of the Azores Islands, in March 2003, between President Bush, Prime Minister Blair and President of the Spanish Government, Aznar, the Summit decided to go ahead with the Irak invasion, meanwhile President Bush has tried to convince the European Union to unify efforts in order to reconstruct the United Nations and therefore to receive a commandment to proceed against Sadam Hussein. Because the support given to President Bush's initiatives, the former Spanish Government has begun by introducing new reforms to the existing law for foreigners and doing so also legal framework for foreigners became much harder. From that date onwards a number of thirteen six reforms of the Criminal Law as well as Penitentiary regulations have being undertaken, which of course have affected not only to foreigners but also to Spanish people under penal control. But all of these amendments were restrictions measures for people who has been blamed of serious and dangerous crimes in general terms but particularly to those suspected of terrorism. Of course, it must be also remembered that all the Spanish governments from the transition era up to current time have had a strong activity against more than one armed group which have put forward political reasons in front its activities, but particularly a big struggle onto the independent Basque warfare known as ETA. It must be now and here specially underlined the present one, of Mr. Rodríguez Zapatero, who has being wrestling to reach to a definitive dismantle of ETA. Therefore, there is a long experience of institutions and politicians to react in front of these emergencies through legal measures which have to be created and enforced inside the limits of the Rule of Law but it were not respected in several opportunities, giving place to a huge number of arbitrariness. This kind of interventions are recognized from within the legal language as exceptional ones, from it comes "exceptionalism" as a way to behave in front of every emergency whose legal treatment is not predicted within the framework of the Rule of Law. Because of this, the legislative production of new rules as well as its enforcement through

the relatives instances or agencies are tasks always fulfilled on the borders of the Rule of Law. This was the situation in some European countries during the 1970 decade in front of the terrorism, and it happens also now in regard to immigration. Therefore, we can speak that most of the European people is leaving inside a so called "emergency culture", from that time up to now.

4.) Now, I will try to explain the real substance of this emergency culture in regard of immigration and linked to Spain. First of all, it must be underline that last amendments introduced to the law for foreigners have hardened their legal situations. This is the consequence of fixing a difference between those foreigners who has residence permission, named as regulars, and the others who have not this authorization, and then they become irregulars. Therefore these last people are promptly turned on illegal, which means *san papiers* (without papers) situation which allows to identify an immigrant in this condition as a clandestine, because he cannot get a job or rent a house. And a person who can be categorized as such is in the same circumstances to be socially recognized like a criminal, particularly because if he has not any possibility to have a regular income, then the straightaway stereotypification facilitates his criminalization. This is a very common belief which is usually supported by communication means which I allow myself to name as a negative common sense within public opinion. Of course, this belief can be reaffirmed itself when it is compared to the level of foreigners in prison, which is at the present very high when contrasted to domestic populations, notwithstanding most of the foreigners are in prison because low level crimes (like petty thefts, pickpockets, small drug smugglings). In Catalonia, as one of the most developed and populated autonomous Communities Spains, for instance, last year foreigners in prison has reached a 32,4 % (thirty two, point four per cent) = 2.625 of the whole penitentiary population = almost seven thousand (7.000). The combination of all these elements provokes the social construction of immigrants as criminals, label which in a context of a large international fear and also manipulated from the level of State institutions, there is no doubt about the stigmatization.

A big risk for an illegal foreigner is the expulsion order, a measure which is usually adopted although the present law allows imposing a fine. During the administrative enforcement of an expulsion order, illegal foreigners are submitted to custody for not more than forty days, (period recently proposed to be prolonged up to sixty days by a reform to the *Organic Law on Rights and Liberties of Foreigners*) time which is spent into a detention centre *(Centro de Internamiento para Extranjeros –CIE–)*. Of course, there is foreseen a jurisdictional control for these situations, but usually the time employed for a court to revise the case is always longer than the administrative process to proceed with the expulsion.

This brief explanation about how is actually in fact the treatment of illegal immigrants, could be useful to understand the level of human rights violations which can be reached through the enforcement of the foreseen administrative

measures within the legal framework established in Spain at the present. From this point of view it must be said that current Spanish legislation for foreigners is highly repressive.

5.) But now it must also be taken under consideration how this stereotypization of illegal immigrants as criminal was also enlarged with their categorization as terrorists too.

When the second legislative period of conservative Government led by President Aznar was reaching to its end, at the beginning of year 2004, the political debate was filled and crossed by a tense argumentation about terrorism. It is also true that this was of course the same political clime around the world, and it was also inside Spain but, within this last framework the fear to terrorism was also grounded on the permanent presence of ETA.

Nevertheless, by that period the attack to the Atocha railway station in Madrid, on March eleventh (M 11) has happened. Notwithstanding, it must also mention that at the same time national elections were already scheduled by March 14th and the Conservative Party (PP) was dubious to obtain a positive success like in other former elections. This estimation was probably stronger because the opponent party (PSOE) had being growing in popular expectations and the socialists have being expressing their suspicions about why the Government has given its support to the war strategy of the United States Government regarding Irak. Once the attack was carried out, by producing around two hundred mortal victims and a huge number of seriously injured, the conservative Government immediately announced that the responsibility for the attack was of ETA. Of course, it must be here also said that ETA is actually one of the most popular enemies within Spanish society. And, therefore from the attack day (M 11) up to the evening before to the precedent day of the polls, the Spanish population was put under a high tension because the Government went on to say about the responsibility from ETA, meanwhile Spanish communication means but also from abroad were informing high doubts on this blame. The suspected Islamic influence was quickly ratified and few hours before the poll day the doubt about the perpetrators of the attack was rapidly clarified. Once the new Government led by Mr. José Luis Rodríguez Zapatero was settled down, within the Parliament was immediately installed a research Commission in order to investigate how and why the former conservative Government has stressed the attack responsibility on ETA regarding the M 11 attack. The Commission's inform was absolutely confirmatory about the deceitfully behaviour of the Aznar Government, by trying to turn public attention off on the attack responsibility. Some people believes that this misconduct of President Aznar and his closer government team was one of the truly reasons of the socialist success. The Spanish population who at the time had not yet decided his choice took the determination to give a protest one in favour of the PSOE.

Up to the present time, two years later that Mr. Rodríguez Zapatero holds his renewed position as President of the Spanish Government, the immigration

legal framework and also the criminal law reforms introduced by Government of former President Aznar, continue to be the same. Nevertheless, on May 2007 a new regularization process of immigrates who are leaving without papers in the Spanish territory, introduced by the present Spanish Government, has reached up to a very successful end because almost seven hundred thousands foreigners (i. e. non European immigrants) has applied for obtain a legal residence. But, from my personal point of view what it has to be done is a complete revision of the legal Spanish framework for foreigners, in order to abolish all the repressive measures and to produce a real change over the immigrant situations. However, this is a very complex issue, especially because Spain, like Italy, Portugal and France are those members which constitute the south continental border of the European Union and for this reason all these countries are required to work as a European frontier for East, South and West migrants. This point constitutes a big challenge which it can only be faced through Rule of Law answers and particularly now, when the consequences of a new world strategy is coming to arise after the settlement of Mr. Obama Government. By the way, this could be a real opportunity to introduce accurately and truthfully rules on immigration within a new constitutional text for the European Union, if this task will be undertake in the next future.

-II-

The present volume is constituted by three different parts, although each of them is linked to the others through the concept of excepcionalism. It must be here remind that closely related to this concept and particularly linked to one of the main subjects of Challenge Project, the OSPDH has stressed its concerns on excepcionalism, particularly related to the Mediterranean area. The serie of *Desafío(s)*, the periodical journal edited by OSPDH, has in its previous issues concentrated discussions on different arguments but most of them distorted because "excepcionalism" has became the first subject to be considered. In this respect, I would stress that "excepcionalism" means also fear to citizens, when insecurity or lack of safe is in the background to traditional resources of crime control. But, when this fear is emphasized and manipulated by politicians, as Salvatore Palidda underlines in his article, then inflation of punitive control and security "measures" are clear demonstrations of political sphere decline. From this conceptualization it is easy to understand how violence and structural violence in particular becomes the main feature of institutions and means of criminal justice systems oriented to behaviours control when considered acts of war or terrorism, as contributions to the first part from Iñaki Rivera Beiras, Mauro Palma and Gabriella Petti emphasize. Most of these papers come to highlight the use of concepts –such as the criminal law dedicated to the enemy– which belongs to an authoritarian conception of punitive control. It must be also underlines, particularly when

these three contributions stress its concerns about penal control of terrorism, how excepcionalism constitutes the real substance of criminal justice systems when applied according to certain war logic.

The second part of the volume is dedicated to contributions related to the everyday life control, and particularly to those aspects such as the human body, real space and the virtual one. Contributions from Salvatore Palidda, Gabriela Rodríguez Fernández, and Prof. Stefano Rodotà come to bring a wide panorama on those topics. Nevertheless, it is of particular relevance the consideration (from Rodotà) of those possibilities given today to the human beings by new technologies and scientific developments in order to transcend the limits of the human shape without failure of human nature.

The last and third part contains three contributions (from Cristina Fernández Bessa and Alejandra Manavella, Nicolas Fischer and Héctor Silveira Gorski) which are closely concentrated on borders and control devices of immigration. I would wish to underline that paper from Silveira, which comes to put under discussion a commandment from the European Union pejoratively called "the directive of disgrace", from june 2008. This particular rule is an attempt to regulate a non return journey of migrants who have leaved the European territory and would try to come back to some country of the UE. But, this commandment is a clear feature of unusual desire to expulsion which at present time characterizes some European countries, regarding migrants. Nevertheless, this kind of measures belongs to a level of administrative decisions which contribute to make more relevant the category of "half persons" in order to underline the violations of Human Rights and degradation of migrants as human beings, committed through law. I will conclude by confirming that the present volume, more than its particular intellectual and cultural values, comes to verify that most of European societies are at present times subjected to a high number of matters of a very complex to grips with and also to be solved.

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