EUROPEAN COMMISSION

Community research

EU RESEARCH ON SOCIAL SCIENCES AND HUMANITIES

European Liberty and Security: Security Issues, Social Cohesion and Institutional Development of the European Union

ELISE

FINAL REPORT

EUR 23129

Interested in European research?

Research*eu is our monthly magazine keeping you in touch with main developments (results, programmes, events, etc.). It is available in English, French, German and Spanish. A free sample copy or free subscription can be obtained from:

European Commission
Directorate-General for Research
Communication Unit
B-1049 Brussels
Fax (32-2) 29-58220
E-mail: research-eu@ec.europa.eu
Internet: http://ec.europa.eu/research/research-eu

EUROPEAN COMMISSION

Directorate-General for Research
Directorate L — Science, economy and society
B-1049 Brussels
Fax (32-2) 2994462

http://ec.europa.eu/research/social-sciences
http://cordis.europa.eu/fp7/cooperation/socio-economic_en.html

EUROPEAN COMMISSION

EU RESEARCH ON SOCIAL SCIENCES AND HUMANITIES

European Liberty and Security: Security Issues, Social Cohesion and Institutional Development of the European Union

ELISE

Final report

HPSE-CT-2002-00150

Funded under the Key action 'Improving the Socio-economic Knowledge Base' of FP5

DG Research
European Commission

Issued in
December 2005

Coordinator of project:
Centre for European Policy Studies (CEPS)
Brussels, Belgium
Prof. Elspeth Guild, Senior Research Fellow, Dr Thierry Balzacq and Mr Sergio Carrera, Research Fellows
Sciences-Politiques, Institut d'études politiques
Paris, FR
Prof. Didier Bigo

Partners:
National Capodistrian University of Athens, EL, Nicholas Scandamis
Centre for Migration Law, University of Nijmegen, NL, Elspeth Guild
University of Genoa, IT, Salvatore Palidda
Keele University, UK, Robert J. Walker
King's College London, UK, Vivienne Jabri

2007 Directorate-General for Research
Citizen and Governance in a knowledge-based society EUR 23129 EN

EUROPE DIRECT is a service to help you find answers to your questions about the European Union

Freephone number(*):
00 800 6 7 8 9 10 11

(*) Certain mobile telephone operators do not allow access to 00 800 numbers or these calls may be billed

A great deal of additional information on the European Union is available on the Internet.
It can be accessed through the Europa server (http://europa.eu).

Cataloguing data can be found at the end of this publication.

Luxembourg: Office for Official Publications of the European Communities, 2007

ISBN 978-92-79-07578-0

Printed in Belgium

PRINTED ON WHITE CHLORINE-FREE PAPER

Preface

Within the Fifth Community RTD Framework Programme of the European Union (1998–2002), the Key Action 'Improving the Socio-economic Knowledge Base' had broad and ambitious objectives, namely: to improve our understanding of the structural changes taking place in European society, to identify ways of managing these changes and to promote the active involvement of European citizens in shaping their own futures. A further important aim was to mobilise the research communities in the social sciences and humanities at the European level and to provide scientific support to policies at various levels, with particular attention to EU policy fields.

This Key Action had a total budget of EUR 155 million and was implemented through three Calls for proposals. As a result, 185 projects involving more than 1 600 research teams from 38 countries have been selected for funding and have started their research between 1999 and 2002.

Most of these projects are now finalised and results are systematically published in the form of a Final Report.

The calls have addressed different but interrelated research themes which have contributed to the objectives outlined above. These themes can be grouped under a certain number of areas of policy relevance, each of which are addressed by a significant number of projects from a variety of perspectives.

These areas are the following:

- ***Societal trends and structural change***

16 projects, total investment of EUR 14.6 million, 164 teams

- ***Quality of life of European citizens***

5 projects, total investment of EUR 6.4 million, 36 teams

- ***European socio-economic models and challenges***

9 projects, total investment of EUR 9.3 million, 91 teams

- ***Social cohesion, migration and welfare***

30 projects, total investment of EUR 28 million, 249 teams

- ***Employment and changes in work***

18 projects, total investment of EUR 17.5 million, 149 teams

- ***Gender, participation and quality of life***

13 projects, total investment of EUR 12.3 million, 97 teams

- ***Dynamics of knowledge, generation and use***

8 projects, total investment of EUR 6.1 million, 77 teams

- ***Education, training and new forms of learning***

14 projects, total investment of EUR 12.9 million, 105 teams

- ***Economic development and dynamics***

22 projects, total investment of EUR 15.3 million, 134 teams

- ***Governance, democracy and citizenship***

28 projects; total investment of EUR 25.5 million, 233 teams

- ***Challenges from European enlargement***

13 projects, total investment of EUR 12.8 million, 116 teams

- ***Infrastructures to build the European research area***

9 projects, total investment of EUR 15.4 million, 74 teams

This publication contains the final report of the project 'European Liberty and Security: Security Issues, Social Cohesion and Institutional Development of The European Union', whose work has primarily contributed to the area 'Citizenship, governance and the dynamics of European integration and enlargement'.

The report contains information about the main scientific findings of this project and their policy implications. The research was carried out by seven teams over a period of three years, starting in October 2002.

The abstract and executive summary presented in this edition offer the reader an overview of the main scientific and policy conclusions, before the main body of the research provided in the other chapters of this report.

As the results of the projects financed under the Key Action become available to the scientific and policy communities, Priority 7 'Citizens and Governance in a Knowledge-based society' of the Sixth Framework Programme is building on the progress already made and aims at making a further contribution to the development of a European Research Area in the social sciences and the humanities.

I hope readers find the information in this publication both interesting and useful as well as clear evidence of the importance attached by the European Union to fostering research in the field of social sciences and the humanities.

J.-M. BAER,

Director

Table of contents

Acknowledgements

We would like to express our sincere thanks to Joanna Apap and Malcolm Anderson both of whom have contributed enormously to the success of this project during its development.

Abstract

The **ELISE** project – *European Liberty and Security: Security Issues, Social Cohesion and Institutional Development of the European Union (EU)* –aimed at **developing adequate conceptual tools for a better understanding of security issues in modern European societies, while at the same time providing a framework for policy responses to future crises which do not undermine civil liberties, human rights and social cohesion.** To achieve this, ELISE has proceeded in three complementary directions. First, it has sought to develop a better and more comprehensive understanding of contemporary security challenges. Second, it has sought to develop a detailed account of the development of security policies at both the national and EU levels – especially in the aftermath of events such as those of 11 September 2001 – and of their impact on EU societies and their cohesion. Third, it has sought to identify the primary institutional challenges now confronting both Member States and the EU as a consequence of the many forces that are reshaping the relation between liberty and security in many different contexts.

In methodological terms, this has involved an **engagement with history** in order to understand how the relation between liberty and security has been articulated both in the modern state and in the modern international system. Further, it has required **looking at the multi-faceted changes affecting contemporary EU security policy**, including the enlargement process, agreements about common EU external frontiers, and new strategies at national, European and international levels developed to combat terrorism. Finally, it has involved **a critical assessment of** what is at stake in the seemingly commonsense idea that it is necessary to strike an appropriate **"balance" between the claims of security and the claims of liberty.**

ELISE research has shown that many recent policy solutions to the insecurity predicament are quite as worrying in the long term as the problems to which they respond**.** This is partly because the recent policy responses to terrorist attacks in the EU trigger memories of the way claims about immediate dangers have led to the erosion of liberalism and democracy at other moments of European history. It is also partly because it is fairly clear that there is an increasing discrepancy between the organizational capacities devoted to security on a global scale and the increasingly fragmented resources available for sustaining liberties under democratic conditions. Therefore particular attention has been paid to potential conflicts between civil liberties/human rights, specific security measures, and the effects of such measures on the overall socio-economic fabric of the EU. Attention has also been paid to the potential conflict between

technically efficient security measures and threats of disaffection on the part of targeted population groups.

ELISE has argued that **liberty is the principle that should govern security measures adopted at the EU level.** The ELISE project stressed that liberty should always be the principle against which any state interference on the basis of security must be limited, justified and open to judicial scrutiny. The perspective sketched by the ELISE consortium, along with the more specific research projects that inform it, suggest an urgent need for much more robust resistance to the marginalization of claims about liberty whenever the necessities of security are invoked. To be sure, where the possibilities of political liberty are currently being constrained by forms of structural and institutional fragmentation, they ought to be nurtured by imaginative forms of cooperation across existing jurisdictions; and where the possibilities of cooperation and unification are being sought in order to control human populations on a wider scale, they ought to be subject to greater scrutiny and control by many different democratically accountable communities and institutions.

The so-called **"democratic deficit,"** which pervades much of the crisis provoked by negative public responses to the proposed European Constitution, **is an especially serious problem in the context of security.** Thus, the policy recommendations proposed by ELISE are grounded upon a renewed commitment to a **politics of accountability**: by a willingness to resist seductive claims about the necessity for overriding liberties in the name of security and to ensure that exceptions to the primacy of liberty, equality and democracy under the rule of law are made only after sustained and multidimensional evaluation. This is not simply a matter of "civil liberties." It is a matter that cuts right to the most fundamental principles of EU modern political life..

I. EXECUTIVE SUMMARY

1. Overall Aim of the Project

1.0. ELISE - *European Liberty and Security: Security Issues, Social Cohesion and Institutional Development of the European Union (EU)* - is a research project funded (from 1st October 2002 for three years) by the Fifth Framework Research Programme of the Directorate General for Research of the European Commission. This Executive Summary outlines the objectives of ELISE, presents the main research findings, discusses some of the policy implications of these findings and offers policy recommendations.

1.1. Our starting point is the contention that the liberal and democratic traditions of modern European politics hinge on aspirations for both liberty and security although the relationship between these two values has had a long and often very troubled history. We have thus sought **to understand recent concerns about security among European citizens while bearing in mind the concern not to undermine civil liberties, human rights and social cohesion**. We have done so initially by seeking to place contemporary dilemmas in a broader context, which enables a broad range of scholarly traditions to engage in productive research over areas of common concern.

1.2. **The problems we address are the multiple challenges to the principles, institutions and practices through which claims to reconcile liberty and security are made.** Some of these challenges have been driven by the emergence of Europe as a novel form of political organization. Some have resulted from broader forms of economic, cultural and technological developments that have come to be identified as globalization. Some have come from the intensification of worries about new forms of violence associated with the attacks of September 11, 2001, and with various responses to these attacks. Some are linked to perceptions of the nature of sovereign states and of the relations between these states. However over the three years the scope has changed. There has been a continuous evolution of liberty and security problems linked to the wars in Afghanistan and Iraq, the 11 March 2004 Madrid bombing and the London bombings of 7 and 21 July 2005.

1.3. In part, this has involved an engagement with history in order to understand how the relation between liberty and security has been articulated both in the modern state and in the modern international system. In part, **it has involved looking at the multi-faceted changes affecting contemporary EU security policy, including the enlargement process, agreements about common EU external frontiers, and**

new strategies at national, European and international levels developed to combat terrorism. In part, it has involved a critical assessment of what is at stake in the seemingly commonsense idea that it is necessary to strike an appropriate "balance" between the claims of security and the claims of liberty.

1.4. The metaphor of a balance captures many popular assumptions about the place of legitimate violence in modern political life. It also promotes a profoundly misleading account of the social forces, institutional practices and legal principles at work in contemporary democratic societies, most especially when questions about liberty and security are involved. **ELISE has sought to untangle the many different and often conflicting dynamics that are obscured by this metaphor so as to offer a richer account of what is at stake when we are asked to make some kind of trade-off between established freedoms and principles for security in a moment of emergency**. If difficult decisions are to be made, they need to be understood not in relation to fuzzy and depoliticizing metaphors of balance but to hard questions about what it means to make an exception to the normal expectations of liberty, equality, democracy and the rule of law in modern political life.

1.5. Against the easy assumption of a need to strike a balance, therefore, ELISE has worked with more technically precise accounts of a politics of the exception. These accounts speak to the intellectual roots of security analyses grounded in traditions of political realism, to legal traditions concerned with the limits of the rule of law, and to historical accounts of liberal and democratic societies confronted with pressures to become more illiberal and more authoritarian. ELISE has thus been concerned to examine precisely how a new politics of the exception, emergency, suspicion and derogation is being constructed as a response to claims about new forms of insecurity and to evaluate their broader implications. Against this background, **particular attention has been paid to potential conflicts between civil liberties/human rights, specific security measures, and the effects of such measures on the overall socio-economic fabric of the EU**. **Attention has also been paid to the potential conflict between technically efficient security measures and threats of disaffection on the part of targeted population groups**.

1.6. ELISE has thus been a very broad project, combining a strong sense of the need for conceptual innovation at the level of principle with a desire to pay very close attention to what has been going on in very specific sites, policy arenas, legal contestations and executive decisions. As such, it has affirmed the need to counteract the professionalised specialisms that produce privileged perspectives named as security, or law, or

criminology, or civil liberties; indeed, it is increasingly clear that the greatest challenges before us arise at the boundaries and interstices of these familiar fields of expertise.

2. Findings and Their Implications

2.0. In general terms it would be fair to say that participants in ELISE are persuaded that many recent policy solutions are quite as worrying in the long term as the problems to which they respond**. This is partly because the recent policy responses trigger memories of the way claims about immediate dangers have led to the erosion of liberalism and democracy at other moments of European history**. It is also partly because it is fairly clear that there is an increasing discrepancy between the organizational capacities devoted to security on a global scale and the increasingly fragmented resources available for sustaining liberties under democratic conditions. In bringing such issues about principle into specific policy arenas, the ELISE project has stressed three general objectives:

- First, it has sought to develop a better and more comprehensive understanding of contemporary security challenges – **the problem of the politics of exception and the rule of law**;

- Second, it has sought to develop a detailed account of the development of security policies at both the national and EU levels – especially in the aftermath of events such as those of 11 September 2001 – and of their impact on EU societies and their cohesion – **the problem of the conflation of categories and social control**;

- Third, it has sought to identify the primary institutional challenges now confronting both Member States and the EU as a consequence of the many forces that are reshaping the relation between liberty and security in many different contexts – **the problem of democratic accountability and security professionals**.

2.1. The New Politics of Exception and the Rule of Law

2.1.1. From the Anti-Terrorism, Crime and Security Act in 2001 to the Prevention of Terrorism Bill in 2005, to take the case of the UK as an example, **changes in legislation and administrative practices across Europe provide all too many illustrations of a politics of exception and permanent danger.** From the clearly defined temporal and spatial remit that the sovereign capacity to declare an exception once had in the modern state, the declaration of exceptions now occurs in almost all of the political realms.

2.1.2. The capacity to decide exceptions is a serious business, as many of the classical traditions of military thought have long insisted. Much of the analysis of contemporary security problems has lost touch with such traditions, and is all too willing to treat every threat even the most banal, actual or predicted, as evidence that limits have been reached, that a state of emergency exists, that freedoms must be curtailed, that norms must be suspended.

2.1.3. **Such extremist reasoning is not only dangerous, but also unnecessary.** It finds little if any support in the relevant scholarly communities, for example. **It is, rather, the product of specific and clearly identifiable circumstances involving the behaviour of political professionals and the relation they have with security and intelligence agencies.** Not least, some players have been able to further their interests by transforming a fluid situation with many possible outcomes into a "fait accompli."

2.1.4. **The politics of exception is underpinned by fear; and fear constrains political creativity**. For example, the decisions to invade Afghanistan as the appropriate response to Al Qaeda's implication in the September 11 attacks, to prioritize the Pentagon and the defence industry, to build up a homeland security, to avoid the kind of judicial and policing approach adopted by the Spanish after 11 March, have been shaped by a specific and even idiosyncratic unilateralist vision of the world. These choices were not the only possible responses. Indeed, they were resisted by most of those who specialize in the demands of an international or multilateral political order. Still, these decisions have been taken, and their consequences are unfolding. Initial feelings of commonality with the victims of September 11, 2001, have given way to deep suspicions and resentment at the way a specific act of terror was amplified, first, into a state of national emergency, and then into a rationale for the wholesale restructuring of large parts of the world contrary to established principles if international order. There is, of course, almost infinite scope for disagreement about the judgements and decisions that were at work as this process unfolded. Two large points should not be forgotten, however. First, these specific decisions were generated through a politics of exceptionalism involving claims about a state of emergency, claims that were so easily and so effectively deployed to justify an attempt to rewrite the entire basis of the global political order with the effect to curtail liberties internally and beyond. Second, other responses were possible, but their very possibility was quickly eradicated through claims about military necessity, claims to a knowledge that legitimized a declaration of war.

2.1.5. **One of the most worrying expressions of the way these specific political choices were made has been the extraordinary willingness to treat "enemies"**

as inhuman, especially given that the framing of enemies has been shaped by claims about the defence of civilization. Abu Ghraib and Guantanamo Bay are significant here, as is the willingness to target entire populations as potential enemies given the difficulties of distinguishing "terrorists" from "civilians," and the indifference with which the scale of civilian casualties in Iraq has been received in many quarters. Troubling though these specific expressions are, however, we should not lose sight of the way they are expressions of deeply rooted tendencies that reach right into the fabric of modern liberal democracies.

2.1.6. **All these concerns are in some sense distilled in the tensions that can be observed between the political class and the judiciary, particularly in relation to respect, or otherwise, for the rule of law**. The emergence of indefinite detention of people suspected of terrorist activity has been at the heart of the discussion both in the US in relation to foreign nationals detained indefinitely at the US bases in Guantanamo, Cuba, and in the UK in relation to the 2001 Anti-Terrorism, Crime and Security Act permitting the indefinite detention of foreign nationals, who were arrested and detained mainly at Belmarsh prison. In 2005, this form of indefinite detention was withdrawn following judicial criticisms but replaced by control orders. ELISE has examined these tensions in some detail, focussing especially on indefinite detention, the rule of law and the role of the judges faced with the executive powers of the government and the administration.

2.1.7. **This struggle around the rule of law at the European level is crucial.** This is not to deny or underestimate the fact that our societies have reacted with some strength against past experiences of highly coercive techniques against subversion, particularly in the 1950 and 1960s in France and Southern Europe but also more recently, in the 1970s and 1980s, in the UK, Germany and Italy. Whether these took the form of dirty wars, suppression of opposition groups under dictatorships or anti terrorism measures, there is a history in Europe of tension between law and state violence which has been searing for the populations involved. **The use of the notion of a state of exception as an explanation for the suspension of the rule of law in certain discrete areas (either geographical or juridical) has been accompanied by the idea that some periods of exceptions may be prolonged and routinised until they become normal.** They have been slowly but surely incorporated into the rule of law, not only into our understanding of the boundaries of normality but into the professional consciousness of the judiciary as well. Indeed, the importance of rule of law in respect of the actions of the administration has been partly undermined by the multiplication of sources and scope of the derogations available for use in everyday life. There is, for example an exception applicable to the legal status of irregular migrants, an exception, in practice, shaping the

treatment of young people from different ethnic origins living in deprived areas, while the detention of foreigners in airport zones or in transit camps paved the way for the acceptance of indefinite detention in Belmarsh prison or at the US bases in Guantanamo. In respect of the former, only dramatic judicial criticism at the national level broke the consensus on indefinite detention.

2.1.8. **The response to challenges to the rule of law so far has been mixed.** While there have been some robust ripostes to some measures, such as that by the UK House of Lords to the indefinite detention of foreigners, legislation they found contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the French Conseil d'Etat, which found the detention of French nationals in Guantanamo to be illegal in international law, there has been silence on a number of critical issues. **The function of the rule of law to protect the individual has not yet found its place with respect to the collection, retention and use of massive amounts of data on the individual.** The collection and use of biometric data on individuals remains a field in which administrations are claiming a wide scope of manoeuvre, with only silence so far from the judiciary.

2.2. The Conflation of Categories and Social Control

2.2.1. That governments tend to justify their security policies in the name of protecting their citizens is one of most broadly recognised truisms of political analysis. Moreover, as the writings of Michel Foucault have affirmed for more recent generations, the protection of populations is necessarily the protection of specific categories of people to the exclusion of others. More particularly, **as much of the research conducted by ELISE suggests, the redrawing of boundaries expressed through many contemporary claims about security has resulted in the targeting of specific categories of the population, in ways that are culturally and racially marked.** Freedom and basic human rights have indeed been compromised by the all-pervasive character of security discourses, but that such discourses have made it much more difficult to treat claims about democracy as anything more that a rhetorical trope to be used to discriminate between ourselves and others.

2.2.2. Traditional liberalisms have long distinguished categories of population, largely in relation to claims about differing capacities of people to manage their own freedom, but they have also devised strategies for social integration within a national space: within a communicative public sphere, on the basis of equal claims to citizenship rights, through welfare policies and principles of distributive justice. With contemporary rearticulations of a politics of exception that works somewhere other than on the borders of those states in

which integrative practices might be cultivated, difference, otherness and exclusion are threatening to become the primary ground on which political relations are organized and legitimized. This has implications for the way liberal societies respond to claims about diversity, for the way individuals are taken to express cultural and racial identities, and for the way in which many long-standing antagonisms between liberal principles and democratic practices are being stretched to breaking point.

2.2.3. The EU as a whole has tried to build an alternative vision of security in the project of enlargement including the Balkans, for example, or managed to prevent excessive prejudices against Muslims, or privileged justice and police cooperation at the world level as the main solution against political violence, or tried to improve economic stability in Middle East. It remains nevertheless the case that **some institutions have played a very different strategy, reproducing at the European level, the assumptions and procedures of their US partners**. For example, some actors inside Justice and Home Affairs have tried to push the agenda for more controls of migrants in the name of the struggle against terrorism and organised crime. They have criminalised migrants and securitised asylum seekers. They have considered themselves in a war on terror extending to illegal migrants and radical Muslim believers, especially imams.

2.2.4. Many other dynamics within Europe give cause for concern about the possible direction of EU-US cooperation. **Even though the fear of terrorism and claims about links with weapons of mass destruction have been less important in Europe, there has been a resurgence of the forms of insecurity generated in the mid-1980s in the name of a struggle against the free movement of people and fear of migrants "invading" the West.** In Europe, as in the USA, powerful discourses have connected terrorism with migration as well as with Islam. Many politicians, in classical populist style, have deployed such discourses for re-election purposes, thereby helping to create a "siege" mentality, especially where people have little contact with other peoples and other places and feel insecure about other ways of life.

2.2.5. As a study of the Italian case shows especially well, claims about security are open to considerable abuse through the superimposition of aggregated categories of friend and enemy with many other forms of political difference. In the Italian case, claims about difference are mainly linked to the role of the country as southern "limit" of Europe. Whether in journalistic discourse, press discourse, political debate, or the common knowledge of Italian prosecutors, the so called "invasion" of "illegal migrants" is frequently translated into terms that are synonymous with terrorist dangers. Two local factors are involved here: the traditional criminalization of migrants as dangerous aliens; and the alleged weakness of Italian borders to terrorist infiltration. **Although there is**

no evidence of connections between terrorism and illegal migration, it has now become normal to search for terrorists among migrants, especially those coming from Muslim countries. This tendency has led to several trials in which people have been charged but eventually acquitted. Nevertheless, the social construction of migrants as potential terrorists has been effective. It has enabled a strategy of internment and easy expulsion that eventually provoked a challenge against Italian authorities regarding human rights violations before international courts.

2.2.6. The climate of unease and fear towards some foreigners has fostered the belief that there is a connection between practices of Islam and doubtful allegiance to the state. Even where individuals have become citizens, their religious affiliation makes them suspect as a possible "fifth column" representing "the enemy within." In practice, it is often a question of how an individual is perceived. If a child is first and foremost a foreigner before he or she is a child, the principle, contained both in national, EU and international human rights legislation that the priority must be given to the best interests of the child in any treatment of him or her will take second place. The expulsion of the foreigner (albeit a child) takes priority over the protection of the child (albeit a foreigner). The possibility of electronically tagging a young person for civil disorder and to generalise the procedures of control have also connected these two dimensions of the normal and the exception in a paradoxical way. On the one hand, **the exception invades the normal and modifies what is considered as normal; on the other there is created a new tolerance for further exceptions.** A climate of fear, even a permanent state of emergency has been created, so that the way an individual behaves is shaped by the conviction that we live in a time of war.

2.2.7. **The consequence has been to reinforce what Didier Bigo in 1998 termed a "governmentality of unease" or "ban-opticon," in which there is a framing of certain people who are then categorised as subject to a sovereign exception, to exclusion and ban on the basis of the threat they represent.** For them, there is a normalisation, and imperative, in the curtailment of some forms of freedom, most graphically freedom of movement. Their boundaries are delimited by the securitisation of everyday life, and the rise of intolerance, even the designation of zero tolerance. September 11 has exacerbated the ban-opticon by making more visible many of the technologies and rationalities at work. In particular there has been an acceleration of the move away from the control of people on the territory or by means of their territorial designation to a control at a geographical distance through the traces they leave**. This is why biometric technologies have become so central to security. However, people are also monitored by reference to the future, by what they may or may**

not do in the future based on what is known about them from the past. This is why data-mining and profiling have also become so central to security.

2.2.8. Interestingly enough, claims about the need for new forms of security have begun to work as claims about the need for new forms of governing–or governance as it is now called by those who understand the limited reach of state governments, or governmentality, as it is called by those who understand the ways in which people are shaped to govern themselves rather than simply to obey the commands of some government. Especially **when new technologies are treated as mere additions to established political processes, specific techniques and strategies are allowed to generate new forms of social control.** Forms of accountability that have been associated with modern forms of government are gradually subverted by the procedures of social control. It is in this context that there is clearly a need for greater attention to what used to be called the unintended consequences of political action, in this case consequences that lead to the erosion of political accountability through the attempt to provide security through technologies that have come to be understood in a political vacuum.

2.3. Democratic Accountability and Security Professionals

2.3.1. ELISE has shown that recent concerns about security have intensified the very old dilemma of how to defend democracy without destroying it in the process.

2.3.2. **The success of discourses about the reintroduction of a military-war state of mind inside a country as well as of justification of the diminution of civil liberties in the name of some emergency is strongly connected to competing approaches to forms of government and democratic accountability.** Among the many discourse put on the market place of security, **intelligence services have had a profound impact on policy.** However, their visibility in the policy sphere has given rise to challenges to their authority. For instance, in the UK, knowledge produced by intelligence services regarding the existence of Weapons of Mass Destruction (WMD) in Iraq was questioned. ELISE has demonstrated that claims to knowledge advanced by the intelligence and security services are often given privileged status in relation to claims made by other political actors. This is in part a consequence of the way in which the mass media are attentive to the voices of specific elites. For example, analysis of press-released statements by domestic political actors in the UK and France between September 2001 and June 2003 has shown that the defence of emergency rules is widely covered by the press, largely because it is supported by several political leaders, but does not receive the open support of the majority of domestic political actors. On the

other hand, the defence of the human rights is adopted by fewer political leaders but enjoys broader support among the general public.

2.3.3. Further, **the primary political narratives about Al Qaeda and other such organizations tend to repeat, as if by mimesis, the specialized and decontextualized forms of knowledge produced by the intelligence services. These forms of knowledge are artificially free both from any democratic accountability and from critical assessment by other institutions.** Knowledge produced by the intelligence services has a sort of privileged status in this respect, but it is a status that depends on the absence of precisely the kind of open critique that is said to be the crucial condition under which knowledge may be distinguished from dogma.

2.3.4. The progressive development of an "Area of Freedom, Security and Justice" has been especially affected by all these developments. While "security" has clearly acquired a predominant value, "liberty" has been relegated to a secondary role. Ever since the Amsterdam Treaty (1999) first transferred polices dealing with elements of freedom, security and justice to EU competence, there has been a tendency, both in discourse and policy, to strengthen and unify transnational cooperation on security. Security understood as protection of the internal order has become the most essential component of EU citizenship in the area of "freedom, security and justice." This policy area has been based both on Community and intergovernmental method, and is gradually leading to new sources of discretionary power through the emergence of European-wide networks of control. **In effect, by providing for common normative parameters and operational co-ordination in the fight against crime and terrorism, EU governance works so as to reinforce national policies against security threats faced by state governments.**

2.3.5. The official Declaration on Combating Terrorism of 25 March, 2004, represented another step towards a common approach to a highly contentious package of restrictive proposals aimed at fighting everything deemed to be a "terrorist activity." Similarly, the development of a Visa Information System (VIS), the second generation of the Schengen Information System (SIS II), as well as the use of biometrics and new technologies of surveillance in such identification documents as visas, residence permits, passports and travel documents, continue to be at the top of the EU policy agenda. **The structural coherence and potential effectiveness of all these pro-security policies, and their compatibility with European and international human rights standards, data protection legislation and the rule of law for EU and non-EU citizens is all open to very serious question.** There is a worrying lack of transparency to the adoption of all these measures.

2.3.6. The implications of this excess can be felt in the tensions of liberal democratic polities that consider themselves to be in a state of permanent emergency (rather than the permanent state of "liberal democratic peace" so widely celebrated only a decade ago). The generalization of claims about a state of emergency as the defining moment of political life raises fundamental questions about the basis of legitimate authority, about peoples' democratic ability to contest the claims of the state and its articulations of singular sovereignty within a specific territory, and indeed about the very possibility of political agency. **More than any other sphere of modern political life, security practices work, in part, by seeking to protect themselves from the normal operation of political contestation while at the same time claiming to be able to protect a sphere in which political contestation may be conducted.** Consequently, to focus on the implementation of security practices, and specifically on the implementation of anti-terrorist legislation, is to engage with political agency not only in relation to rights, but to the contestation of the claims about the conditions under which political authority is now considered to be legitimate.

2.3.7. The debate on what democracy we want today, what freedom we are effectively sacrificing in the name of future freedoms and the eradication of terrorist dangers, has not been at the top of the agenda recently. Indeed, for all the rhetoric about the need to secure democracy, the extent to which democracy remains a viable political aspiration under contemporary conditions is hardly discussed among the elites or mass media which can afford to take their place in the world more or less for granted. This is no doubt linked to the way in which the security industry and those interested in economic cooperation between EU members, or in competition with the US industry, have been able to assume priority over those engaged with debates about civil liberties and social cohesion. Nevertheless, liberty and social cohesion are closely related, on a judicial level, to juridical control over complex and diverse systems of power, to the political and administrative means for the implementation of legal provisions over issues of discrimination. As long as such issues are swamped by the perceived necessities of certain kinds of cooperation on matters of security and economic interest, democratic energies will continue to atrophy.

3. Policy Implications

3.0. **In EU Treaties liberty is always the principle against which any state interference on the basis of security must be limited, justified and open to judicial scrutiny.** The perspective sketched here, along with the more specific research projects that inform it, suggest an urgent need for much more robust resistance to the marginalization of claims about liberty whenever the necessities of security are invoked. In general terms it might be said that where the possibilities of political liberty are

currently being constrained by forms of structural and institutional fragmentation, they ought to be nurtured by imaginative forms of cooperation across existing jurisdictions; and where the possibilities of cooperation and unification are being sought in order to control human populations on a wider scale, they ought to be subject to greater scrutiny and control by many different democratically accountable communities and institutions. The policy implications advanced hereunder follow these principles.

3.1. The Rule of Law should Monitor Claims for Exception

3.1.1. Faced with the revival of politics of exception that curtails the rule of law at national level and the strengthening of EU networks of control, the European regime of governance should be completed with a number of specific institutional safeguards and the existing ones should be adequately adapted in order to address the rise of new sources of discretionary power in what has been qualified as the area of freedom, security and justice.

3.1.2. Developing and consolidating effective tools of control

The argument of emergency and calls for derogatory measures by security professionals have to be carefully monitored through the establishment of institutional mechanisms of controls that will counterbalance the power granted to security agents. This should be done at both national and EU levels.

As far as the control of national authorities is concerned:

a) Mechanisms of mutual evaluation or peer review (as proposed under art.III-260 Constitutional Treaty), should lead to regular and thorough assessments as to the practical implementation of police and judicial co-operation.

b) The monitoring function fulfilled by the EU network of independent experts in fundamental rights with regard to the application of the EU Charter at national level should be further promoted, but also completed by thematic reports and comparable data to be provided by the European Union Agency for Fundamental Rights (see the Proposal for a Council Regulation establishing European Union Agency for Fundamental Rights. Art. 4.1 sets out the tasks of the Agency). Moreover, **monitoring should cover not only legislative measures, but also the application of law to individual cases as well as the practices and attitudes by national officials, notably by law-enforcement and security service agents.**

c) **A more active Fundamental Rights policy at EU level by a specialised agency, in connection with a separate Commissioner for Fundamental**

Rights, would be completed by ex-ante policy measures the human rights protection mainly provided by courts. Such policy should focus on areas of special interest to the individual residing in the Union: immigration, asylum, criminal investigations relating to terrorism and organised crime. This presupposes the adoption of the proposed decision of extending the competencies of the European Union Agency for Fundamental Rights to the EU Third Pillar [COM(2005)280]. The tasks of such policy might include public awareness activities, extensive dialogue with civil society actors, the exchange of best national practices on basis of interdisciplinary thematic reports, comparable data and, on a longer-term basis, the definition of indicators and benchmarks as well as non-binding codes of conduct in chosen policy-areas.

As far as the control of EU authorities is concerned:

a) The EU legislator should proceed by giving clearly defined mandates to executive agencies concerning their operational powers and the conditions of their exercise (e.g. joint-investigative teams with the participation of Europol's agents). The basic idea should be that liberty is the principle and security should be adjusted to it. **To promote liberty, we need to build processes that set the principle of reciprocity at the centre of their functioning.** In other words, the professionals of security have to recognize that if they have more capacities and more freedom to check identities, to limit privacy, to connect data bases which were designed for other purposes, they should, equally, accept the lost of their own autonomy and freedom. This means that their activities have to be put under strict scrutiny. In practice, this can be achieved through, for instance, an "special envoy" on data protection working in sensitive teams of EU security professionals and reporting their behaviour; through a more formalized monitoring of their own practices; through frequent assessments of teams handling private data.

b) Effective political monitoring by the European and national parliaments should not be limited to the discussion of annual reports of activities by EU agencies. It might also include participation in hearings before the competent parliamentary committees and the obligation to comply with special requests for information. On a longer-term basis, the European Parliament, and possibly national parliaments, might be associated in the appointment of the heads of EU agencies.

c) **ELISE consortium acknowledges that security may sometimes involve secret and speed. However, the actions of security agents must not be exonerated from accountability. An independent body needs to be set up at the EU level.** This body dealing with human rights, anti-racism, anti-

discrimination and data protection issues should be established with a budget in proportion with that required for the development of SIS II, VIS, Europol and Eurojust. **External control by independent supervisory bodies involves a series of options not necessarily mutually exclusive: the creation of a special unit of the European Ombudsman to monitor the correct application of EU security measures.** This type of control should be implemented in conjunction with the adaptation of patterns of internal control based on the operation of Joint Supervisory Bodies. Internal and/or external control may also take the form of a physical presence of a representative of the supervisory body within the operational centre of the security agency. In any event, **special control mechanisms need to be established with regard to the management of personal data by a Data Protection Officer in liaison with the independent authority on data protection.**

d) Furthermore, **special procedures of administrative adjudication of individual complaints open to all persons likely to be affected by the operation of EU executive agencies (e.g. access to documents, right to obtain rectification of personal data, right to compensation by the usage of data) are in order.** In this context, the option should be considered to invest an independent authority, namely the European Union Agency for Fundamental Rights, in connection with the Commission as the guardian of the Treaties, with the power to investigate allegations of human rights violations by EU institutions in general and by EU executive agencies in particular.

3.1.3. The requirements of the rule of law

For ELISE members, a strict and consistent application of the rule of law stands as the necessary cornerstone of the European regime of governance as applied in the area of freedom, security and justice. This implies:

a) The introduction of legal provisions as to the means of redress available to individuals in all instances likely to affect their rights and legitimate interests. In particular, the "necessary legal safeguards" with regard to the adoption of lists of persons subject to special restrictive measures (as proposed under art.III-322 CT) must include effective access to the European Court of Justice (ECJ) and the burden of proof should lie with law-enforcement services. Moreover, administrative complaints regarding the operation of EU executive agencies must also make provision for the eventual settlement of the disputes before EU Courts.

b) The adherence to the rule of law in the light of new challenges implies jurisdiction for the judiciary to scrutinize these fields and especially by the ECJ. It remains for the ECJ to determine the scope of its jurisdiction as to national law-enforcement measures initiated at EU level, to define the scope of application of the EU Charter to national measures in general and to decide in which cases natural and legal persons are directly and individually affected by the operation of EU executive networks.

3.2. To Win Trust the EU should strengthen Social Cohesion

3.2.1. **The reaction of selected EU governments to threats of terrorism in 1991 in light of the first Gulf War and post 2001 reveals a temptation to label all foreigners as potential enemies.** The two periods are marked by the insertion into legislative texts of exceptions to international obligations to protect refugees. The comparative research carried out by ELISE consortium shows that circumventing human rights norms and regarding all immigrants as enemies have a deleterious effect on social solidarity and trust in national and EU institutions. **This may be fought through a set of policy measures that defend equality, solidarity, racial and cultural tolerance; engage "panic politics" through training programmes; promote EU citizenship; and safeguard the rule of law.** These measures are spelled out below.

3.2.2. As the reactions to September 11 and, to a lesser extent, the London attacks of 7 and 21 July 2005 have dramatically shown, the professionals of politics and the media have been the first groups to "panic" (in contrast with civilians and even victims). They were unprepared to deal with this kind of events. Their reactions have fuelled resentment against foreigners residing in the EU. To avoid this kind of behaviour, the **EU should set up an emergency crisis group composed of specialists of complex emergency situations, historians, sociologists and psychologists to assess the danger on a larger scale in space and time.**

3.2.3. The respect of the fundamental rights and freedoms of every human being (Liberty) and the rule of law (Justice), as guaranteed by international as well as European legal frameworks, need to be taken as a point of departure in security measures envisioned, discussed or adopted. **ELISE consortium believes that "security" only comes from the respect and protection of human rights and fundamental freedoms through the rule of law.** This major aspect of democracy must not be diminished for foreigners in such times. The right to habeas corpus, to a hearing before a judge on the merits of an application must remain in place not only for nationals, but also for foreigners. In addition, the weakening of rule of law in respect of

foreigners, in particular for refugees, the most vulnerable of our communities, on account of heightened fears of political violence does not result in greater security but rather in a diminution of social solidarity and cohesion. And, EU Members States know this too well, culturally and politically fragmented societies offer a fertile terrain for violent political actions. Thus, a politics of solidarity and equality, not a politics of security that undermines democratic rights should be pursued. Equal rights do not mean assimilation or cultural homogenization; they are the premises of a political community that is continuously transformed in a demanding global world.

3.2.4. The right of free movement should be reviewed without so much reference to the economic considerations that continue to limit its full exercise in a number of practical cases. In this sense, all the visible and hidden obstacles inherent to the "freedom to move" need to be openly debated and urgently overcome in order to make free movement and residence rights more inclusive in a enlarging EU. **The restrictive transitional arrangements applied to workers coming from eight of the ten new EU Member States should be abolished in conformity with the right of equal treatment and non-discrimination on grounds of nationality, as enshrined by the EC legal framework and the proactive case law of the ECJ.** These steps, the aim of which is to foster a successful transition from market citizen to Union citizen should effectively take place for the benefit of all in an enlarged EU.

3.2.5. Security officials involved in the definition and implementation of the fight against terrorism at the national and even the EU level do not have a comprehensive perception of the multiple facets of the issue of political violence, nor of the various stakes related to it. **The organization of training seminars at the EU level may allow them to acquire the legitimate knowledge for the construction of an efficient counterterrorism policy including security, liberty and cultural aspects.** For this purpose, these training seminars should address the underlying factors of tensions within EU Member States.

3.2.6. A comparative approach to different periods of time is important in order to learn from each other's experience, especially in a knowledge-based society. **It is therefore vital to develop a permanent, independent and interdisciplinary academic working group at the EU level that analyses the patterns of national cultures in relation to political violence and their way to deal with it.** The trajectory of each state, the structure of its security services and their articulation, the political games and the previous lessons from antiterrorist policies success or failures should equally be examined.

3.3. Security Professionals should be Democratically Accountable

3.3.1. The need to provide immediate policy responses and efficient solutions to security challenges dominating the political context, namely terrorism, may also open the way to more radical changes, i.e. the development of EU law-enforcement agencies as organic patterns of power with the power to address binding instructions to their national counterparts. Naturally, such option should be read in conjunction with the evolution of the general constitutional structure of the EU, especially the emergence of a single executive authority directly accountable before the European Parliament. Still, the provisions of the Treaties leave open the option for the gradual transformation of EU executive agencies into organic patterns of power, according to the precedent set by the European Central Bank in the monetary field.

3.3.2. The application of the agency model in the form of independent federal agencies with executive powers over police and judicial action in criminal matters would require a fully-fledged system of federal guarantees, possibly including a nomination procedure involving not only the European but also national parliaments, supervision by an executive authority directly accountable before the European Parliament and, ultimately, the recognition of the EU Charter as the general standard of protection of human rights in the Union and the Member States alike.

3.3.3. EU Governance, in the form of an integrated approach to threats facing the security of the Union as a whole and its citizens, may not be effectively pursued solely on basis of intergovernmental structures under the authority of the Council and/or the European Council, such as the Art.36 Committee or the newly appointed Counter-terrorism Co-ordinator. The European Commission stands as the most qualified independent authority with valuable expertise and policy input with regard to all aspects of security management at EU level, ranging from market security in the broadest sense to the management of information as the main object of networks of control. **The functional synergy between supranational and intergovernmental actors which lies at the heart of the so-called Community method, should be adequately translated to the EU patterns of power dealing with risks affecting the security of the market as well as individual safety. Consequently, the Commission should be fully and actively involved in the proceedings of the standing committee on internal security** (as proposed under art.III-261 CT), **in monitoring mechanisms of police and judicial co-operation** (as proposed under art.III-260 CT) **and especially in future arrangements providing for an integrated EU approach against "man-made disasters" covered by the solidarity clause** (as proposed under art.I-43 & III-329 CT).

3.3.4. To sum up, **the so-called "democratic deficit," chronic across so much of the EU, is an especially serious problem in the context of security.** Thus, the institutional initiatives proposed here need to be driven by a renewed commitment to a politics of accountability: by a willingness to resist seductive claims about the necessity for overriding liberties in the name of security and to ensure that exceptions to the primacy of liberty, equality and democracy under the rule of law are made only after sustained and multidimensional evaluation. There is no reason to abandon the achievements of modern political life to those who have been enabled to speak in the name of security and nothing but security, but there is very good reason to suspect that much too much ground has already been ceded to agencies and institutions which have become used to speaking in this way. **Although threats of violence and terror may continue, the potential excesses of a new politics of exception must also be dealt with. This is not simply a matter of "civil liberties." It is a matter that cuts right to the most fundamental principles of modern political life.** In the end, it is not a matter that can be left exclusively in the hands of the security professionals, nor even the political professionals. Given the crisis provoked by negative public responses to the proposed European Constitution, this is a particularly good time to establish discussion on a much broader basis.

4. Policy Recommendations

In view of the supremacy of the principle of liberty in respect of which security must always be subsidiary, the allocation of budgetary resources to the defence of freedom must exceed that allocated to security. Accordingly, any increase in budget allocation for security measures and the security industry must be accompanied by an equivalent and proportionate percentage increase in budget allocation for programmes enhancing freedom. We therefore make the following recommendations in respects of bodies to consolidate the meaning and exercise of liberty.

The establishment of:

a) A Commissioner for Fundamental Rights with all the institutional implications that it involves.

b) A fully independent Fundamental Rights Agency which has the full scope of tasks as set out in the Proposal for a Council Regulation establishing a European Union Agency for the Fundamental Rights [COM(2005)280, June 2005].

c) A special branch of this Agency which has the power to send specialized data protection agents, without advance notice, to any place where Member States authorities are effecting data collection and management both within the Union

and abroad, to ensure the conformity of such data collection and management activities with EU law, Article 8 of ECHR and other international commitments.

d) A special Unit of the European Ombudsman to monitor the correct application of EU security measures.

e) A permanent, independent and interdisciplinary, academic working group to advice the Commissioner and the Fundamental Rights Agency on European liberty and security.

f) An emergency crisis group composed of specialists of complex emergency situations, historians, sociologists and psychologists to assess the danger on a larger scale in space and time.

In the elaboration of activities for the protection of freedom the following procedures must apply:

a) The European Commission should be fully and actively involved in the proceedings of the standing committee on internal security, in monitoring mechanisms of police and judicial co-operation and especially in future arrangements providing for an integrated EU approach against "man-made disasters" covered by the solidarity clause.

b) Any Agency established by the EU must be directly accountable to the European Parliament and its activities subject to review by the European Union Agency for Fundamental Right and subject to the power of the Commissioner for Fundamental Rights.

c) Wherever individuals, rights and legitimate interests are engaged by measures taken either at the EU level or at national level as results of EU law, there must be effective and comprehensive legal remedies including appeal rights and ultimate supervision by the ECJ.

d) Equality is the fundamental principle of citizenship and inimical to restriction on freedom of movement. The limitation on freedom of movement of workers, nationals of eight of the 2004 accession countries should be lifted forthwith.

e) The right to habeas corpus and to a hearing before a judge on the merits of an application must be respected not only for nationals, but also for foreigners and guaranteed not only at the national level but also by the EU.

II. SCIENTIFIC DESCRIPTION OF PROJECT RESULTS AND METHODOLOGY

1. ELISE Final Synthesis Report

1.1. Introduction

1.0. ELISE – *European Liberty and Security: Security Issues, Social Cohesion and Institutional Development of the European Union* – is a research project funded by the Fifth Framework Research Programme of the DG for Research of the European Commission for three years (beginning 1 October 2002). This report presents the main research findings, outlines some of the policy implications of these findings and offers policy recommendations.

1.1. Our starting point is the contention that the liberal and democratic traditions of modern European politics hinge on aspirations for both liberty and security, although the relationship between these two values has had a long and often very troubled history. We have thus sought to understand recent concerns about security among EU citizens while bearing in mind the concern not to undermine civil liberties, human rights and social cohesion. We have done so initially by seeking to place contemporary dilemmas in a broader context, which enables a wide range of scholarly traditions to engage in productive research over areas of common concern.

1.2. The problems we address are the multiple challenges to the principles, institutions and practices through which claims to reconcile liberty and security are made. Some of these challenges have been driven by the emergence of the EU as a novel form of political organisation. Some have resulted from broader forms of economic, cultural and technological developments that have come to be identified as globalisation. Some have come from the intensification of worries about new forms of violence associated with the attacks of 11 September 2001 and with various responses to these attacks. And some are linked to perceptions of the nature of sovereign states and of the relations between these states.

1.3. In part, this task has involved looking back several centuries in order to understand how the relation between liberty and security has been articulated both in the modern state and in the modern international system. In part it has also involved looking at the multi-faceted changes affecting contemporary EU security policy, including the enlargement process, agreements about common EU external frontiers, and new strategies developed to combat terrorism at the national, EU and international levels. Finally, it has involved a critical assessment of what is at stake in the seemingly common

sense idea that it is necessary to strike an appropriate 'balance' between the claims of security and the claims of liberty.

1.4. The metaphor of a balance captures many popular assumptions about the place of legitimate violence in modern political life. It also promotes a profoundly misleading account of the social forces, institutional practices and legal principles at work in contemporary democratic societies, most especially when questions about liberty and security are involved. The ELISE project has sought to untangle the many different and often conflicting dynamics that are obscured by this metaphor so as to offer a richer account of what is at stake when we are asked to make some kind of trade-off between established freedoms and principles for security in a moment of emergency. If difficult decisions are to be made, they need to be understood not in relation to fuzzy and depoliticising metaphors of balance but to hard questions about what it means to make an exception to the normal expectations of liberty, equality, democracy and the rule of law in modern political life.

1.5. Against the easy assumption of a need to strike a balance, the ELISE project has worked with more technically precise accounts of a politics of the exception.[1] These accounts speak to the intellectual roots of security analyses grounded in traditions of political realism, to legal traditions concerned with the limits of the rule of law, and to historical accounts of liberal and democratic societies confronted with pressures to become more illiberal and more authoritarian. The ELISE project has thus been concerned to examine precisely how a new politics of the exception is being constructed as a response to claims about new forms of insecurity and to evaluate their broader implications. Against this background, particular attention has been paid to potential conflicts between civil liberties/human rights, specific security measures and the effects of such measures on the overall socio-economic fabric of the EU.[2] Attention has also been paid to the potential conflict between technically efficient security measures and threats of disaffection on the part of targeted population groups.

1.6. In general terms it would be fair to say that participants in the ELISE project are persuaded that many recent policy responses constitute cures that are quite as worrying in the long term as the disease to which they respond. This is partly because they trigger memories of the way claims about immediate dangers have led to the erosion of liberalism and democracy at other moments of European history. It is also partly because it is fairly clear that there is an increasing discrepancy between the organisational

[1] See WP1, 2, 4 and 6 reports.
[2] See WP3 report.

capacities devoted to security on a global scale and the increasingly fragmented resources available for sustaining liberties under democratic conditions.

1.2. Scholarly Orientations

2.0. The research carried out during the three-year duration of the project has been organised around two main scholarly axes. The first has been a process of refining the concepts relating to security at the national, EU and global levels. The second has been a process of developing an analytical framework to evaluate and test policy responses to future security challenges, particularly those involving acts of political violence officially labelled as 'terrorism', and building into this framework criteria relating to civil liberties and social cohesion.

2.1. In both contexts, the ELISE project has built upon a broad acknowledgement of the limited perspective that traditional accounts can offer on contemporary dilemmas, offered from either a view that is defined in purely national security terms in relation to an external or international sphere or from a purely national arena of freedom under the law of particular states. The very idea of 'Europe', like the awkward label of 'globalisation' and the extremely contentious notion of a 'war on terror', attests to the need for some quite profound rethinking of the most basic principles through which we have come to understand ourselves as free citizens under law yet also as secure in the possibilities of a collective existence that is not exhausted by claims of the sovereign state.

2.2. In the first instance, therefore, the ELISE project has sought to become sensitive to the depth of the challenges to fundamental principles of liberty and security that have resulted from contemporary developments. It has also sought to bring both transnational and transdisciplinary perspectives to bear on what these challenges might mean for the formation of complex judgements about what ought to be done about problems that so clearly elude the capacities of established scholarly literatures. The project has thus had to engage not only with the different forms of knowledge arising from various scholarly traditions among the ELISE team, but also with questions about the authority of various agencies claiming to be able to make judgements about the seriousness of various acts of violence and about the consequences that must necessarily follow.

2.3. Bringing different modes of thought within the same debate, such as national security discourse on the one hand and political and sociological discourse about citizenship on the other, illustrates the difficulty and complexity of the issues confronted by the team. On a different level, taking account of the extraordinary complexity of contemporary legal and administrative practices, which have blurred old boundaries,

poses new problems unexpected by traditional 'internationalists' and 'integrationists' alike.

2.4. Debates about 'theory' and abstract principles formed a part of the work undertaken. But we were also concerned to illustrate how laws and principles are moulded by 'micro-practices'.[3] These set processes in motion, establish practices and introduce rules of behaviour (sometimes by functional agreements); short-term expedience mutates into entrenched routines, and, not infrequently, laudable intentions generate negative effects.[4] An overall objective has been to place the stakes in the multiple dramas unfolding in the past few years in a broader historical and comparative perspective, while paying equal attention to the precise details of practices and events. These latter aspects produce new understandings of and responses to the relation between liberty and security – sometimes responsibly, sometimes not, and often in ways that raise basic questions about claims concerning political responsibility in contemporary Europe.[5]

1.3. The Objectives

3.0. In bringing such questions about principle into specific policy arenas, the ELISE project has stressed three general objectives.

3.1. First, it has sought to develop a better and more comprehensive understanding of contemporary security challenges. Building on the wide range of literature that has emerged since assumptions about 'national security' and 'political realism' lost credibility with the end of the cold war, under this objective the ELISE project has aimed at:

- working with a variety of political, sociological and legal research communities;

- thinking about the implications of notions of 'good governance' for claims about security;

- resisting the metaphysical claims about a universal 'power politics' through a careful assessment of the specific techniques through which power is exercised in modern societies;

- assessing the work that is done through the deployment of specific conceptions of terrorism;

[3] See WP4 and 5 reports.
[4] WP1 report.
[5] See WP6 and 1 reports.

- understanding the implications of attempts to constitutionalise security policy; and, perhaps above all,

coming to some considered judgement about the implications of the changing relationship between claims about liberty and claims about security for what it means to speak of the EU as a site of political legitimacy grounded in claims about the rule of law.[6]

3.2. Second, it has sought to develop a detailed account of the development of security policies at both the national and EU levels – especially in the aftermath of events such as those of 11 September 2001 – and of their impact on EU societies and their cohesion.[7]

3.3. Third, it has sought to identify the primary institutional challenges now confronting both member states and the EU as a consequence of the many forces that are reshaping the relation between liberty and security in many different contexts.[8]

3.4. ELISE has thus been a very broad project, combining a strong sense of the need for conceptual innovation at the level of principle with a desire to pay very close attention to what has been going on in very specific sites, policy arenas, legal contestations and executive decisions. As such, it has affirmed the need to counteract the professionalised specialisms that produce privileged perspectives named as security, or law, or criminology, or civil liberties; indeed, it is increasingly clear that the greatest challenges before us arise at the boundaries and interstices of these familiar fields of expertise.

3.5. The ELISE project has managed to work across some of these boundaries, while recognising that any possible EU future will still involve boundaries of some sort and those that lie between the demands for freedom and the demands for security will continue to frame the possibilities of any claim to an EU that is somehow still liberal and democratic, legitimate and authoritative. Moreover, the common concern with boundaries and limits at the heart of any consideration of the relation between security and liberty has sustained a rather surprising level of understanding and communication among different disciplinary divisions, most notably those involving political theory, sociology, criminology, international relations, law and policy analysis. A mutual interest in identifying the problems has proved to be more powerful than any differences in the methodologies informing the work of different researchers.

[6] See WP6, WP4 and WP1 reports.
[7] See WP1, WP2, WP3 and WP4 reports.
[8] See WP3 and WP5 reports.

1.4. Continuity and Change: The Exaggeration of Novelty

4.0. The main results achieved during the three years of the ELISE project clearly differ from the narratives that have been presented by many politicians, by large sections of the mass media and by some forms of academic research grounded in nationalist accounts of friend-enemy relations. Nevertheless, these results seem to be corroborated by an emerging consensus across a broad spectrum of contemporary scholarship and informed opinion. Two general conclusions seem especially uncontroversial, both of which lead to concerns about premature judgements about the novelty of the present situation. Accounts of the radically new are all too easily transformed into accounts of the radically dangerous.

4.1. First, it is clear that 11 September cannot be considered to be an 'unprecedented event' that radically changed the face of the modern world, even if it was a tragic moment. It did not mark the birth of a new age of terrorism, or hyper-terrorism, or mega-terrorism, or some third type of terrorism. The transnationalisation of political violence by clandestine organisations has been a long process, with roots that go back at least as far as the decolonisation processes of the 1950s, the hijacking of the aircraft of third parties in the 1970s, the development of killing at a distance through technologies of remote bombing in the 1980s, the radicalisation of conflicts in Lebanon and Palestine and the resurgence of suicide bombers against French and US armies. To the extent that novelties may be identified, they involve new combinations of traditional forms of action, and not, as so many official accounts have implied, some grand new force combining weapons of mass destruction with fanatical and irrational clandestine organisations.[9]

4.2. As far as it is possible to judge from the available evidence, contemporary clandestine organisations have not tried to use weapons of mass destruction. The use of anthrax does not seem to have been related to al-Qaeda, for example, although fears about biologically-based weaponry are now widespread. Links between Saddam Hussein's Iraq, weapons of mass destruction and transnational clandestine organisations were strongly alleged, but were, notoriously, unconfirmed. On the other hand, it is reasonable to suspect that many political professionals have developed a strong fear that their longstanding claim on a monopoly of violence within a specific national territory is coming to an end. Moreover, one of the strongest arguments for traditional claims to a monopoly of violence within a specific territory has been a claim that the only alternative is some kind of apocalyptic nightmare, the loss of all political control under conditions of revolution of the kind threatened by Lenin and the chaotic condition in which much of

[9] See WP1, WP3 and WP4 reports.

Europe found itself at the end of the First World War. This is an alternative that has long made the monopolisation of power by the modern state seem more or less reasonable, the obvious ground for the kind of political realism that was largely constructed in the aftermath of revolutionary threats in order to affirm the modern nation state as the natural site of all political possibilities.[10]

4.3. It is this kind of alternative that again seems to haunt many political professionals who have come to take the state for granted as the only possible source of contemporary political authority and as the necessary site of all decisions about the legitimacy of violence. It reappears now as fear of an Armageddon created by small groups of fanatics, religiously motivated, and with weapons of mass destruction readily to hand: a combination, perhaps, of the Aum sect in Japan and the organisational resources of al-Qaeda networks.

4.4. Whatever the precise explanation for the way so many political professionals have been so quick to over-interpret totalising accounts of a new threat environment from empirical evidence that demands rather more circumspect judgements, it is clear that a fear of the future has become a significant feature of contemporary political life. This fear has especially been played up by some members of the US administration. It has been used to elevate the attacks of 11 September to a threat to the very survival of the US, thereby generating powerful narratives that give legitimacy to claims about an emergency situation, about the need to suspend the conventions of a politics as usual, about the necessity to wage a war, about the need to engage in a new confrontation between friends and enemies – although friends and enemies are not easily mapped onto competing national sovereignties within an international system.

4.5. The precise processes involved here are no doubt enormously complex, but the consequence has certainly been a powerful attempt to cultivate an ultra-nationalism predicated on a strong desire for revenge – an attempt that has required the creation of sharper and sharper distinctions between friends and enemies in some new world of inter-civilisational conflict. The dangers of rhetorical excess in this context have been widely remarked, but the rhetoric can become extremely effective when claims about threats, dangers and terrors intersect with longstanding claims that the only alternative to the modern security state is some kind of apocalyptic collapse. Many political professionals are susceptible to this way of thinking and are easily swayed by talk of radically new dangers. More sober assessment requires attention to continuities and

[10] See WP1 and WP6 reports.

relatively subtle adjustments and to the playing down of events such as 11 September as a key moment in a narrative of an onrushing apocalypse.[11]

4.6. Further, just as 11 September does not mark a major break from the old and the entry of the radically novel in relation to forms of terrorism, neither does it mark any such break in the practices that are used to respond to terrorism. The appeal to some declared or undeclared condition of extreme danger is surely one of the most fundamental resources available to all statist governments and has a long history in the practices of both statecraft and constitutional law. The use of derogatory measures in relation to human rights and privacy rights was already well-developed in Algeria towards the end of the 1950s, and has recurred in Brazil, Argentina, Uruguay, Chile and other Latin American states, as well as in liberal states such as Germany (against Baader Meinhof), Italy (against the Red Brigades), Spain (against ETA), France (after 1986) and especially the UK (against the Provisional IRA in Ulster).

4.7. Even in the US, antiterrorism policies after 11 September have followed proposals set out in 1999 and adopted by the Clinton administration. Such measures have been shaped by organic adaptations to existing bureaucratic orders. They also continue trends already expressed in such responses to attacks against the Americans in the early 1980s (in Lebanon and Berlin) as the strike against Libya and, later, the setting up of the Central Command in the Pentagon. All the key debates since 2001, in the EU and the US, whether about reorganising and coordinating intelligence structures, about Homeland Security or about the US Immigration and Naturalization Service and border guards, as well as the priority given to military measures, follow the pathways inscribed by these older logics.

4.8. More to the point, what was proposed in the immediate aftermath of 11 September was a series of measures that had already been envisaged in practical terms before 2001 but had often been rejected as unacceptable in principle. It is the willingness to accept the previously unacceptable that gives special cause for concern.[12]

4.9. The adherence to older logics partly explains why much current antiterrorist policy is so technologically driven, so preoccupied with the use of data surveillance, biometrics, the transnationalisation of intelligence and police information, and appeals for greater collaboration between the police organisations under the lead of US intelligence services. Policy in the EU has been even less innovative. The EU framework includes a range of measures concerning information exchange, police and judicial cooperation, the security

[11] See WP1, WP3, WP4 and WP6 reports.
[12] See WP1, WP2 and WP4 reports.

of travel documents, money laundering, the freezing of assets, specific instruments such as the European Arrest Warrant and the EU evidence warrant. Further, it includes the setting or reinforcement of specific institutions such as Eurojust, the new powers given to Europol, the automation and acceleration of procedures, reinforced control over the Internet, enhanced surveillance of mass demonstrations and the launch of routinised discussions between the intelligence services.

4.10. None of these measures can usefully be understood as a speedy reaction to 11 September or to subsequent US pressures. They were very largely the outcome of a long trend of proposals that can be traced from the beginning of the Trevi and Schengen groups in the mid-1980s – proposals that were partly resisted at Amsterdam and Tampere but which came to be the dominant trend after Genoa.[13]

4.11. So again, continuity has been more significant than practical innovation, although the boundaries of what has been considered to be acceptable have clearly shifted. There has also been a significant transformation in the overall articulation of what security means. Despite renewed recourse to nationalist rhetorics, claims about a purely national security no longer monopolise professional or public discourses. With the establishment of institutional networks of control in particular, the EU has developed what amounts to a form of market security: a set of institutions and procedures concerned with the management of the population and commodity flows so as to protect the efficient operation of the market and its human, institutional and technical infrastructures.[14]

4.12. This form of security reflects the widely noted shift away from welfare states of the kind associated with national governments and neo-Keynesian economic regulation and the emergence of new forms and techniques of governance across many formal jurisdictions. In this sense, concepts of security have come to be associated with concepts of economic prosperity and thus to encompass any threats potentially endangering market-oriented conceptions of welfare. In this sense, also, Genoa may come to be seen as a more important turning point than 11 September, although the latter has certainly changed many relations of power and enabled the US to become a more powerful player 'inside' EU debates, encouraging more coercive and more proactive measures and diminishing the importance of safeguards for privacy, data protection and *habeas corpus*. The 2004 joint EU-US Declaration on Combating Terrorism, especially in the field of countering terrorist financing through the first ad hoc, informal EU-US

[13] See WP1, WP2 and WP3 reports.
[14] See WP5 and WP6 reports.

partnership on the prevention of terrorist financing, which included all three pillars, offers an important example in this respect.[15]

1.5. Five General Grounds for Concern

5.0. These judgements about the need to stress continuities as well as innovations in the assessment of contemporary terrorist acts and of responses to them have emerged from a genealogical and multidimensional analysis by ELISE researchers of transformations in the use of political violence on the part of clandestine organisations as well as through antiterrorist strategies. In practice, the ELISE project has focussed primarily on the second of these. It is quite impossible to know seriously and independently what is going on with al-Qaeda networks and the related situations in, for instance, Saudi Arabia, Yemen, Indonesia, Afghanistan, Palestine and Algeria. Nevertheless, it is possible to evaluate the ways in which antiterrorist strategies have tried to understand contemporary forms of political violence and to respond to them. In this context, there are at least five grounds for concern.

5.1. First, the primary political narratives about al-Qaeda and other such organisations tend to repeat, as if by mimesis, the specialised and de-contextualised forms of knowledge produced by the intelligence services. These forms of knowledge are artificially free from either any democratic accountability or critical assessment by other institutions. Knowledge produced by the intelligence services has a sort of privileged status in this respect, but it is a status that depends on the absence of precisely the kind of open critique that is said to be the crucial condition under which knowledge may be distinguished from dogma. Unsurprisingly, the narratives produced under such conditions have been strongly shaped by experiences in the 1970s, maintaining much the same sort of analytical structure except for the crucial addition of a strong technological determinism. Most of the main 'solutions' informed by these narratives are in fact rooted in very old visions. Very often they even express a backlash against the more complex and subtle analyses that were becoming more influential in the mid-1990s. In a familiar pattern, complexities and subtleties have been trampled by the clarity afforded by older simplicities, which are then used as a basis for uncritical obsessions with technological innovations.[16]

5.2. Second, claims about the need for new forms of security have begun to work as claims about the need for new forms of governing – or 'governance' as it is now called by those who understand the limited reach of state governments, or 'governmentality', as it

[15] WP2, WP3, WP4 reports.
[16] WP1, WP3, WP6 reports.

is called by those who understand the ways in which people are shaped to govern themselves rather than simply to obey the commands of some government. Especially when new technologies are treated as mere additions to established political processes, specific techniques and strategies are allowed to generate new forms of social control. Forms of accountability that have been associated with modern forms of government are gradually subverted by the procedures of social control. It is in this context that there is clearly a need for greater attention to what used to be called the 'unintended consequences' of political action – in this case consequences that lead to the erosion of political accountability through the attempt to provide security through technologies that have come to be understood in a political vacuum.[17]

5.3. Third, in keeping with both the value placed on new technologies and a tendency to see some sort of apocalyptic chaos as the only alternative to the monopoly of violence in a specific territory, narratives about security are increasingly articulated in terms of a capacity to control the future. Many old-fashioned worries arise in this context, not least about an over-reliance on worst-case scenarios or hubris, or again, unintended consequences. There is further reason to be concerned about the extent to which claims about security can now be invoked so as to control populations not only in relation to dangers that at least have some concrete and tangible reference but also in relation to speculative, abstract and explicitly metaphysical ideas about futures that can only be imagined – and imagined on the basis of out-of-date ideas about what friends must do to enemies. The so-called 'doctrines of preventive war' and proactive policing both express disturbing tendencies in this direction. Moreover, political professionals and members of intelligence and security services have been increasingly in competition to assess not only what has happened but what will happen; at the EU level, for example, the European Council assesses threats on the basis of the work of the Situation Centre.[18]

5.4. Fourth, claims to knowledge advanced by the intelligence and security services are often given privileged status in relation to claims made by other political actors. This is in part a consequence of the way in which the mass media are attentive to the voices of specific elites. For example, analysis of press-released statements by domestic political actors in the UK and France between September 2001 and June 2003 has shown that the defence of emergency rules is widely covered by the press, largely because it is supported by several political leaders, but does not receive the open support of the majority of domestic political actors. On the other hand, the defence of human rights is

[17] See WP2 and WP5 reports.
[18] See WP1 and WP3 reports.

adopted by fewer political leaders but enjoys broader support among the general public (Tsoukala).[19]

5.5. Fifth, as a study of the Italian case shows especially well, claims about security are open to considerable abuse through the superimposition of totalising categories of friend and enemy onto many other forms of political difference. In the Italian case, claims about difference are mainly linked to the role of the country as the southern 'limit' of Europe. Whether in journalistic or press discourse, political debate or the common knowledge of Italian prosecutors, the so-called 'invasion' of 'illegal migrants' is frequently translated into terms that are synonymous with terrorist dangers. Two local factors are involved here: the traditional criminalisation of migrants as dangerous aliens; and the alleged weakness of Italian borders to terrorist infiltration. Although there is no evidence of connections between terrorism and illegal migration, it has now become normal to search for terrorists among migrants, especially those coming from Muslim countries. This tendency has led to several trials in which individuals have been charged but eventually acquitted. Nevertheless, the social construction of migrants as potential terrorists has been effective. It has enabled a strategy of internment and easy expulsion that eventually provoked the indictment of Italian authorities for human rights violations by international courts.[20]

1.6. Security, Liberty and Challenges to Democracy

6.0. These five general grounds for concern ultimately draw attention to the uneasy status of contemporary forms of democracy. As has been broadly remarked, recent concerns about security have intensified the very old dilemma of how to defend democracy without destroying it in the process.

6.1. Symptomatically, analysis of the Italian press shows the absence of any significant debate on the implications of contemporary security policies. Closely linked to the specific configuration of the domestic political field, this is partly explained by the fact that the legal provisions that were extended to terrorists were already in force in relation to organised crime. Placing specific differences into a highly charged framework of security against terror is often sufficient to silence all discussion.

6.2. At the EU level, the analysis of the debates of the European Parliament on combating terrorism (again in the period September 2001 to June 2003) also suggests that questions about the issue of invocation of emergency rules were hardly considered

[19] See WP1 report.
[20] See WP1, WP3, WP4 reports.

before the 11 September terrorist attacks. When such questions did become prominent in the aftermath of these attacks, the need for emergency-rule derogations was defended by only a very small minority among the EU deputies, most of whom strongly defended principles of human rights. It is not possible, however, to find such a clear-cut position within the representatives of the EU institutions. While the representatives of the Council have never defended the need for emergency rules, but on the contrary have argued in favour of the need to defend human rights, the prevailing sentiment has been to support the seemingly moderate but in practical effect illiberal thesis that a 'balance' must be struck between security and human rights. With respect to the representatives of the Commission, support for a balanced position is further reinforced by explicit statements about the dangers of infringing civil rights and liberties. Yet at the same time, the possibility of adopting emergency rules as a necessary step to protect the internal security of EU countries and the rest of the world is clearly left open.[21]

6.3. One of the most powerful and consequential responses to recent acts of terror has been to try to seal the borders, in order to:

- create an EU Homeland Security (even when the leading motto of EU governance continues to invoke the need to keep markets open and facilitate freedom of movement);

- introduce new technologies for tracing individuals;

- reinforce the filters for people willing to enter;

- incarcerate the potential suspects;

- use the military and intelligence services to 'police' inside a country; and

- argue about the necessity of derogatory measures in the name of a cataclysmic future.

Again, none of these measures are especially novel, although they have usually been blocked by the rise of a political culture celebrating civil rights for citizens and foreigners in the 1970s and by the development of legislation guaranteeing better data protection. There is a clear link between the national security strategy of the colonial and neo-colonial powers (Trinquier, Kitson and the Panama School) and the internal security strategies of today. This perhaps goes some way towards explaining why some actors have reverted to justifications for the severe and prolonged interrogation (as

[21] See WP4 and 6 reports.

distinguished from torture) during the 'dirty wars' in Algeria, Burma and Vietnam. It has created struggles within different armed forces as many were revolted by and rejected the kinds of justifications they once knew so well.

6.4. The success of discourses about the reintroduction of a military-war state of mind inside a country as well as of justification of the diminution of civil liberties in the name of some emergency is strongly connected to the struggles between security professionals at the transnational level. This is clearly shown in Dal Lago's research on the genealogy of strategies of prevention and their effects on contemporary politics. Similarly, Bigo has shown how the transnational field of the security profession has been organised in accordance with different securitisation discourses; that is, not only in relation to one security discourse that is in profound tension with claims about liberty but also in relation to a large number of competing security discourses.[22]

6.5. In this context it is useful to recall that during the cold war, the highest professional ranks, the generals, were always drawn from the strategists, the specialists in deterrence, and not from the specialists in asymmetric wars or peripheral wars, or low-intensity warfare as these were known at the time. Yet after 1979 and the Iranian revolution, and even more so after the end of bipolarity and the first Gulf war, the specialists in asymmetric warfare were more and more eager to move up to the top level, arguing that they were dealing with the real wars and terrorism. The events of 11 September have since reinforced their rhetorical influence. More ominously, at least in relation to the understanding of borders and boundaries that has been central to modern understandings of political possibility, this shift away from strategy has led to the deployment of police forces beyond the borders of domestic jurisdiction. In fact, police forces have tried to transpose their technologies of domestic policing outside, in the name of consolidating peace. Predictably, this has led to competition with militaries abroad.

6.6. To be sure, struggles to control and reduce violence have been central in Kosovo, Afghanistan and Iraq (Olsson) among other places, as well as inside many countries trying to deal with (im)migrants and citizens of foreign origin (Bonelli, Palidda). Yet such struggles, while often understandable, have created confusion about the status of war in comparison with internal struggles and class conflicts within society. No doubt the theme of the 'enemy within', the 'stealth enemy' or the 'infiltrated enemy' has always been salient in the discourses and practices of intelligence services. Since 11 September, however, it has risen to the top of the agenda of many political professionals. This poses

[22] See WP1 and WP3 reports.

many questions: Do we have a war inside our societies or not? What is the status of the 'national emergency'? To what extent can we consider that terrorist attacks are a threat to the survival of the nation state? Is the EU level of authority assuming a comprehensive protection and promotion of liberty (for the individual as an agent, for data protection and freedom of movement, for civil aviation, as well as for Charter as a general regime of protection) while increasing technologies of security to struggle against specified threats? Different bureaucracies have different answers to such questions – answers that are closely linked with their main interests and norms.

6.7. What is pivotal in all this is that security, perhaps the most-contested field of politics, has come to saturate all political discourse. It is an arena of struggle *par excellence*. This is the battleground on which a specific meaning of politics emerges. In this light, the agenda of security is, therefore, the result of sustained social interactions among various stakeholders, the aim of which is to win the appropriate political mandate and obtain resources for targeted action. To oversimplify, but also to underline a crucial point, two discursive logics compete today. On the one hand, the police and judiciary, while acknowledging that terrorism is a crime, even a crime against humanity, oppose the argument that terrorism is a war inside society. By contrast, intelligence services and the partisans of asymmetric warfare champion the idea of a war against terrorism inside society. This point must not be underestimated, and ought to resonate with anyone who is familiar with the history of struggles to resist many other forms of illiberalism, because it provides grounds for a politics of the exception and for the curtailment of the rule of law.[23]

1.7. A New Politics of the Exception

7.0. From the Antiterrorism, Crime and Security Act in 2001 to the Prevention of Terrorism Bill in 2005, to take the case of the UK as an example, changes in legislation and administrative practices across Europe provide all too many illustrations of a politics of exception and permanent danger. From the clearly defined temporal and spatial remit that the sovereign capacity to declare an exception once had in the modern state, the declaration of exceptions now occurs in some other spatiality and some other temporality. Some analysts go so far as to suggest that the entire world has been internalised, and a capacity to declare exceptions has been generalised. Others think contemporary political life is rather more complex. Both positions have found expression within the ELISE project, as in debates about terrorism, globalisation, unilateralism and empire more generally. Nevertheless, contemporary claims about a war against terrorism

[23] See WP1, WP2, WP4, WP6 reports.

have clearly been iterated in ways that exceed the spatiotemporal boundaries of the modern sovereign state coexisting in a system of sovereign states.[24]

7.1. The implications of this excess can be felt in the tensions of liberal democratic polities that consider themselves to be in a state of permanent war (rather than the permanent state of 'liberal democratic peace' so widely celebrated only a decade ago). The generalisation of claims about a state of emergency as the defining moment of political life raises fundamental questions about the basis of legitimate authority, about peoples' democratic ability to contest the claims of the state and its articulations of singular sovereignty within a specific territory, and indeed about the very possibility of political agency. More than any other sphere of modern political life, security practices work, in part, by seeking to protect themselves from the normal operation of political contestation while at the same time claiming to be able to protect a sphere in which political contestation may be conducted. Consequently, to focus on the implementation of security practices, and specifically on the implementation of anti-terrorist legislation, is to engage with political agency not only in relation to rights, but also in relation to the contestation of the claims about the conditions under which political authority is now considered to be legitimate. Any attempt to remove security practices from political contestation necessarily directs attention to the very possibility as well as the limits of political action, most notably in relation to the judiciary and civil society [25]

7.2. That governments tend to justify their security policies in the name of protecting their citizens is one of the most broadly recognised truisms of political analysis. Moreover, as the writings of Michel Foucault have affirmed for more recent generations, the protection of populations is necessarily the protection of specific categories of persons to the exclusion of others. More particularly, as much of the research conducted by the ELISE team suggests, the redrawing of boundaries expressed through many contemporary claims about security has resulted in the targeting of specific categories of the population, in ways that are culturally and racially marked.[26]

7.3. Traditional liberalisms have long distinguished categories of population, largely in relation to claims about differing capacities of people to manage their own freedom, but they have also devised strategies for social integration within a national space: within a communicative public sphere, on the basis of equal claims to citizenship rights, through welfare policies and principles of distributive justice. With contemporary re-articulations of a politics of exception that works somewhere other than on the borders of those states

[24] See WP6 report.
[25] See WP6 report.
[26] See WP1, WP3, WP4, WP6 reports.

in which integrative practices might be cultivated, difference, otherness and exclusion are threatening to become the primary grounds on which political relations are organised and legitimised. This has implications for the way liberal societies respond to claims about diversity, for the way individuals are taken to express cultural and racial identities, and for the way in which many long-standing antagonisms between liberal principles and democratic practices are being stretched to breaking point.

7.4. Indeed, one of the striking features of recent claims about a new security environment has been a return to several classical intellectual traditions that have tried to think about what happens at the limit of modern political life in order to justify derogatory measures and their subsequent routinisation. Thomas Hobbes is perhaps the most important thinker in this context, not because of his well-known cynicism about human nature and the anarchical quality of life among free and equal individuals but because of the way he framed an account of a sovereign power capable of constituting legal authority and of defining the limits of this authority. The reputation of Carl Schmitt, the German constitutional theorist forever tainted by his fascist tendencies, is even darker, perhaps as dark as it is possible to go while still maintaining at least some credibility as a serious thinker. It is in relation to Schmitt in particular that most contemporary thinking about what it means to treat sovereign authority as a capacity to make exceptions may be traced. Similar lines of thought have looked at the tendency for liberal and democratic societies to degenerate into various forms of authoritarianism; the basic idea can be found in classical accounts of cycles of corruption, but again 20th century European history offers many salutary experiences for contemplation in this respect.

7.5. The basic reason these sorts of thinkers still generate contemporary interest is that they illuminate the way even the most liberal societies are far from immune from illiberal practices and the way even the most democratic societies have authoritarian potentials. Conventionally, of course, authoritarianism and illiberalism are regarded as limit conditions, that is, as evils that can only be tolerated under conditions of emergency, of war, when the norms of everyday conduct must be suspended in order to ensure the very survival of the state. In other words, the capacity to decide where and when exceptions must be made, when limit conditions have been reached, rests precisely with deciding when and where the claims of liberty must give way to claims about security.[27]

7.6. Some are interested in such thinkers because they offer a powerful way of justifying the need to suspend civil liberties in the face of danger. This is the basic dynamic expressed in the traditions of political realism that inform most discourses about national

[27] See WP4, WP6 reports.

security. It is also the dynamic that is reproduced in a new form in many contemporary claims about the threat of terrorism. Others are interested in such thinkers because they show how an uncompromising attachment to sovereign nation states will eventually lead to the dire necessities demanded at the limit, a situation that they consider must be resisted through a clear understanding of how easy it is to destroy freedoms in the name of some state of emergency. Much of the political imaginary that gave rise to the European Union as so much more than a system of nation states came from precisely such a revulsion against the nationalistic exceptionalism that thrived in the 1920s and 1930s.

7.7. Now the EU is beset with demands for new forms of exceptionalism – not articulated in nationalistic terms to be sure – but certainly demands that lines be drawn between the possibilities of liberty and the necessities of security. The balance, it is said, must tip towards security and away from liberty. Or rather, an exception must be made. Norms must be suspended. Freedoms must be curtailed. In a converse dynamic, much of the resistance to the unilateralist imaginary that has been cultivated by the Bush administration arises from the judgement that any state that treats itself as an exception is always likely to promote its own values as universal rather than international, and thus to simplify the world into binary categories, to celebrate the analysis of worst-case scenarios and to create a climate of suspicion destroying social cohesion in the name of patriotism.

7.8. The capacity to decide exceptions is a serious business, as many of the classical traditions of military thought have long insisted. Much of the analysis of contemporary security problems has lost touch with such traditions and is all too willing to treat every threat, actual or predicted, as evidence that limits have been reached, that a state of emergency exists, that freedoms must be curtailed and that norms must be suspended.

7.9. Such extremist reasoning is not only dangerous, but also unnecessary. It finds little if any support in the relevant scholarly communities, for example. It is, rather, the product of specific and clearly identifiable circumstances involving the behaviour of political professionals and the relation they have with security and intelligence agencies. Not least, some players have been able to further their interests by transforming a fluid situation with many possible outcomes into a '*fait accompli*'. In one of the great paradoxes of our time, security has mutated from being a matter of uncertainty and contingency, of careful judgements about the unpredictable, of a politics of responsibility, into a professionalised and institutionalised capacity to know, with certainty, with all the advantages of science and technology, who is a friend and who is an enemy.[28]

[28] See WP1, WP6 reports.

7.10. For example, the decisions to invade Afghanistan as the appropriate response to al-Qaeda, to prioritise the Pentagon and the defence industry, to build up a Department of Homeland Security, to avoid the kind of judicial and policing approach adopted by the Spanish after the Madrid attacks of 11 March 2004, have been shaped by a specific and even idiosyncratic unilateralist vision of the world. These were not the only possible responses. Indeed, they were resisted by most of those who specialise in the demands of an international or multilateral political order. Still, these decisions have been taken, and their consequences are unfolding. Initial feelings of commonality with the victims of 11 September have given way to deep suspicions and resentment at the way a specific act of terror was amplified: first, into a state of national emergency, and then into a rationale for the wholesale restructuring of large parts of the world contrary to established principles of international order. There is, of course, almost infinite scope for disagreement about the judgements and decisions that were at work as this process unfolded. Two large points should not be forgotten, however. First, these specific decisions were generated through a politics of exceptionalism involving claims about a state of emergency – claims that were so easily and so effectively deployed not only to curtail liberties but to justify an attempt to rewrite the entire basis of the global political order. Second, other responses were possible, but their very possibility was quickly eradicated through claims about military necessity and to a knowledge that legitimised a declaration of war. Very serious dangers arise, however, when specific agencies and professionals are enabled to tell us when necessity must take over our lives and freedoms.

7.11. One of the most worrying expressions of the way these specific political choices were made has been the extraordinary willingness to treat 'enemies' as inhuman, especially given that the framing of enemies has been shaped by claims about the defence of civilisation. Abu Ghraib and Guantanamo Bay are significant here, as is the willingness to target entire populations as potential enemies given the difficulties of distinguishing 'terrorists' from 'civilians', and the indifference with which the scale of civilian casualties in Iraq has been received in many quarters. Troubling though these specific expressions are, however, we should not lose sight of the way they are expressions of deeply rooted tendencies that reach right into the fabric of modern liberal democracies.[29]

7.12. It may be that the unilateralism of the first Bush administration is over. Greater coordination with the EU is now being envisaged, with greater emphasis on policing and the judiciary. Already vivid debates about the relation between the EU and the US will no

[29] See WP1, WP2, WP3, WP4, WP6 reports.

doubt continue and intensify. In this context, it is extremely important that discussions about the best common security policy do not become channelled exclusively into questions about better forms of cooperation without serious consideration of the impact of such cooperation on civil liberties. It is important not only for the obvious reason that the US remains hegemonic even if not unilateral, but because cooperation involves less any traditional relations among sovereign states than the effective globalisation of techniques and agencies concerned with surveillance of people on the move. What is at stake in claims about the need for greater cooperation among security agencies and intelligence services is nothing less than the construction of new ways of shaping societies and their democratic possibilities – or impossibilities.

7.13. The debate on what democracy we want today, what freedom we are effectively sacrificing in the name of future freedoms and the eradication of terrorist dangers, has not been on the top of the agenda recently. Indeed, for all the rhetoric about the need to secure democracy, the extent to which democracy remains a viable political aspiration under contemporary conditions is hardly discussed among the elites or mass media who can afford to take their place in the world more or less for granted. This is no doubt linked to the way in which the security industry and those interested in economic cooperation among EU members or in competition with the US industry have been able to assume priority over those engaged in debates about civil liberties and social cohesion. Nevertheless, liberty and social cohesion are closely related, on a judicial level to juridical control over complex and diverse systems of power, and to the political and administrative means for the implementation of legal provisions over issues of discrimination.[30] As long as such issues are swamped by the perceived necessities of certain kinds of cooperation on matters of security and economic interest, democratic energies will continue to atrophy. Much of the research conducted by the ELISE team suggests not only that freedom and basic human rights have indeed been compromised by the all-pervasive character of security discourses, but that such discourses have made it much more difficult to treat claims about democracy as anything more that a rhetorical trope to be used to discriminate between ourselves and others.

7.14. Many other dynamics within the EU give cause for concern about the possible direction of EU-US cooperation. Even if the fear of terrorism and claims about links with weapons of mass destruction have been less important in the EU, there has been a resurgence of the forms of insecurity generated in the mid-1980s in the name of a struggle against the free movement of people and fear of migrants 'invading' the West. In the EU, as in the US, powerful discourses have connected terrorism with migration as

[30] See WP2 and WP4 reports.

well as with Islam. Many politicians, in classical populist style, have deployed such discourses for re-election purposes, thereby helping to create a 'siege' mentality, especially where people have little contact with other peoples or other places and feel insecure about other ways of life.

7.15. Even though the EU as a whole has tried to build an alternative vision of security in the project of enlargement (extending to the Balkans), for example, or managed to prevent excessive prejudices against Muslims, or privileged justice and police cooperation at the world level as the main solution against political violence, or tried to improve economic stability in the Middle East, it is nevertheless the case that some institutions have played a very different strategy, reproducing at the EU the assumptions and procedures of their US partners. For example, some actors inside Justice and Home Affairs have tried to push the agenda for more controls of migrants in the name of the struggle against terrorism and organised crime. They have criminalised migrants and securitised asylum seekers. They have considered themselves in a war on terror extending to illegal migrants and radical Muslim believers, especially imams.[31]

1.8. Challenges to the Rule of Law

8.0. All these concerns are in some sense distilled in the tensions that can be observed between the political class and the judiciary, particularly in relation to respect, or otherwise, for the rule of law. The emergence of indefinite detention of persons suspected of terrorist activity has been at the heart of the discussion both in the US in relation to foreign nationals detained indefinitely at the US bases in Guantanamo Bay and in the UK in relation to the 2001 Antiterrorism, Crime and Security Act permitting the indefinite detention of foreign nationals who were arrested and mainly detained at Belmarsh prison. The ELISE project has examined these tensions in some detail, focussing especially on indefinite detention, the rule of law and the role of the judges faced with the executive powers of the government and the administration.[32]

8.1. According to this analysis, the rule of law has been called upon as a principle capable of compensating for weak democratic control over the legislative and executive processes in the protection of the individual's right to liberty. The conditions necessary for the judiciary to carry out this highly controversial role have included the possibility of access to the supranational courts, particularly the European Court of Human Rights but also the possibility of the involvement of the European Court of Justice (ECJ). This has been central as the mechanism by which judges may perceive themselves as less dependent

[31] See WP2, WP3, WP4 reports.
[32] See WP4 report.

on national legislation and legislatures. Further, judges are already required to apply supranational law in the national domain by the legislature and thus are entitled to protection from the charge of usurping the role of the legislature. For example, the ECJ has used principles of market freedoms as specified under the EC Treaties, that is, freedom of movement in the sense of access to the single market, as a counterbalance to claims about general interest specified in national terms. The position of the rule of law as an organising principle in the EU goes some way to explaining some of the differences between the indefinite detention of foreigners in Belmarsh prison in the UK and the case of the US bases at Guantanamo Bay.

8.2. This struggle around the rule of law at the EU level is crucial. This is not to deny or underestimate the fact that our societies have reacted with some strength against past experiences of highly coercive techniques against subversion, particularly in the 1950s and 1960s in France and southern Europe but also more recently, in the 1970s and 1980s, in the UK, Germany and Italy. Whether these took the form of dirty wars, suppression of opposition groups under dictatorships or antiterrorism measures, there is a history in Europe of tension between the law and state violence that has been searing for the populations involved. The use of the notion of a state of exception as an explanation for the suspension of the rule of law in certain discrete areas (either geographical or juridical) has been accompanied by the idea that some periods of exceptions may be prolonged and routinised until they become normal. They have been slowly but surely incorporated into the rule of law, not only into our understanding of the boundaries of normality but also into the professional consciousness of the judiciary as well. Indeed, the importance of the rule of law in respect of the actions of the administration has been partly undermined by the multiplication of sources and scope of the derogations available for use in everyday life. There is, for example an exception applicable to the legal status of irregular migrants, along with an exception, in practice, shaping the treatment of young persons from different ethnic origins living in deprived areas, while the detention of foreigners in airport zones or in transit camps has paved the way for the acceptance of indefinite detention in Belmarsh prison or at the US bases in Guantanamo Bay.[33]

8.3. The climate of unease and fear towards some foreigners has fostered the belief that there is a connection between the practices of Islam and doubtful allegiance to the state. Even where individuals have become citizens, their religious affiliation makes them suspect as a possible 'fifth column' representing 'the enemy within'. In practice, it is often a question of how an individual is perceived. If a child is first and foremost a

[33] See WP1, WP4, WP5 and WP6 reports.

foreigner before he or she is a child, the principle, contained in national, EU and international human rights legislation that the priority must be given to the best interests of the child in any treatment of him or her will take second place. The expulsion of the foreigner (albeit a child) takes priority over the protection of the child (albeit a foreigner). The possibilities of electronically tagging a young person for civil disorder and for generalising the procedures of control have also connected these two dimensions of the normal and the exception in a paradoxical way. On the one hand, the exception invades the normal and changes what is considered as normal; on the other a new tolerance for further exceptions is created. A climate of fear, even a permanent state of emergency has been created, so that the way an individual behaves is shaped by the conviction that we live in a time of war. For instance, can anyone in London or Paris still ignore an abandoned rucksack sitting on a train or bus?

8.4. The effect has been to reinforce what Bigo in 1998 termed a "governmentality of unease" or "ban-opticon", in which there is a framing of certain persons who are then categorised as subject to a sovereign exception, to exclusion and ban on the basis of the threat they represent. For them, there is a normalisation, and imperative, in the curtailment of some forms of freedom, most graphically freedom of movement. Their boundaries are delimited by the securitisation of everyday life and the rise of intolerance, even the designation of zero tolerance. The events of 11 September have exacerbated the ban-opticon by making more visible many of the technologies and rationalities at work. In particular there has been an acceleration of the move away from the control of people on the territory or by means of their territorial designation to a control at a geographical distance through the traces they leave. This is why biometric technologies have become so central to security. Yet, people are also monitored by reference to the future, by what they may or may not do in the future based on what is known about them from the past. This is why data-mining and profiling have also become so central to security.[34]

8.5. The response to challenges to the rule of law so far has been mixed. Although there have been some robust ripostes to some measures, such as that by the UK House of Lords to the indefinite detention of foreigners, legislation they found contrary to the European Convention on Human Rights, and that by the French *Conseil d'Etat*, which found the detention of French nationals in Guantanamo Bay to be illegal in international law, there has been silence on a number of critical issues. The function of the rule of law to protect the individual has not yet found its place with respect to the collection, retention and use of massive amounts of data on the individual. The collection and use of

[34] See WP1 and WP6 reports.

biometric data on individuals remains a field in which administrations are claiming a wide scope of manoeuvre, with only silence so far from the judiciary.[35]

8.6. The progressive development of an Area of Freedom, Security and Justice has been especially affected by all these developments. While 'security' has clearly acquired a predominant value, 'liberty' has been relegated to a secondary role. Ever since the Amsterdam Treaty (1999) first transferred polices dealing with elements of freedom, security and justice to EU competence, there has been a tendency, in both discourse and policy, to strengthen and unify transnational cooperation on security. Security understood as protection of the internal order has become the most essential component of EU citizenship in the area of 'Freedom, Security and Justice'. This policy area has been based on both the Community and the intergovernmental methods, and is gradually leading to new sources of discretionary power through the emergence of EU-wide networks of control. In effect, by providing for common normative parameters and operational coordination in the fight against crime and terrorism, EU governance works so as to reinforce national policies against security threats faced by state governments.[36]

8.7. The official Declaration on Combating Terrorism of 25 March 2004 represented another step towards a common approach to a highly contentious package of restrictive proposals aimed at fighting everything deemed to be a 'terrorist activity'. Similarly, the development of a Visa Information System (VIS), the second generation of the Schengen Information System (SIS II), as well as the use of biometrics and new technologies of surveillance in such identification documents as visas, residence permits, passports and travel documents, continues to be at the top of the EU policy agenda. The structural coherence and potential effectiveness of all these pro-security policies, and their compatibility with EU and international human rights standards, data protection legislation and the rule of law for EU and non-EU citizens is open to very serious question. There is a worrying lack of transparency to the adoption of all these measures, not least to their real scope and limits and to their relation to the so-called 'principle of availability' affording information-sharing between security agencies all around the European Union.[37]

[35] See WP4 report.
[36] See WP2, WP4 and WP5 reports.
[37] See WP2 and WP5 reports.

1.9. The Metaphor of Balance and the Politics of the Exception

9.0. Looking at the broad array of initiatives that have been mobilised in relation to claims about a new security environment, ELISE project researchers are largely persuaded that the application of security measures in relation to social mobility, immigration and asylum policies, and indeed to all social fields in which the status of freedom is at stake, has been over zealous. This is in no way to dismiss claims about the dangers posed by the resort to violence in the contemporary world, but it is to challenge the way many such claims are produced on the basis of artificially over-stimulated, narrowly focused and institutionally self-interested accounts of what it means to make judgements about a state of emergency warranting the derogation of liberties, rights and democratic responsibilities.

9.1. In general terms, this judgement is perhaps not surprising, whether historically or comparatively. The capacity of political agents to invoke claims about impending dangers in order to justify restrictions on peoples' lives is perhaps one of the most longstanding themes of political commentary. It has been central to the stories about the origins of the modern state in some sort of social contract, and it has been central to the way modern states have understood the relationship between peace at home and war broad. Some would even say that what has been happening is more or less natural and only to be expected. This, too, is part of what has made it relatively easy for many people to accept claims that a privileging of the necessities of security over any guarantees of liberty is perfectly acceptable.

9.2. Yet the appearance of necessity, inevitability and apparent naturalness is precisely only an appearance, an effect of specific, concrete and identifiable practices in many arenas. Many claims have been made about the dire threats posed by terrorist activities and the necessity of exceptional measures to deal with them, but these claims have emerged from specific agencies and professional groups, with their own interests, rivalries and myopias. They have been able to make their claims to knowledge largely away from any critical public arena and to create an environment in which knowledge about security matters is both distinct from and much more important than knowledge about liberty, social integration, rights, or the rule of law. Security matters are important. Acts of terror are not trivial. Yet the claim to know precisely how important, and to know to what extent they are sufficient to justify the forms of exceptionalism that have become widespread over the past few years, is not something that can be taken out of the realm of democratic accountability without serious damage to the expectations we have of democratic societies.

9.3. An important characteristic of contemporary debates about the relationship between claims about security and claims about liberty is the resort to the metaphor of striking a balance between liberty and security. It is a comforting metaphor. It suggests, not least, that someone is in a position to judge when a proper balance has been reached. Thus it is a metaphor that disables any understanding of how the relationship between these competing claims is, in practice, structurally one-sided. Some voices are in a much stronger position to speak and be heard than others, just as some bank balances are considerably more impressive than others. Balance, in this case, suggests a situation of preponderance, not of equality. It is also a metaphor that discourages people from thinking about the way in which any possible judgement about when a balance has been reached will be made by agents who are very closely connected with security agencies, even though this is, after all, what is meant by accounts of the sovereign state as having a monopoly over violence in a particular territory. On the contrary, it encourages people to think about politics as a matter of simple choices, as if one can choose liberty or security, rather than as inseparable values that are always in potential conflict. The use of the cosy imagery of a balance in this context works precisely so as deflect attention to what is at stake in the idea of the exception, in claims about the need for some sovereign decision to be made so as to suspend established norms and freedoms in the name of security in a state of emergency. The metaphor of a balance, in short, detracts attention from all the hard questions about responsibility, about judgement, about who gets to decide that an act of violence warrants military action or legal action, derogations of the rule of law or responsibility under the rule of law, about whether suspects are to be treated as humans or as something else entirely.

9.4. Not the least reason to be sceptical of this metaphor under contemporary circumstances lies in the degree to which discourses about security are increasingly framed as a matter of cooperation and unification while discourses about liberty are framed in relation to fragmented jurisdictions severely constrained by law and regulations. Security is now considered as a value without frontiers. Cooperation is seen as the key to efficient and centralised information, for anticipating events and profiling who is and who is not dangerous, who is and who is not suspect. European Union agreements have been pushed forward, especially by Spain, so as to structure an EU identity as a democracy struggling against the same terrorist enemies. The US wishes to have even more cooperation at the transatlantic level, but under its own strategic direction. Internal and external securities are being merged, in complex ways that certainly do not fit with conventional accounts of a 'security dilemma' between states, but which have been examined in some detail by the French, Belgian and Greek teams of the

ELISE project.[38] On the other hand, the spaces for liberty have been carefully distinguished, especially in relation to freedom of movement and the crossing of borders.

9.5. The challenge before us does not lie in the mysterious task of identifying some acceptable balance between claims about security and claims about liberty. It lies in the need for much more rigorous scrutiny of the conditions under which claims about security warrant the suspension of liberties and freedoms. It requires much more sustained attention to the ways in which the restructuring of political life in response to many different forces is being especially shaped, and distorted, by agencies capable of converting serious threats requiring democratically considered responses into extreme states of emergency requiring military responses, new modalities of social control, intensified forms of surveillance and exclusion as well as unwarranted assaults on the most basic values of liberalism, democracy and the rule of law.[39]

1.10. A Politics of Accountability

10.0 The broad perspective sketched here, along with the more specific research projects that inform it, suggests an urgent need for much more robust resistance to the marginalisation of claims about liberty whenever the necessities of security are invoked. In general terms it might be said that where the possibilities of political liberty are currently being constrained by forms of structural and institutional fragmentation, they ought to be nurtured by imaginative forms of cooperation across existing jurisdictions; and where the possibilities of cooperation and unification are being sought in order to control human populations on a global and indeed imperial scale, they ought to be subject to greater scrutiny and control by many different democratically accountable communities and institutions.

10.1. In relation to the institutions of the European Union, this implies not least a need to enhance the capacity of agencies charged with ensuring greater protection against new sources of discretionary action. The so-called 'democratic deficit', chronic across so much of the EU, is an especially serious problem in this context. Thus it is possible to envisage an independent agency of fundamental rights capable of concentrating an administrative power of inspection across the security agencies; or a process of enlarging and unifying the different agencies concerned with data protection; or specific missions to inspect various transnational European bodies and groups, including a special surveillance of intelligence and police activities, especially when they are operated by agents beyond their state borders; or new powers to enable inquiries into the behaviour of specific

[38] See WP1 and WP5 reports.
[39] See WP4 and WP6 reports.

security agencies, whether public or private, perhaps with the help of networks of NGOs and academics of different disciplines; or new obligations on the part of member states, as well as all third parties who share data with the EU, to be liable for their use of data, ultimately before the European Court of Human Rights. Other proposals of this sort are outlined in many of the texts produced by specific work packages in the ELISE project, most explicitly those involving the Greek and Belgian teams, but also those that have looked at emerging procedures in the fields of migration, citizenship, policing and law.[40]

10.2. In one way or another, however, such institutional initiatives need to be driven by a renewed commitment to a politics of accountability: that is, a willingness to resist seductive claims about the necessity for overriding liberties in the name of security and to ensure that exceptions to the normal expectations of liberty, equality and democracy under the rule of law are made only under sustained and multidimensional evaluation. There is no reason to abandon the achievements of modern political life to those who have been enabled to speak in the name of security and nothing but security, but there is very good reason to suspect that much too much ground has already been ceded to agencies and institutions that have become used to speaking in this way. Although threats of violence and terror may continue, the potential excesses of a new politics of exception must also be dealt with. This is not simply a matter of 'civil liberties'. It is a matter that cuts right to the most fundamental principles of modern political life. In the end, it is not a matter that can be left safely in the hands of the security professionals, nor even the political professionals. Given the crisis provoked by negative public responses to the proposed European Constitution, this is a particularly good time to establish discussion on a much broader basis.

2. ELISE Reports per Team

2.1. Workpackage 1: Freedom, security and danger: Conceptual tools, survey of anti-terrorist measures and challenges posed by them

Leading Partner: Sciences-Po, Institute d'Etudes Politiques
ELISE Contact person: Dr. Didier Bigo

The Impact of transnational political violence on civil liberties and social cohesion in Europe

September 11th 2001, March 11th 2004, July 07th and 21st 2005, as a series of bombings, have partially changed the scale of transnational political violence but are not constitutive of a major social change at the global level when looking in detail at practices of violence

[40] See WP2 and WP5 reports.

from the sixties. Anti-terrorist policies "answering" these events are also rooted in older practices but have accelerated the dynamics of change in liberal societies.

In most case studies, these events seem to have much more reinforced and radicalized tendencies than they have opened a so-called "new area". In that sense, there is no reliable division in terms of "before and after 9.11" that can be established. 9/11 was in continuity with the end of bipolarity argument of the emergence of a global disorder, and discursive procedures of justification which are invoking the 9.11 events and its tragic and traumatising dimensions, attempt to justify:

- increased security measures against foreigners;
- a more global approach in coping with violence;
- the reinforcement of transnational forum of security professionals;
- the implementation of technology of surveillance and control through biometrics and interconnection of data-bases;
- and more autonomy for the governments in the name of emergency, concerning parliaments, judges, the rule of law and basic democratic procedures, considered as "slowing down the process".

The modification of the relations between all the European governments and their citizens, as well as their parliaments and judges has been transformed into a necessity to act urgently, and has created more autonomy or "freedom" of the ministries in charge of security and their bureaucratic agencies. They have asked to be freer from their duties concerning the right of private life, the right to due process and the balance of power between executive, legislative and judiciary within the Rule of law.

It has supposedly enhanced the efficiency of the services but has certainly affected social cohesion when proactive and preventive measures based on dubious profiling and patterns concerning probabilities of violence in the future were used. The correlation between knowledge of the past and capacity to anticipate the future has been overestimated and has often been biased by prejudices concerning Muslims and foreigners. The presumption of innocence has been the most affected principle by the will to monitor through biometrics and data bases the movement and identity of people, even in the countries which have refused a militarization of the fight against terrorism. The presumption of innocence is slowly replaced by a presumption of "legitimate suspicion" which enacts the possibility of illiberal practices in liberal regimes.

Continuities and changes

September 11th 2001 as well as March 11th 2004 and July 07th and 21st 2005 did not mark the birth of a new age of terrorism, or hyperterrorism, or megaterrorism, or some third type of catastrophic terrorism. By chance the scale had been decreasing and the fear of Weapons of Mass Destruction (WMD) linked with bombings had to be measured in relation to the last five years. The scale of September 11th was unprecedented for the US soil and had a very strong effect on all actors over the world. But the transnationalisation of political violence by clandestine organisations has been a long process, with roots that go back at least as far as the decolonisation processes of the 1950s, the hijacking of the aircraft of third parties in the 1970s, the development of killing at a distance through technologies of remote bombing in the 1980s, the radicalisation of conflicts in Lebanon and Palestine, and the resurgence of suicide bombers against French and US armies in Lebanon. To the extent that novelties may be identified, they involve new combinations of traditional forms of action (suicide bombs in planes or trains), and not, as so many official accounts have implied, some grand new force combining weapons of mass destruction with "one" powerful fanatical and irrational clandestine organisation.

Just as September 11th 2001 does not mark a major break from the old, and the entry of the radically novel in relation to forms of terrorism, neither does it mark any grand innovation in the practices that are used to respond to terrorism. The novelty of antiterrorist polices has to be relativised. Their roots are from the thirties and the countersubversive doctrines of the decolonization period. The use of derogatory measures in relation to human rights and privacy rights has a long history (Algeria in the fifties, Brazil, Argentina, Uruguay, Chile and other Latin American states later in the sixties, as well as in liberal states like Germany – against Baader Meinhof –, Italy – against the Red Brigades –, Spain – against ETA –, and especially the UK – against the Provisional IRA in Ulster – and France – after 1986), but under "special" conditions limited in time, space and object. And even so, the participation of military and secret services within the country was not accepted as "normal" by liberal democracies in the eighties. Unfortunately these practices blurring the line between liberal democracies and liberal regimes using illiberal practices by lack of checks and balances is now coming back, especially in the countries supporting the war in Iraq, but not only. It destabilises the boundaries of what is legitimate in democracy.

The antiterrorist policies have not been innovative. They have been a mix of traditional coercive previously unsuccessful answers of previous bureaucratic interests and of a will to consider technology of surveillance and biometrics as "the" solution to transnational political violence. The main political questions have been silenced by this belief in

technology and still are. The US path was directed towards militarization. In the European Union, it was more a series of police measures that have already been envisaged in practical terms before 2001 but have often been rejected as unacceptable by principle. It is the willingness to accept the previously unacceptable that gives special cause for concern. In Europe, none of the measures decided can usefully be understood as a speedy reaction to September 11th or to subsequent US pressures. They were very largely the outcome of a long trend of proposals that can be traced from the beginning of the Trevi and Schengen groups in the mid-1980s; proposals that were partly resisted at Amsterdam and Tampere but which came to be the dominant trend after Genoa. The argument for a more responsive government in the need to protect the population is to insist that derogatory and emergency measures are necessary because of the change in the nature of violence itself at the global level. But, if the transformation of the way of conducting political violence by clandestine organisation needs to be taken into account, nevertheless, there is a danger to act just as if the Apocalypse will happen in the near future. Too often, claims about the necessity to fight against terrorism are not based anymore on the possibility a major dramatic event happens but on the certitude it will happen. They thus ask the question of "when it will happen" which frames a particular relation to the future. Moreover, nothing proves that a global technology of surveillance is a solution. This way of thinking of the future – as already knowledgeable in the name of protection of people – is more astrological than scientific, and denies the role of politics.

Fear, state of emergency, suspicion and the will to monitor the future

Decisions regarding anti-terrorism and security policies/laws are more and more based on an extensive definition of "terrorism". The misunderstanding of the transnational political violence goes with an abusive resort to the notion of terrorism which tends to be applied to phenomena such as migrations or movements of mass contestation. The extensive definition of "terrorism" works with strong suspicion on certain categories of people as well as with the extension of surveillance.

A climate of fear has been enacted by the bombings and the political reaction to them. For instance, can anyone in London or Paris still ignore an abandoned rucksack sitting on a train or a bus without looking suspiciously at "aliens"? The effect has been to reinforce what Didier Bigo termed in 1998 already a "governmentality of unease" or "ban-opticon," in which in the name of protection against a potential new action of violence, there is a framing of certain people who are then categorised as subject to a sovereign exception, to exclusion and ban on the basis of the threat they represent. For the others living in the society, there is a normalisation, and a form of imperative to enjoy freedom, and

especially freedom of movement. The boundaries between the normalised and the banned are delimited by the securitisation of everyday life, and the rise of intolerance (what is called zero tolerance) for any kind of deviance, of distance from the main stream.

September 11th has exacerbated the Ban-opticon by making more visible many of the technologies and rationalities at work. In particular there has been an acceleration of the move away from the control of people on the territory or by means of their territorial designation to a control at distance in geographical terms.

Narratives about security are also increasingly articulated in terms of time, of a capacity to control the future. Many old-fashioned worries arise in this context, not least about an over-reliance on worst case scenarios, or hubris, or again, unintended consequences. There is also reason to be concerned about the extent to which claims about security can now be invoked so as to control populations not only in relation to dangers that at least have some concrete and tangible reference but to speculative, abstract and explicitly metaphysical ideas about futures that can only be imagined -- and imagined on the basis of out-of-date ideas about what friends must do to enemies. The so-called doctrines of preventive war and proactive policing both express disturbing tendencies in this direction.

Technology, spaces and the state of emergency

Antiterrorist policy is technologically driven with the use of data (sur)veillance, biometrics, transnationalisation of intelligence and police data, appeal for more collaboration between the police organisations. Combining an analysis of the relation to territory and new technologies with the way security agencies and politicians think about this relation in order to protect territory through the use of new technologies, suggests three main points.

Technology offers the dangerous possibility for an automatized and systematized control of people. This creates the technological conditions for the possibility of a progressive globalized state of surveillance. Where gathering information as fast as possible, capitalizing it and using it on bodies (territorial bodies, social bodies as well as biological bodies), is essential.

The resort to data-bases as a tool for the protection of territorial space makes it a crucial element of the securitization process. This leads to an ambivalent hierarchical relationship between the security of the territory and the security of cyberspace: the latter is progressively becoming the condition for the former.

What may now be a necessary condition for maintaining and enhancing people's rights to privacy is to look at the production and distribution of data-bases so as to map the digital interconnections between the different state bureaucracies and between these bureaucracies and private companies.

With the implementation of biometrical systems, it is not only the state that is engaged in a subject to new historical developments. Borders are also profoundly reshaped, not so much in their function as in their form. We can observe a sort of "pixelization" of borders as they shift from a line to a set of points of connection distributed around the earth; points of connection where people are controlled, through connections to a central database, and with the capacity to determine whether or not people are acceptable for entry.

Intelligence, suspicion and the law

The attacks of September 11th, 2001 in the United-States, of March 11th, 2004 in Spain and of July 07th and 21st in London have strongly challenged the historically constituted modes of regulation of political violence by the intelligence services. Nevertheless, the research has shown strong continuities beyond the cold war and permanency of some categories of analysis of the terrorist threat.

The post September 11th transformation in the Intelligence activities (considering both the services and the missions) are not just a response to "adapt" to so-called new threats. They are a push to reconfigure the field of the professionals of security under the leadership of intelligence services. The bureaucratic/institutional routines that heavily structure the field of Intelligence play also as obstacles to the analyses of the specific mode of mobilitsation/action of the radical Islamic groups, by superposing to them a view coming from the cold war and reading migrants as a fifth column.

This leads some members of intelligence agencies to analyse the "terrorist threat" as the actions of an "invisible, faceless enemy", as a "stealth" enemy. This is where lies the possibility for the importation of logics of suspicion into the political activity, and thus those recurrent analyses in terms of "plots" and "manipulation": the way Intelligence Services tend to present any local violent initiative by small groups or autonomous individuals as part of a global political strategy of an occult and structured organisation is particularly telling in this respect.

Suspicion is becoming more significant than established guilt. Here, we are facing a significant shift in the balance between the logics driving the intelligence activities, based on suspicion, and the logic of the legal system/state of law, which requires establishing

the proof first. The combination of a generalized state of suspicion and of the mass mobilisation of resources to combat terrorism following September 11th, is then strongly challenging civil liberties and the state of law on which the construction of western democracies have historically been based.

Anti-terrorism, cooperation and the European Identity

The construction of the European Democratic Political Norm is to be put in relation to the problem of a common definition of what Europe is and is not.

The European anti-terrorist practices are consubstantial of what being European means. The idea of a European co-operation imposed by the need to bring a response to the lack of security – that goes with the obliteration of the borders – is an official reassuring discourse for the police, legal and policy actors concerned but with some strong effects on the European identity.

European Union agreements have been pushed forward, especially by Spain, to structure an EU identity as democracy struggling against the same enemies: the terrorists.

Co-operation is seen as the key word for efficient and centralised information anticipating the events and profiling who is and who is not dangerous, who is and who is not a suspect.

And as soon as co-operation between democracies becomes the relevant mean for a mutual recognition of democracies, the question of violent practices in the name of a Raison d'Etat remains often unexplored and unquestioned. Anti-terrorist co-operation can thus be perceived as a loyalty test between inter-pares members and through which each member reaffirms its own democratic identity. But this mutual recognition process is based on a closed anthropological system where no one can really defeat his neighbour through a lack of cooperation as his own recognition as a democracy hangs on the existence of cooperation.

The decision and the debates around the European Arrest Warrant are definitively linked to this major symbolic political framework in Europe. This judicial European process highlights the tensions and conflicts resulting from the connection between the "terrorism/antiterrorism issue" and the "European identity issue" - which are two topics always under consideration in an exclusive way and consequently held at good distance from one another.

Discourses and the state of exception

The post-September 11th reconfiguration of the internal security field of EU countries owes a lot to the decisions and actions undertaken by the professionals of politics. Embedded in the struggles for power within both the political and the security fields, these ones try to satisfy a series of political needs while (re)positioning themselves versus the other actors of the fields.

The firm and reassuring governmental discourse on the introduction of allegedly efficient counterterrorism policies, which rest upon an increasingly extending set of emergency rules, aims to restore the jeopardised sovereignty in the eyes of the people but is also not dissociable from various domestic political stakes. It seeks to obtain the political superiority of the executive in the definition of the terrorist threat (with regard namely to the security professionals), in the decision-making process (with regard to the judges and the human rights defenders) and in the efficient protection of the public safety and national security (with regard to other, rival political parties).

These claims for reinforced co-operation at the European level, better coordination of Intelligence activities, the implementation of technical systems allowing to anticipate probable violent acts in the near future are all often given privileged status in relation to claims made by other political actors. This is partly a consequence of the way in which the mass media are attentive to the voices of specific elites. The analysis of press-released statements by domestic political actors in the UK and France between September 2001 and June 2003 has shown that the defence of emergency rules is widely covered by the press, largely because it is supported by several political leaders, but does not receive the open support of the majority of domestic political actors. On the other hand, the human rights defence is adopted by fewer political leaders but enjoys broader support among the general public.

To further strengthen the executive's position in the domestic political field and to legitimise the introduction of emergency measures, the governmental discourse seeks to reframe the notion of freedom and to downgrade the place held by human rights in contemporary democracies. In the former case, freedom is no more presented as freedom of the people to act in democratic terms but as freedom from fear and insecurity. In the latter case, human rights are no more seen as a substantive part of the frame in which democracy is possible but as one among other values to protect during the ordinary act of governing. Accordingly, law and security are not anymore the means to guarantee the exercise of civil rights but are turned into autonomous aims and, consequently, into internal restrictions of these freedoms. And justice, in this reasoning,

ceases to be the core element of the rule of law to become a relative, politically-oriented social value, in the service of the executive. Nevertheless, judges, after a while, have put strong limits to this tendency. And some Parliaments seem now more aware of the danger to accept the idea of trade off or of balance between security and liberty. They insist on the primacy of the values of democracy and liberty over a security concern which has a meaning only if it does not undermine the values in the name of which it has been used.

Progress in the Last Six Months

As mentioned in the Second Year Technical Report, the French Team main objectives for the ELISE third year were:

The valorisation of the ELISE Network production

The French team has largely focused, during this third year of contract, on the valorisation/diffusion of the main work and production of the ELISE Network. This has encompassed:

- The development of the ELISE website (main priority);
- The organization of conferences and panels:
  - A first conference taking place at the CERI on October 25, 2004. "Liberty and Security in a Transatlantic Perspective" (see the program attached);
  - The French Team participates to the setting up of some ELISE panels at the next ISA Conference;
  - The French is organizing some conferences in the scope of the Research Group on Exceptionalism.
- The development of relations with national parliaments as well as with the European Parliament;
- The publication of the French Team papers that are still to be published, as well as some of the papers of the other teams. Two special issues of the Journal *Cultures & Conflits* are already scheduled in 2005;
- The development of the ELISE Cd-Rom which will be composed of the major results of the ELISE Network research and of important documents in relation with the ELISE problematic.

Some of these activities have been realized during the first 6 month of this third year of the contract. They are specifically listed in the French ELISE Progress Report already submitted to the European Commission at the end of the first half of the year.

During the last six month (April 2005 – September 2005) the French Team has mainly been involved in three major activities that are all to be linked to the diffusion of the ELISE Network research:

1) Final Synthesis Report

2) Presentation of the ELISE French team researchs' main results

3) Dissemination of the ELISE Network Production
   - Publication of the ELISE Network Production
   - Realization of the ELISE Cd-Rom

Final Synthesis Reports

Under the supervision of Didier Bigo, the members of the French Team have:

- Prepared a **synthesis document** of their research.
- Participated in the realization of the **ELISE Network Final Synthesis Report** in close relation with the other ELISE Teams

Presentation of the ELISE French team researchs' main results

Didier Bigo, as leader of the French Team and as Scientific Coordinator of the ELISE Program, developed important contacts with various Institutions as well as NGOs: CNIL (Commission National Informatique et Liberté in France), European Parliament, ASEF, UNHCR, Statewatch…Didier Bigo also participated in the large conference organized in Kingston (Canada) around the issues of Surveillance where he presented the ELISE Research results. May 2005. *Paper presented*: Detention of foreigners, State of exception, and the social practices of control of the Ban-opticon.

Laurent Bonelli presented the ELISE research at the UNESCO conference « Islam, médias et opinion publique. Déconstruire le choc des civilisations » (Paris, July 2005) as well as in the conference « Política criminal de la guerra. Abans i després de l'11-S 2001 i de l'11-M 2004 (a Estats Units i a Europa) », Universitat de Barcelona, Barcelona, March 2005. *Paper presented*: "La maquina del castigo o la obsesión por la seguridad en Francia"

Laurent Bonelli also issued a paper (« Quand les services de renseignement construisent un nouvel ennemi ») in *Le Monde diplomatique* (April 2005). This paper which presents some of the main results of the French Team (translated in the various national printings: Spain, UK, Italy, Germany, Argentina, Chile, Croatia as well as in the Arabic Countries etc…).

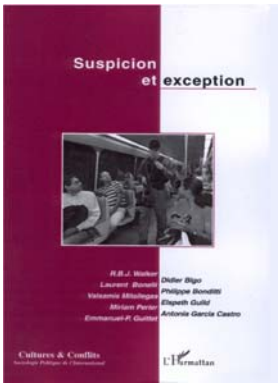
Dissemination of the ELISE Network production

Publication of the ELISE Network Production

The French Team has actively been working on the **diffusion of the ELISE results** in close relation with the other ELISE Member Teams as well as with the Editorial Board Team of the French Journal *Cultures & Conflits*.

During the last 6 past months the French Team worked on the publishing of the first of the two[41] ELISE Special Issues in the Journal *Cultures & Conflits (French Language issue)*. It implied first, for the French Team, to update their own research and to put them in close relation to the other ELISE Team deliverables published in the same issues.

Suspicion et exception (C&C, 2/2005)



Editorial. Suspicion et Exception
Emmanuel-Pierre Guittet, Miriam Perier

International, Impérial, Exceptionnel (UK Team Deliverable)
Rob Walker

La mondialisation de la sécurité? Réflexions sur le champ des professionnels de la gestion des inquiétudes et analytique de la transnationalisation des processus d'(in)sécurisation (French Team Deliverable), Didier Bigo

Un ennemi "anonyme et sans visage". Renseignement, exception et suspicion après le 11 septembre (French Team Deliverable), Laurent Bonelli

Biométrie et maîtrise des flux. Vers une gestion du « vivant-en-mobilité » (French Team Deliverable), Philippe Bonditti

Contrôle des étrangers, des passagers, des citoyens: surveillance et anti-terrorisme, Valsamis Mitsilegas

L'Etat d'exception, le juge l'étranger et les droits de l'Homme: trois défis des Cours britanniques (Netherland Team Deliverable), Elspeth Guild

Regards sur l'entre-deux, Didier Bigo, Antonia Garcia Castro

[41] As mentioned in the last progress report (March 2005), it was initially decided to publish three ELISE special issues in the Journal Cultures & Conflits. In accordance with the other ELISE member Teams, we eventually agreed to merge the two ELISE Special issues in a single one titled Guerre et Résistances (War and Resistances). This has been decided in relation to the recent events in London so as to publish as fast as possible the last ELISE research results

Guerre et Resistance (forthcoming issue; **summary can still be modified), Papers in English are being translated

The Matrix of War
Vivienne Jabri (UK Team Deliverable)

L'altermondialisme au prisme de la mondialisation
Nathalie Bayon/Jean-Pierre Masse (French Team Deliverable)

Media et exceptionalisme
Anastassia Tsoukala (French Team Deliverable)

Identité politique européenne et solidarité démocratique après le 11 sept.
Emmanuel Guittet (French Team Deliverable)

The ELISE Final Synthesis Report
The Elise Network

Elise Cd-Rom

In addition to the publications issued in the French Journal Cultures & Conflits, the French Team also finalized the ELISE Cd-Rom which eventually compiles

- the deliverables of each of the different teams;

- the list (even if not exhaustive) of the anti-terrorist related laws and legislative decisions at the European level as well as in the 25 different EU countries;

- a short video (15 min.) which presents the research program in a dynamic way.

2.2. Workpackage 2: Freedom of movement, immigration policy and "conflict of citizenship"

Leading Partner: University of Genoa
ELISE Contact persons: Dr. Alessandro Dal Lago & Dr. Salvatore Palidda

The overall Italian team contribution to the ELISE Project has mainly been focusing on the social and political consequences of the security politics adopted in the last four years at European and specifically Italian level. The main assumption in approaching these issues has been - rather than assuming the terrorist attacks in New York, Madrid and London as a turning point in security politics - to look for and to outline the trends, the continuities as well as the harshening of already existing practices, technologies and devices of social control.

At a more theoretical level this has in turn implied a (re)conceptualization of the central role played by war within current political or state domain - particularly assuming contemporary "war on terror" and its consequences as the sign of a definitive overcoming of modern conceptual distinction between internal and external politics. At an empirical level, the topics of the research have been mainly addressed to the direct consequences of security politics at the level of the rule of law and the quality of social life and social cohesion – i.e. analysing the redefinition of police policies, judicial behaviours, migration management, border control, and so forth.

On the base of such a general framework, during the last six months the Italian Unit has firstly organized a workshop that has been held in Genoa, on April 8th and 9th 2005, concerning '*Citizenship, Social Cohesion and EU Security*',

The workshop has primarily focused on the research carried out by WP2 in the last period of the ELISE research project. Four different papers dealing with social cohesion, identity, security and border policies were presented by the representatives of the Italian team. Each paper was then commented and reviewed by other members of the ELISE network.

Roberto Ciccarelli's presentation ("***Comparison and Assessment of the Main Models of European Citizenship***") has synthesised a research based upon a comparison between three of the main models of citizenship (national, cosmopolitan and republican), problematising them *vis à vis* the European citizenship constitutional process firstly established in the Maastricht Treaty of 1992. The final point being that the European road to and through an exclusively economic enlargement is missing the legacy of an actual social citizenship. The enlargement of the Union and the constitutional European process have still today a tendency to return to purely corporatist forms, since economic

deregulation and globalization deprive it of its material possibilities to protect citizens from the brutal variations in the labour market, the continuous decrease in the level of welfare and the securitarianism in migration policies.

Devi Sacchetto's presentation ("***The Change in the Relations between the Actors of EU Countries and the Euro-Mediterranean Societies***") reflected a research concerning the most recent political and social transformations on the eastern borders of EU, particularly focusing on the delocalization of production and the emerging of new relatively autonomous actors (delocalizers, professionals of humanitarianism, traders, mercenaries, instigators, migrants, seamen). The main assumption being to show the extent to which the building of a "Fortress Europe" is constantly forging new social hierarchies, both inside and outside the EU, according to an ambivalent process - insofar as purely repressive immigration policies are now confronting with the demand for full operating freedom from European power-brokers in emigration societies.

Salvatore Palidda's presentation ("***The Change in the Security Paradigm in Europe as New Citizen Practices***") was based upon a research on the (political as well as "human") costs of security politics on social cohesion - underlying by this the adoption of violent means and devices of social control as a norm, rather than the exception, that has actually abolished any form of pacific negotiation of social conflicts. The aim of the research being to show how far an Europe invested by the "war against terrorism" and marshalled against the Islamic world and a "total" dimension of enemy has brought to the fore a connotation of European citizenship as opposed to any idea of a pacific and respectful perspective of basic rights.

Federico Rahola's presentation ("***The Changes in the Management of Migrations***") firstly problematised the very notion of management suggesting the adoption of the Deleuzian notion of control as well as the Foucauldian one of governmentality, by this implying the fragmentation of sovereignty into a plurality of actors involved in migration and border management. The main assumption of the research is based upon the radical redefinition of borders, their progressive deterritorialization as physical barriers as well as direct operators of political difference, thus reproducing clandestine labor and a regime of apartheid at the very hearth of EU constitutional process.

The workshop has finished with a roundtable panel on the issue *"Is there a Global State of War?"* that involved most of the ELISE workpackage leaders as well as other external participants.

In April 2005 the Italian team of Elise has also published the first issue of a new *journal* (*Conflitti globali*) financed with Elise funds and mainly devoted to the publication of the main researches developed by the Italian Unit.

Indeed, the main aim of *Conflitti globali* (Global Conflicts) is to fill a gap in contemporary socio-political sciences, providing a multi-disciplinary analysis of the different - social, political, cultural, ideological, military - aspects of the conflicts that are now involving a very large part of the world and that are best synthesised in the on-going war in Iraq. Providing a new heterogeneous instrument of analysis, we want to suggest that the "new conflicts" can't be understood on the basis of the single traditional conceptual schemes of the specialised disciplines (international relations, sociology, anthropology, strategic studies, cultural studies and so on). The main assumption being that the scientist and objectivist approaches that by and large dominate the field have become an obstacle to understanding the political dimensions and the social effects of the "new" global conflicts.

With the term "conflicts" we don't mean only wars, although they definitively have a crucial role in the contemporary world; we also mean the conceptual oppositions that are running across the whole global spaces and that are inevitably influenced by war: the opposition between freedom of movement and control on migrations, between freedom of action and all sorts of controls, between global economic policies and local resistances, etc.

The first issue of *Conflitti globali*, entitled "La guerra dei mondi" ("War of the Worlds") includes articles, among the others, by A. Joxe, E. Said, T. von Trotha and A. Dal Lago, a section on war in the philosophical culture of the XXth century (Jünger, Foucault, Deleuze), a commented new version of an essay by Max Weber on pacifism, book-reviews, and research papers on the victims' status in contemporary culture (Rahola), on the links between war and economy in the Balkans (Sacchetto), on peacekeeping politics (Ciccarelli, Foglio).

The next issue of *Conflitti globali* ("Fronti e frontiere", "Fronts and Frontiers"), whose publication is foreseen for November 2005, will specifically focus on the political and social transformations involving the current dimension of borders. It is an attempt to conceptualise the progressive deterritorialization of borders following two apparently opposed trends: towards a spatialisation or re-naturalisation of borders (by this meaning their increasing action at distance) as well as towards their reflection inward, within the political space they delimit. The issue will include contributions, among the others, by Didier Bigo and Elspeth Guild (on the Schengen Visa policies), Rob Walker (on the

redefinition of the border as the outside of modern "inside-outside"), and Mike Davis (on "global slums").

The first issue of the journal has been discussed in several presentations organised all around Italy (Milano, Roma, Firenze), promoting a lively debate. Each presentation has been occasion even to present the main assumptions of the ELISE research made by the Italian Unit:

For what directly concerns the further steps of the research reached in the last six months, our attention has been mainly devoted to analyse further aspects of securitarian politics. The empirical research has thus assumed as a specific case study the judicial behaviour towards migrants alleged/targeted to be terrorist, the several cases of direct expulsion of migrants (particularly Islamic religious leader) under suspicion of supporting terrorism.

A particular interest has been devoted to the social effect of the new security law (act), the so-called "decreto legge Pisanu" of September 2005.

In our empirical research we have carried out also a monitoring of some aspects regarding the "paradoxes" of the "war" to clandestine immigration, emphasized in name of the war on terrorism.

In particular our analysis of the information and statistics published by the Audit Court, by the Ministry of the Interior and other institutions, shows

- the strong imbalance between the costs of the activities defined as contrast to clandestine immigration that amount by now to more the 80% of total funds allocated to the management of immigration, without calculating the direct costs of other institutions and police forces;
- the actual "productivity" of the action of contrast is reduced to 24.374 expulsions and to 54 charter flights, in operations that have been defined from Amnesty International and other NGO as *manu militari* deportations and that have implied very high costs.

As noted by the Italian State Audit Court, during 2002 the amount of € 65,469,100.00 was the cost of the "activities of contrast" and € 63,404,004.00 was the sum assigned to the "measures of support". In 2003 these amounts were respectively € 164,794,066.00 € 38,617,768.00. In 2004, € 115,467,102 and € 29.078.933.

But those costs don't include the expenditures on the Police. It should be also noted that the resources for the whole migration sector come from the wages of the immigrants

themselves. Moreover, part of the spending on support measures is used also for contrast activities (private enterprises selecting the migrants, managing imprisonments/expulsions, etc.).

According to the Ministry of the Interior, 75 per cent of the "clandestines" arrested by the police is composed by over-stayers that remain in Italy once their temporary permission is expired (for tourism regularly) or by people who haven't extended their permission because they find only concealed jobs (in Italy the shadow economy amounts to 40 per cent of the Gross National Product).

In such context (which hasn't changed since immigration started) it is evident that Italy has not facilitated the regular and pacific integration of immigrants.

Table 1. Output of the activity of contrast 2000–2004

		2000	2001	2002	2003	2004*
Immigrants arrested in irregular position	driven away	69.263	77.699	88.501	65.153	45.512
		53 %	58 %	59 %	61 %	57 %
	non repatriated	62.217	56.633	62.245	40.804	34.860
	total	**131.480**	**134.332**	**150.746**	**105.957**	**80.372**
among the actually driven away immigrants						
immigrants repulsed at the frontier		30.871	30.625	37.656	24.202	18.725
		45 %	39 %	43 %	37 %	41 %
immigrants repulsed by the police		11.350	10.433	6.139	3.195	1.993
immigrants who left voluntarily after police order		3.206	2.251	2.461	8.126	5.816
immigrants accompanied until frontier		15.002	21.266	24.799	18.844	12.673
immigrants expelled according to a provision by the Judicial Authority		396	373	427	885	675
immigrants readmitted in their country of origin		8.438	12.751	17.019	9.901	5.630

Source: Italian Audit Court 2004 and 2005

NB: In the third category there are persons who left Italy voluntarily; as a matter of fact, all of the huge costs of the "rejections at the frontier" regard people who risked their life to get to such frontiers and who would have the right to humanitarian or political asylum. Still more amazing is the "productivity" of the detention centers for irregular migrants, often managed by catholic NGOs (and relatives and friends of members of the government - the president of the NGO "Misericordia", which manages the Lampedusa and Modena centers, is the brother of the minister Giovanardi).

Table 2. Immigrants imprisoned in detention centres for irregular migrants actually readmitted in their country of origin

	1999	2000	2001	2002	2003	2004
Interned in detention centers	8.847	9.768	14.993	18.625	14.223	15.647
No. of immigrants actually readmitted in their countries	3.893	3.134	4.437	6.372	6.830	7.895
% of immigrants actually readmitted in their countries	44%	31,1%	29,6%	34,2%	48%	50,4%

Source: information supplied by the Ministry of the Interior and published by the Italian State Audit Court, 2004 and 2005

These informations and statistics along with many other data being collected by our Team will continue to be analysed in the activities of the plan Challenge as a continuity of ELISE.

2.3. Workpackage 3: External border and security policies including their impact on other policy areas

Leading Partner: Centre for European Policy Studies, CEPS

ELISE Contact person: Prof. Elspeth Guild, Dr Thierry Balzacq, Mr Sergio Carrera

2.3.1 Security, emergency and borders

The Schengen agreements of 1985 and the Convention of 1990 that implemented it were intended to establish through an intergovernmental approach the application of "the principle of the free movement of persons" within the European borders. Looking at the implementation by Member States of some of the measures adopted under the Schengen regime CEPS has shown, however, that a different path has been taken from the one carefully settled in the EU Treaty structure, due to the predominance of the security

rationale over the one of freedom. The security rationale has pervaded most of the practices related to the Schengen regime. This include: The discretionary use of Art. 2.2. of the Schengen Convention by Member States; the profiling of political demonstrators in the EU and the development of new databases with few safeguards.

The discretionary use of Art. 2.2. of the Schengen Convention by Member States

On dubious grounds, some Member States have overused Art. 2.2 of the Schengen Convention which provides the following: "where public policy or national security so require, a Contracting Party may, after consulting with the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders." Even though this provision must be used exclusively under the exceptional circumstances of an emergency and for a limited period of time, looking at the states practices, however, their use has not been so exceptional. A good example if the often-unilateral use of Art.2.2 was that by Italy on the occasion of the G8 meeting in Genoa between 20 and 22 July 2001, during which 2,093 persons were denied entry into the country. These persons were not checked at the border points on a case-by-case basis, as required by the Schengen *Acquis*, but instead were blocked as a group at the Italian frontiers. It appears therefore that, political protesters, in the name of declared emergency, have become the main targeted groups when Art. 2.2 has been more frequently applied by Members States. This leads to the second way through which security activities are undermining freedom of movement in the EU.

The Profiling of political demonstrators

The huge demonstrations that occurred during the EU-US summit in Gothenburg represented the starting point for the development of an EU policy dealing with these matters. Consequently, The Council Resolution of 29 April 2004 on security at European Council meetings and other comparable events sets out operational measures to reduce risk of serious disturbances of law and order, including the need to develop the collection, analysis and exchange of data between the competent national authorities. This resolution is intended to lead to the creation of a system of national databases of persons who have been identified as potential "troublemakers" or "suspects". These databases will enable the transfer of data between the different national authorities. For CEPS team, it is striking to see how the inclusion of a suspect in such database and the exchange of data concerning a particular person may be base exclusively on suspicions that if the person crosses the border, s/he may be a serious threat to the internal security of the state. In addition, our analysis shows that no clear legal standards are provided for carrying out the surveillance of these targeted groups. More fundamentally, it is highly

probable that the respect of the rights to peaceful assembly and demonstration and freedom of expression, provided by Art. 10 and 11 of the ECHR, as well as the right of data protection of the "not-welcomed" would be jeopardized by the application of the Council Resolution.

Finally, the creation of a system to transfer personal data between the Member States is covered by Art. 3 of the Council Resolution. This system is regarded as an extension of the SIS. It would incorporate to the latter a European database on "suspected protestors". In this context, it is worth highlighting that Art. 4 of the Resolution states that "information supplied may, where national legislation allows, include names of individuals convicted of offences involving disruption of public order at demonstration or order events". However, the real scope and limits of behaviours and activities that may fall within the expression "or order events", as well as the control and limits over the use of the special information provided remains rather far from the concept of European accountability.

In sum, there are disabling differences between the actual spirit of the Schengen *Acquis* and how it is implemented in different Member States. CEPS investigation underlines the persistent gaps ion some of its current and projected aspects that may be worrying. The overuse of the formerly considered "exceptional" or "emergency" clause by Member States to politically justify and guarantee a high level of security and protection is likely to lead to cases in which serious, practical human rights considerations arise. Further, a serious lack of democratic accountability – checks and balances – on, for instance, the respect of the principle of proportionality, the protection of human rights. Thus, in our view it is clear that the question as to what extent an increase in a security rationale actually guarantees an increase in internal safety and freedom leads to a negative answer.

2.3.2. Judicial cooperation in criminal matters: the false promise of the European Arrest Warrant

The event of 11 September 2001 has considerably influenced political discourse in a decisive manner. Among the many security policies deemed necessary to implement the EU strategy for the Beginning of the New Millennium on organized crime – such as terrorism, money laundering, drug trafficking, smuggling, illegal immigration and the trafficking of human beings – the Council reached political agreement on the European Arrest Warrant (EAW), which was formally adopted in June 2002. The Framework Decision on the EAW is a positive step towards the realisation of an Area of Freedom, Security and Justice as highlighted at Tempere. In addition, it represents one of the first

legal instruments on mutual recognition formally agreed and adopted from the Council's programme of measures to implement the principle of mutual recognition of decisions in criminal matters. Finally, we acknowledge that the EAW is an important part of the EU security measures against acts of political violence. This is why CEPS team has deemed it necessary to conduct an extensive analysis of the EAW, outlines its limitations and propose some ways to improve its functioning.

The principle

The EAW is a "judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" (Art. 1 of the Framework Decision). In order words, the EAW seeks, with a considerable number of exceptions, to abolish and supplant the traditional extradition procedures between Member States and replace these with a system of surrender judicial authorities for those acts categorised as offences, without control of double criminality. It intends to overcome the former national frontiers in judicial matters, which may at times undermine the cornerstone of judicial cooperation (i.e. the principle of mutual recognition) by establishing a surrendering system, based on a process that is completely controlled by the judiciary. It sets aside the political aspect built into the traditional extradition system.

Limitations of the EAW

Despite its innovative character, CEPS team has shown that the EAW is beset with several shortcomings.

First, the list of "euro-crimes" that have been politically agreed within the Framework Decision on the EAW is rather fuzzy. It includes offences such as the illicit trafficking of drugs, weapons, hormonal substances and other growth promoters, stolen vehicles, racism and xenophobia). The listing, or rather labelling, of offences in the legislative tool may be criticized because, our opinion, it lacks a rationale for choosing precisely which crimes fall within its scope. Also it should be remembered that our research has highlighted that at present there is not an agreed common definition of any criminal activity, either at EU or international levels.

Second, the question as to what extent the EAW truly guarantees a good balance between efficiency and human rights seems far from having a positive answer. As a matter of fact, CEPS regrets that the EAW was adopted while the EU still lacks a framework for homogeneously protecting the legal certainty of procedural rights for

persons suspected of, accused of, prosecuted for and sentenced in respect of criminal offences.

Third, the EAW has, among other things forgotten to include the essential obligation not to surrender an individual in the cases set forth in Art 3 – "No one shall be subjected to torture or to inhuman or degrading treatment or punishment – of the ECHR. This provision may render the executing state liable under the Convention, when there are substantial grounds and evidence that the person genuinely risks being subject to ill-treatment and s/he surrendered anyway to the issuing state. The European Court of Human Rights (ECtHR) has interpreted this legal clause in many instances, and has ruled that obligation is on the contracting party not to surrender the individual under those circumstances. Yet this is not expressively qualified as one of the mandatory grounds for a state's refusal to surrender an individual under the EAW's system.

Finally, serious concerns have been raised by some EU Member State governments, such as Germany and Italy while attempting to transpose the EAW. AS a result, the desired, added value of this legal iunstrument, i.e. to increase the level of trust among Member States by replacing the traditional, complex channels of extradition, may be dramatically be undermined and hinder the EU's fight against acts of political violence.

2.3.3. Towards a Proactive Immigration Policy in the EU?

A truly common immigration policy continues not to exist. Since the Amsterdam Treaty Europeanized this sensitive field in 1999, very few policy instruments being adopted at EU Level, and the very few in place have been subject to several criticisms regarding their compliance with the "human rights dimension".

First, concerning regular migration, the final output from the Council Directives on long-term resident status and the right to family reunification have been rather disappointing. Both Directives negatively link access to the set of rights they confer (inclusion) to compliance by migrants with a series of restrictive conditions left in the hands of the member states (exclusion). For example, the requirement to comply with mandatory integration conditions in order to have access to rights is most worrying. The very values of an intercultural society and social cohesion may be gravely endangered. This securitarian trend in European Migration Policy could set *the fair and equal treatment paradigm* highlighted in the Tampere Conclusions as a rather utopian milestone.

Further, potential annulment by the ECJ of some of the contested provisions inserted in the Council Directive on the right to family reunification will profoundly influence the very nature of all other existing and future migration-related instruments. Particularly

problematic is the continuing failure to reach a political agreement on issues surrounding economic/labour migration, as well as admission procedures. A consensus among the member states on this important matter needs to be achieved urgently for the sake of the EU's future, social cohesion and the prosperity of all.

The texts adopted in the area of irregular migration provide a gamut of instruments to fight against unauthorised entry, transit and residence in the territory of the EU. Human trafficking and smuggling is now severely sanctioned. Further, the penal framework to curb the facilitation of illegal migration is up and running.

What has been the impact of 11/9, 11th March and 7/21 July 2005 in the field of immigration? We have seen a clear negative reaction based on a securitazation of migration. A series of security measures have been proposed as "a response" to prevent that events such as the ones of the USA, Spain and the UK will happen again. "Security" at the top of the policy agenda. It has conquered, and overruled freedom and justice in the EU. The nexus between "terrorism, organized crime, trafficking of human beings and illegal migration" has been strengthened in political and media discourse, as well as in some policy responses at EU level. We need to fight against this link which places migrants as suspects/criminals.

In every Council Declarations following these events, and this has been also the case in the Council Declaration on the EU response to the London Bombings of 13 July 2005, we find a series of security policy measures based on the use of new technologies (databases and biometrics) which pretend to "fight effectively what has been qualified as terrorism". Security tools such as "the SIS II, VIS, and introduction of biometric identifiers in visas and residence permits of non-EU nationals" are now the priority. All these contested measures have been openly criticized and put seriously into question by the EP, NGOs and civil society all across the EU.

Our research findings have joined these critical and liberal claims based on the following points:

1) Their compliance with the principle of legitimacy, liberty and the rule of law is critical. Their compatibility with international and European human rights commitments is far from being clear. Especially if we look at Art. 8 of the ECHR and the Council Directive 95/46 on the protection of individuals with regard to the processing of personal data.

2) Democratic deficit (the no-involvement of the European Parliament) in the decision making process of most of these instruments;

3) Their compatibility with the principle of proportionality is also doubtful. The principle of proportionality entails that the measures adopted are the least restrictive towards freedom. Is that really the case? Yet, the civil rights implications of these security measures based on the blind belief in technology are very serious and careful attention and study will be further required.

4) Their effectiveness and efficiency is equally a contested issue. Including biometric technologies, databases and video surveillance is certainly not going to prevent an act of political violence to happen again.

2.3.4. Freedom of Movement in an enlarged EU

We have assessed of the scope ratione personae and the current state of the principle of free movement of persons looking at the most recent case law of the Court of Justice and the Directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States 2004/38. This Directive establishes the conditions and rules for the exercise of the right of free movement and residence within the EU by Union citizens and their family members of any nationality, including third-country nationals. On the other hand, the enlargement of the Union that took place on 1 May 2004 has created a 'variable geometry' for the citizens of the Union as regards the freedom to move.

While nationals of Cyprus and Malta immediately had full free movement rights across and inside the traditional borders of the 'old member states' (EU-15) since the date of accession, the nationals of the other eight member states did not. Nationals from the Central and Eastern European countries (CEECs) – the Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia – are entitled to all the free movement rights except the free movement of workers.

The majority of the EU-15 member states, with the exceptions of Ireland, the UK and Sweden, are using 'transitional arrangements' limiting the rights of workers and services providers from the CEECs to move and reside in EU-15 countries. For a period of up to seven years (in what has been referred to as the '2+3+2 formula'), which may potentially last until 2011, the national migration laws of the member states will continue to apply to workers from these countries, who will still be considered as 'migrants' and not as equal EU citizens. Yet, all citizens should, as citizens, be equal.

Indeed, in addition to the uncertain economic justification of these restrictive arrangements in view of the expected migration flows from these countries, these periods represent a real and unnecessary obstacle to the principles of free movement of

persons, solidarity and non-discrimination on grounds of nationality as recognised by Art. 12 EC Treaty. The inclusion of transitional arrangements in the last enlargement processes does not represent an 'exception'. In the Brussels European Council Conclusions of December 2004, the opening negotiations with Turkey have been conditioned on the possibility of introducing *"long transitional periods, derogations, specific arrangements or permanent safeguard clause for areas such as freedom of movement or persons".* Moreover, the Accession Treaties signed with Bulgaria and Romania also provide for the possibility to apply transitional measures and substantially restrict the free movement of workers and services providers.

What has been the impact of 11/9, 11th March and 7/21 July 2005 in the field of immigration? There has also been a securitazation of mobility. The Use of new technologies and security measures consisting in the introduction of biometrics in passports, ID and health cards. Also, the establishment of databases such as the SIS II. Looking in particular to the SISII, we have sustained that the compatibility of security policies such as the Schengen Information System II with the right of freedom of movement in particular, and social mobility in general, remains highly uncertain.

The development of the SIS II needs first to be based on an exhaustive and careful civil rights assessment of its adequacy in terms of both data security (the right of data protection) and safeguards for the fundamental freedoms of individuals. Without the establishment of a parallel framework providing a high level of protection and guarantees of the freedom dimension, the SIS II and all the rest of the security tools based on a technology of surveillance may lead to a scenario in which undue and disproportionate control, monitoring and surveillance of the movement of all is freely carried out in the EU. The respect of fundamental rights and freedoms of every human being needs to be taken as a point of departure in every security initiative adopted on behalf of our safety. This continues to be a challenge for the EU.

2.4. Workpackage 4: Immigration, asylum policies and responses to terrorism

Leading Partner: Radboud University of Nijmegen, Centre for Migration Law
ELISE Contact persons: Dr. Elspeth Guild

We have compared the developments in the field of immigration and asylum law and practice in five Member States (the Netherlands, France, Germany, Italy and the UK) and the European Union at two points in time: first at the time of the Gulf War in 1990/1 following Saddam Hussain's invasion of Kuwait; secondly following the terrorist attacks in the United States on 11 September 2001.

In the case of both events, immigration and asylum law were engaged through the perception that the enemy or the perpetrators were foreign nationals. The most striking difference between these two events is that in the first case war occurred over a limited period and was waged against a state identified as an aggressor. In the second case, we have what is perceived as a permanent threat from a terrorist network of 'Muslim fundamentalists' under circumstances of globalized insecurity. The implications for asylum and immigration law appear significant in the context of the ongoing 'War on terror' as they become part of a transformation of law which makes every foreigner a suspect.

The focus of this study is on the legal status of immigrants and asylum seekers and how that legal status is being modified on grounds of anti-terrorism measures adopted over a period of about 10 years. Particularly, the question is whether and how far situations have come into existence, which could be considered to be in conflict with principles of human rights.

Conflict with human rights obligations are highlighted throughout the reports. They arise because asylum and immigration law is more vulnerable to exceptional measures than other areas of law, particularly criminal law. The guarantees of due process under the ECHR do not apply to immigration or asylum proceedings in the same way as they apply to the determination of civil rights and obligations and criminal charges.

States can detain and expel non-nationals without charges being brought, or evidence to the standard of criminal procedures, or independent reviews of their decisions being made subject to a high burden of proof. However, some protections do apply internationally to prevent arbitrary detention and expulsion of non-nationals.

Firstly, the Geneva Convention on Refugees places substantial limitations on state sovereignty as regards the expulsion of refugees. Article 33 prohibits to return a refugee back to a country where he or she alleges a fear of persecution on the basis of race, religion, membership of a social group or political opinion. This is knows and the principle of non-refoulement. The Convention allows for exceptions to this principle. One exception is Article 1F providing that status should be denied to refugees engaged in very serious crimes, including terrorism. The Convention further allows an exception to non-refoulement on national security grounds. Article 33(2) states that protection against return may not be claimed by refugees who are perceived as a danger to the security of the host country or who, having been convicted for a particular serious crime, constitute a danger to the host country's community.

The study highlights that, following the first Gulf War, there was in general no heightened use of exclusion clauses under the Refugee Convention against Iraqis or others considered to represent a security risk, despite a significant increase in asylum applicants from Iraqi nationals in Europe (i.e. the UK). On the other hand, the most direct impact of 9/11 on obligations under the Refugee Convention has been that procedures for asylum claims have been affected by the invocation of the 'national security' exceptions in Articles 1F and 33(2) and created a ground for exclusion from protection before any consideration of the merits of a claim.

Secondly, there are significant constrains on EU Member States actions and policies in respect of aliens under the ECHR. The ECHR Article 3 places on Member States an absolute prohibition to deport or remove persons who fear torture, inhuman or degrading treatment in their country of origin. Between the two periods of this study, the interplay between Article 3 ECHR and immigration and asylum law had more clearly been articulated and developed by the European Court of Human Rights, particularly in *Chahal*, which set substantive and procedural limits on the power to deport.

After 9/11, both the Refugee Convention and the ECHR have come under attack by Member States engaged in the so-called 'war on terrorism'. The protection of refugees from deportation is arguably less secure than previously (exclusion before inclusion, security clauses overriding procedural rights etc) and there are now open attempts at undermining the strong ECtHR jurisprudence on Article 3 so that people may be deported in the face of diplomatic assurances from the receiving country that the person in question will not be tortured or ill-treated.

2.4.1. The Country reports

European Union

Important difference between the two periods under review is that during Gulf War I Member States had complete autonomy (no Maastricht, no pillars etc). In 2001 EU had competence over asylum and immigration, and an institutional framework for a co-ordinated response to terrorism.

However, already during the pre-Maastricht era, the perspective of free movement of persons across borders within the internal market raised the fear of the presence of undesirable elements within people movements but there was not yet the structure for a co-ordinated and common response, nor were security concerns at that time directly linked to the war in Iraq or specific terrorist threats.

9/11 on the contrary impacted significantly on EU policies in the immigration and asylum field over which the Community had now competence. The attacks of 9/11 were employed as a catalyst for restrictive policies where security measures with are lumped together with measures in respect of immigrants and asylum seekers.

A review of the current state of EC policy and legislation reveals a structural and deliberate weakening of the position of immigrants, asylum seekers and refugees by increasing their dependence on Member States discretion for receiving and maintaining rights and security of residence and various benefits.

United Kingdom

In each war, the response operated in a context of broader anti-terrorist laws which furnished authorities with more extensive powers than are available to deal with other serious crimes and establish a regime facilitating arrest and extended detention without charge. In the first Gulf War, those powers were found in temporary emergency legislation, largely shaped by the conflict in Northern Ireland. But restrictions on Iraqi nationals came principally through the extensive powers of detention, deportation, refusal of entry and police registration available under immigration laws.

At the time of 9/11, a permanent terrorism act was in place more obviously geared towards international terrorism. However, by December 2001 another Act was adopted which provided for indefinite detention of aliens without trial under immigration powers and required derogation from Article 5 ECHR.

The central element in the UK's response in immigration terms to 9/11 – detention without trial of foreign suspects – has been found by the highest court in Britain to be a disproportionate and discriminatory response. Other measure enacted since (control orders) are also unlikely to be sustainable under the ECHR, raising the same issues of proportionality, too limited scope of judicial supervision and possible discriminatory application. The attacks in London on 7 July, which were perpetrated by British nationals, have resulted in moving the focus from immigration to security, focussing on degree of threat regardless of citizenship. But there remains concern that communities regarded as 'immigrant' will be disproportionately and inappropriately targeted in the deployment of new security measures.

Germany

Germany was not actively engaged in either the Gulf War of 1991 or the post-9/11 wars with Afghanistan and Iraq. German counter-terrorism from the 70s to the 90s fundamentally engaged with an internal phenomenon (RAF, Neonazis, PKK sympathisers). Both events, however, coincided with significant changes to immigration and asylum law. Asylum law was fundamentally altered by a change to the German Constitution which made seeking asylum in Germany for people arriving from neighbouring countries all but impossible. This was a response to the sharp increase in applications following the Balkan war and the perception that Germany was taking a disproportionate burden of refugees. In the late 1990s, in response to PKK terrorism immigration provisions were tightened making deportation easier.

Only after 9/11 were changes to immigration law more directly linked to wide-ranging measures against terrorism. The fact that the lead 9/11 hijacker had lived in Germany had come as a particular shock and led to a crack down on Muslim organisations deemed to nurture extremism. It also sparked a long stifled debate on recruitment of foreign workers, integration of immigrants and German's wider views on immigration. The passage through parliament of controversial measures, curtailing rights and liberties of aliens especially in the context of entry, deportation and removal, encountered considerable resistance but was eventually helped by the terrorist attacks in Madrid in 2004.

France

At the time of first Gulf War in 1991, changes to immigration law with the introduction of the threat to public order concept beyond expulsion cases were already underway in France. Such changes would attach also to entry and residence the 'not being a threat to public order' condition, allowing for instance the deprivation of status to long-term residents. There appears to be no explicit connection between this development and security concerns arising from the War. Rather, they arise from the numerous terrorist attacks on the French mainland in the 1980s and 1990s. A trend is however emerging whereby the adoption of criminal offences and of special rules of procedure linked to terrorism intersects with the criminalisation of immigration. So, for instance, offences which are linked to illegal entry or residence are referred to as offences concerned with the fight against terrorism.

This trend is more marked after 9/11. Although the legislative response to 9/11 in France was muted, it led to the intensification of an existing emergency plan giving the French

authorities extra powers to protect internal security and a new chapter on combating terrorism in a draft law on everyday security that was already under parliamentary debate at that time.

These measures in theory were not concerned with aliens any more than with citizens but in fact had a particular impact on migrants and asylum seekers. Old measures of expulsion were executed, and extra search powers of police and security authorities were used especially against immigrants with a large number of them detained for identification purposes shortly after 9/11. The report also suggests a widespread use of the exclusion clause in the admissibility procedure of an asylum claim following 9/11.

New asylum and immigration legislation was introduced over the past two years. The new immigration law, which initially meant to deal with integration policy, voting rights of foreigners, regularisation of immigrants etc, became the toughest reform ever in French immigration law. It is wholly marked by precariousness of residence and obsession with fraud. The reform of asylum legislation also resulted in a significant departure from previous policy, with the abolition of the concept of territorial asylum and the introduction of exceptional procedures that are believed to undermine refugee protection standards. These reforms where helped by the political exploitation of a growing sense of emergency and fear of insecurity.

The Netherlands

The report highlights that the first Gulf War, to which the Netherlands was a participant, raised concerns over terrorist activities by activists and Muslim communities and fears about a possible fundamentalisation of Dutch society caused by migration. However, security measures were not stepped up. This period however registers rousing popular feelings against migrants, especially against the growing numbers of family members joining settled immigrants and the sharp increase of asylum seekers. This led to changes to immigration and asylum legislation geared towards deterring arrivals of foreigners and making expulsions more effective.

The insistence on stepping up expulsions and enhancing border controls is more marked in the second period under review, with anti-immigrants sentiments, especially anti-Muslim sentiments, now openly aired as part of the political campaign. While not participating in the war against Iraq, following 9/11 security measures were stepped up with increased powers for the intelligence service and new measures ensuring more efficient criminal investigations and prosecution of terrorist acts. Asylum and immigration law was once again amended, extending the grounds on which residence could be terminated (such as for instance for minor crimes such as shoplifting), criminalizing

illegal stay, and making it easier to detain people. Although implicitly justified on the ground of heightened security threats, the content of these measures, which dismantle legal protections for aliens, are wholly unrelated to the threat of terrorism.

The Netherlands is also an interesting case of a country that has tried to address the relationship between asylum and national security and made use of the exclusion clause under Article 1F. Here a special team for the assessment of possible 1F cases has existed with the Immigration Service since 1977 and several hundred cases have been rejected under this clause. Where neither prosecution nor expulsion is possible, due to international obligations, the persons concerned are denied any form of residence permit but in practice are allowed to stay illegally without any rights to social benefits or medical care.

Following 9/11, new procedural guidelines concerning the application of 1F were introduced allowing the immigration service to make more use of this option, as a way of denying admission.

Italy

In Italy legislation, until very recently, there were no specific provisions dealing with terrorist attacks by foreigners. Following the first Gulf War, there appear to have been no measures applied to foreigners via the ordinary anti-terrorism legislation, the legal framework of which is associated with the fight against domestic terrorism and mafia activity. Even after 9/11, Italy did not enact any specific provisions against foreign terrorists. As a result, preventive and repressive measures against aliens suspected of or convicted of committing crimes of terrorism arise from the application of the ordinary provisions that aim to prevent and punish terrorism and general provisions on the status of foreigners.

A new anti-terrorist law came into force in August 2005 in response to the London attacks of July and the threat issued by Al Qaida against Italy in relation to its presence in Iraq. The new law includes amongst others measures which make data retention compulsory, limit judicial oversight in expulsions and in investigative activities.

2.4.2. Progress in the last six months

Our objective over this final six month period has been to examine in depth the engagement of Italy as regards immigration, asylum and security at the time of Gulf War I (1991) and Gulf War II (2003). Because of difficulties encountered by researchers we have moved the timetable of the fields to be researched and thus instead of undertaking the work on the European Union during this six month period we have undertaken a study of Italy. The report is contained at annex 1.

Over this period we have been examining the development of law and its application in the field of terrorism and how it impacts on immigrants and asylum seekers.

2.4.3. Methodology

As with the other parts of the research in this work package, the methodology has remained constant. It is based on literature, legislation and court judgments which are relevant to the field. It provides a detailed, coherent and comparative analysis of events following 11 September 2001 and the adoption of legislation in the fight against terrorism which impacts on foreigners.

2.4.4. Description of the work

See the deliverable about the situation in Italy in Annex of the Final Report.

2.4.5. Dissemination

Work has now begun on updating all the deliverables in this work package and their preparation of publication in a book. A contract has been signed with Brill NV to publish the book in the Martinus Nijhoff title. Each chapter has been edited to ensure that there is no overlap as regards the contents and the final summary of the conclusions of the whole work package research is currently under production.

The ELISE team will present the final conclusions from the three years of research at the final conference on 16 September 2005 in Brussels. Thereafter, the comments and discussion will be taken into account in the finalising of the conclusions. The whole book will be sent to the printer before the end of October. The team will undertake the page proofs and final work thereafter. The publisher has committed to wide dissemination of the book once it appears.

2.5. Workpackage 5: Security issues and the reshaping of the EU institutional framework

Leading Partner: National Capodistrian University of Athens
ELISE Contact persons: Dr. Nicholas Scandamis

2.5.1. General objectives

The general objectives which guided our research may be framed as follows:

a) *Bring out and refine necessary conceptual tools*: The most crucial element of a research lies not in finding appropriate answers to given questions but in proposing new readings of the questions themselves which may lead to more adequate formulations of actual policy challenges. In our case, conceptual tools such as Governance as opposed to Government or market security as opposed to internal security were proven very helpful in deciphering the actual patterns and balances of power at national and EU level in order to propose a new reading of the security challenges which are actually facing us.

b) *Identify institutional challenges with regard to security*: In this connection, we focused on the emerging institutional framework dealing with security challenges at national and European level. May we speak of still fragile or well developed types of EU Governance over security, especially in the form of EU agencies? As a matter of fact, the Constitutional Treaty actually proposed a renewed EU institutional framework in the area of Freedom, Security and Justice and important re-arrangements in all areas pertaining, directly or indirectly, to security. Does this affect the overall institutional balance underlying the paths of economic and political integration?

c) *Analyse the status of the individual in the face of EU and national executive authority over security*: The EU level of authority is gradually asserting itself as provider of security to human populations within the unified market. In this context, which is the actual shape of European citizenship in the area of freedom, security and justice (FSJ)? In particular, which is the impact of the development of EU executive agencies vis-à-vis the individual?

d) *Explore policy implications*: In this respect, our research focused on two main elements: first, possible institutional options as to the future development of EU patterns of power, especially in the light of the Constitutional Treaty, second, adequate safeguards of the individual against the revival of exceptionalism at national level and the emergence of patterns of executive power at European level.

2.5.2. Main Scientific Results

The main results of our research may be summarised as follows:

a) **On a conceptual level**, several elements may be pointed out:

First of all, security does not amount to a pre-existing object, but is actually taking shape through the exercise of power and according to the rationale and the specific techniques of governance in the case under investigation. In this perspective, *market security* appears to be the essential object of EU Governance in the context of managing human populations within a unified market. EU Governance places terrorist threats in a rather different perspective than that of State Government, that is *preserving welfare through the smooth operation of open markets and not safeguarding the internal order of the State as such*. *Security in the sense of preserving prosperity* may be distinguished from *security as integrity*, i.e. the protection of the internal order of a State. More tentatively, Governance in the sense of controlling human populations with a view to enhancing productivity may gradually give way to techniques of managing population redundancies in the context of open and secure markets.

Second, we've been able to draw important connections between *key concepts of modernity and post-modernity* (e.g. sovereignty in the form of State Government and "gouvernementalité"/Governance, hierarchy and networks, open markets and market citizenship) and *the techniques of exercising power* in the European context following the attacks of September 11th, in particular *institutional variations* within the overall scheme of the EU. In the process of European integration, *the technique of economic liberalism tends to become a technique of political governance* whereby the *Community method* leads to a kind of meta-national Governance of the single market without any central Government. In this context, the revival of exceptionalism at national level following September 11th leads to institutional variations departing from the Community method as such; these variations point either to functional modes of exercising power such as *networks* or *mixed/semi-organic patterns of intergovernmental federalism*.

Third, we've tried to identify the tensions characteristic of *the subject of Governance* as opposed to the member of the City. *Individual safety ("human security")* as a legally protected sphere (e.g. human security rights under the EU Charter of Fundamental Rights) may be contrasted with the *security of human populations* in a unified market whereby a number of individuals *below a critical mass may be sacrificed* in order to protect the security of the population as a whole as well as the security of political institutions and vital infrastructures from mega-threats such as terrorist attacks of a large scale.

b) **From an institutional viewpoint**, we've been able to ascertain the specific ways of EU Governance with regard to internal security as such: *protection of vital (physical. institutional and technical) infrastructures* in order to ensure the smooth operation of the market, but also *management of information*, namely management of criminal intelligence, and, on longer-term basis, setting priorities of criminal investigation at EU level through the assessment of comprehensive threats affecting the security of the Union as a whole.

In fact, *several critical parameters of security as the object of governing are no longer defined at national level*: EU contributes decisively in fulfilling the basic functions of the Welfare State, which is ensuring market, economic and, to a certain extent, social security. In this context, the emergence of EU executive agencies marks the growing involvement of EU Governance in the realm internal security itself, namely maintaining law and order. In other words, EU is gradually asserting itself as provider of security and, perhaps, as the appropriate level of authority for a comprehensive trade-off between liberty and security which is still characteristic of State Government.

Furthermore, the relevance of the *Community method* as an institutional model in the field of internal security was examined. The Community method as a paradigmatic form of exercising power without central government in the economic field retains its power of attraction but is far from being transposed as such in the field of internal security. As a matter of fact, the Constitutional Treaty proceeds either by *revised forms* of the Community method (legislative procedure in criminal matters) or *by EU agencies* as a distinct institutional paradigm in the field of operational activities. In both cases, EU Governance acts chiefly in support of State Government but is also likely to restrain or even to steer the activities of the latter on a longer-term basis. EU agencies as networks of control -responsible for the management of criminal intelligence- as well as executive networks -responsible for the initiation of criminal investigations and proceedings- are, perhaps, the most striking case of this institutional ambivalence.

Finally, we've put together the main elements of the ***European regime of governance***: it consists in controlling the exercise of discretionary power by State Government not only by means of the Community method but also by the *recognition of the individual as agency*. From this viewpoint, the European regime of governance stands as a *specific mixture of economic and political liberalism.* Market rights were construed as primary civil rights against the exercise of discretionary power by national authorities in the economic sphere. In the area of freedom, security and justice, however, European citizenship is placed in a rather different perspective than the traditional liberal one. Security is construed as an essential component of European citizenship and actual security discourses tend to legitimise the upgrading of EU legislative and executive responsibilities in maintaining law and order. Once again, the EU asserts itself as a provider of security and not as a regime of controlling unnecessary interference with individual action. Still, the EU Charter of Fundamental Rights does not depart itself from the *rights-based approach of EU citizenship*, but it is open to question whether this approach provides adequate safeguards in the area of freedom, security and justice against the revival of exceptionalism, in particular against new sources of discretionary power at EU level.

c) As far as **policy implications** are concerned, one may argue that a consistent application of liberal principles lying at the heart of the European regime of governance would be to focus on all forms of discretionary power and unnecessary interference with the individual sphere not only in the economic field as such but also in the area of freedom, security and justice. In this respect, several observations are in order:

First of all, it seems useful to remind, especially in the context of current security discourses, that anti-terrorist concerns may not put into question the free flow of commodities and productive factors within the single market as a necessary condition for preserving welfare in European societies. Market primacy retains its relevance in the context of exceptionalism. In other words, security as integrity against perceived threats should not lead in undermining security as preserving prosperity. On the other hand, one may point to a possible unbalance between civil/political and economic liberties, in particular a selective application of the European regime of protection in the sense that market freedoms are fully preserved if necessary to the expense of fundamental rights of certain target groups.

Second, as EU Governance is gaining momentum in the field of internal security itself, special institutional tools need to be devised in order to effectively counterbalance new sources of discretionary power in the hands of EU executive agencies. In addition to

drawing all necessary consequences *of the rule of law*, *specific institutional tools* at EU level may include: strengthened political monitoring, specific monitoring mechanisms by independent supervisory authorities, special procedures of administrative adjudication and, tentatively, a more active human rights policy covering both EU and national law-enforcement services.

Last but not least, the option of *European Government in the field of freedom, security and justice* (e.g. operation of Europol according to the precedent set by the European Central Bank) would require a *fully-fledged system of federal guarantees* (e.g. procedure of nomination involving not only the European but also national parliaments, supervision by an executive authority directly accountable before the European Parliament, gradual recognition of the EU Charter as the general standard of protection of human rights in the Union and the Member States alike).

2.6. Workpackage 6: Liberty, Security and the Limits of Modern Politics

Leading Partner: University of Keele & King's College London
ELISE Contact persons: Dr. Rob Walker & Dr. Vivienne Jabri

2.6.1. Background and objectives

The main objective of Workpackage 6 has been to provide the theoretical and conceptual tools to analyse the global, regional, and local practices of security and to understand what the re-emerging discussions about the relationship between security and liberty entail politically. The research has consequently focused on state and non-state practices of security and the place that liberty is assigned within these practices. The purpose of the Workpackage has been to analyse 'our' security practices and how these relate more widely to liberal and democratic values. Its aim has therefore been not to assess the practices of danger or threat but reflect upon European and global developments in response to them.

The Workpackage was also tasked with empirical research into anti-terror legislation in the UK, specifically concerning its implications for civil liberties and the relationship between global security practices and domestic liberties. The results of this research were presented in ELISE deliverable no. 27.

Research was developed and presented through 4 workshops and conferences organised by WP6 and in conjunction with other Workpackages. These workshops concerned developing theoretical and conceptual tools exploring the limits of liberties and the liberal state in relation to security and immigration practices, the restructuring of police and

military apparatuses and the problem of legitimacy, and discriminatory practices related to anti-terror legislation.

Research has been presented in working paper deliverables and supplementary papers. The results of research in Workpackage 6 were consolidated and presented in an edited volume. Both the volume and the research undertaken have pointed out the necessity to analyse the 'effects' of practices and not simply their deployment. Thus exceptionalism was shown to be as much about globalised warfare as about practices of criminalisation and exclusion at all levels.

Specific activities of the final six months of ELISE have been the attendance and presentation of research results by the principle researchers in the ELISE conference organised by WP2 in Genoa, 8th and 9th April 2005; and the contribution to and drafting of the final synthesis report.

2.6.2. Scientific description of project results and methodology

The principal researchers (Vivienne Jabri, Rob Walker), the research assistants (Claudia Aradau, Andrew Neal), and the associate researchers (Jef Huysmans) have continued and consolidated the conceptual work on exceptionalism, the implications of security practices and the historical and political determinations of liberty.

- Research has drawn upon debates around Carl Schmitt's theorisation of the exception and Giorgio Agamben's reformulation of the implications of an exceptional politics for the modern state. Michel Foucault's work has provided inspiration and conceptual tools for exploring security as practices of differential control of populations and ordering of society. The analyses of illiberal practices within the liberal state and the relation between security and liberty had recourse to the early theorist of the modern state, Thomas Hobbes, as well as to the theorist of modernity and the modern subject, Immanuel Kant.

- The term exceptionalism captures a range of policies and practices put into motion under claims about the threat of terrorism. These policies and practices have included, for example, detention without trial, the curtailment of civil liberties, derogations from human rights conventions, and a greater willingness by governments to sanction torture, either explicitly, implicitly or secretly. Exceptionalism characterises a range of illiberal policies and practices that deviate significantly from established legal, political and social norms. As well as being a critical term, the concept of exception has been invoked in attempts to explain, justify or legitimate illiberal policies and practices, either by political

commentators or by governments themselves. Appeals have frequently been made to the notion that exceptional times require exceptional measures, and to claims that "the rules of the game have changed."

- Practices of exceptionalism signal a move away from traditional notions of national security and international collective security, and towards a more dispersed array of micro-practices directed towards individual, group and population behaviour, and particularly towards specifically targeted minorities. More profoundly, the idea of exception invokes a questioning of the basic principles of citizenship, liberty, authority and security.

- The exceptionality of current international politics follows from the politicisation of insecurity in relation to exceptional events. The politics of exception is not limited to contests over normativity and the rule of law in international relations. The most important tension that structures the current practices of security through the matrix of the exception is that between those who try to maintain ground for symbolic mediation in international politics and those who intensify anti-diplomatic inwardness. The politics of exception, through its turn to inwardness (which often reads as ultra-nationalism) undermines the grounds for symbolic mediation or diplomatic practices.

- The exception can either function at the limit of the modern state or at the limit of the international system of states. At the limits of the modern state, exceptions may be enacted as a state of war or a state of emergency, as the moment that affirms both a capacity to exceptionalise and the normality that is placed into suspension. Exceptions may be enacted as a claim about inhumanity (the primitive, the barbarian or the merely colonial fit for development, democratization or trusteeship) or as a claim about the final collapse of a world of politics scripted as an antagonism between citizens and other modern humans who are also citizens of (other) states; as a claim, that is, that the international has given way to empire, to a community of humanity, to universality.

- The exceptionalisms that we associated with the spatial limits of the modern state (friends and enemies) and the temporal limits of the state system as the political expression of the modern world (civilised and barbarian) have been conflated, not for the first time, but certainly in many places and contexts. Where Schmitt's account focuses on the big exception, the declaration of war, exceptions are now made as a continual mode of action as new enemies are constructed, and they

can be made by bureaucratic machinery and functionaries quite as easily as by grand sovereigns.

- Exceptional practices have been continuing practices of the liberal state. Liberal governmentality has entailed a differential experience of the exception. While a number of measures undertaken in the name of security, such as proposals for the introduction of identity cards in the UK or increasing surveillance of financial transactions in the US, might encompass the population as a whole, the politics of exception is marked by racial and cultural signification. It is evident that practices based on increasing restriction and surveillance of transactions visibly reinstate the sovereign authority of the state into the lived experience of the citizen and hence may produce a crisis of legitimacy. However, it is the treatment of the culturally marked other that challenges liberal conceptions of social solidarity based on a free and equal communicative space.

- The 'illiberal' practices of liberal democracies are not a new thing. The drawing of boundaries at the global level targets specific categories of the population, culturally and racially marked. Within liberal forms of government there is a long history of people who, for one reason or another, are deemed not to possess or to display the attributes required for the juridical and political subjects of rights and who are therefore subjected to all sorts of disciplinary, bio-political and even sovereign intervention. Alongside the minority of self-governing subjects, the rest are constituted as subjects upon whom governmental technologies will be deployed. The protection of populations is therefore the protection of specific categories to the exclusion of others.

- If liberal governmentality has always distinguished categories of population depending on their ability to manage their own freedom, it has also devised integrative strategies within the national space: a communicative public space, citizenship, welfare.

- A politics of exception has been extended spatially and temporally. Some literatures suggest a contemporary shift towards a totalizing and permanent politics of exception, in which sovereign subjectivity is organized within a more imperial order. Other literatures suggest a more complex spatiotemporal articulation of practices of exceptionalism. It is clear, however, that the contemporary politics of exception find expression in many sites other than the borders of the sovereign state and system of sovereign states.

The methodological approach has been a) interdisciplinary, b) theoretical and conceptual, and c) historical and hermeneutic. The research has continued interdisciplinary analyses of the governmentality of security and exceptionalism and has developed conceptually the continuity within liberalism of 'illiberal' practices. It has shown the implications of a politics of exceptionalism and of 'illiberal' practices, which have informed analyses by the other workpackages and have guided the drafting of the final synthesis report. The research has hermeneutically explored practices of government in the aftermath of 9/11 and transnational terrorism.

2.6.3. Conclusions and policy implications

The research undertaken by Workpackage 6 has shown that the post-September 11 political context has made more visible on-going illiberal practices of the liberal state. Democracy and liberalism have always defined their limit in relation to security. As the writings of German scholars in the 1920s and 1930s show, democracy can verge into authoritarianism through threat constructions and exceptional practices responding to the politics of insecuritisation. The practices of liberal states have always been defined by the limit of 'illiberalism', the exclusion and control of those who were not able to manage their own freedom (or not deemed as such). While the existence of such practices has been a matter of concern, in the current context these limit-practices have gained centre-stage and have hijacked normal politics. Security is no longer the limit and the boundary of politics, politics is now taking place at the limit.

In relation to this politics of the limit, the discussion of the balance between security and liberty is inadequate. The metaphor of a balance between liberty and security presents contemporary political conditions as one of public choice. However, a politics of exceptionalism is a very different equation – illiberal practices are being pursued at the margins of populations, jurisdictions and normal political life. A politics of exceptionalism is dissimulated by claims about a politics of balance. The metaphor of balance is depoliticizing; it detracts from the hard political questions that need asking about liberty, equality, democracy and the rule of law in contemporary political life. We are particularly concerned that claims about the need for security are feeding into increased unification and cooperation on security practices across the EU, while the defence of liberty becomes increasingly marginalised and fragmented, suffering a lack of corresponding coordination.

2.6.4. Dissemination and/or exploitation of results, including activities for the final 6 months of the project

Vivienne Jabri

- Publication of: "War, the Politics of Security and the Liberal State" in *"Counter-Terrorism: Implications for the Liberal State in Europe"*, CEPS, March 2005.

- Workshop paper: 'War and the Politics of Race and Culture', presented at WP6 Workshop: "The implications for the liberal European state of xenophobia and discriminatory practices in light of anti-terrorist legislation.", 11 February 2005.

- Publication of "Critical Thought and Political Agency in Time of War", in International Relations, Vol. 19, No 1 (March 2005).

- Took part in an ESRC-funded seminar at the Centre for the Study of Human Rights, the LSE, on the UK's anti-terrorist legislation (1st March 2005).

- Completion of chapter, "The Limits of Agency in Times of Emergency", in Huysmans, J, et al, *The Politics of Protection* (Routledge December 2005)

- Contribution to final synthesis report.

Rob Walker

- Conference presentation: "International, Imperial, Exceptional: With But Mainly Against Kant" at the annual meeting of the International Studies Association, Honolulu, Hawaii, 2-5 March 2005

- Participation in ISA roundtable, "The Boundaries of Biopolitics: Bodies, Borders, and the New Terrain of Global Politics", International Studies Association, Honolulu, Hawaii, 2-5 March 2005

- Participation in ISA roundtable "Geocultural Epistemologies, Rethinking the International Outside the Core (II): Empire, Globalization, and Internationalism", International Studies Association, Honolulu, Hawaii, 2-5 March 2005.

- Publication of: "International, Imperial, Exceptional" published in *"Counter-Terrorism: Implications for the Liberal State in Europe"*, CEPS, March 2005.

- Various presentations on contemporary theories of international relations with some commentary on the liberty/security problem at the ECPR meetings in Granada, Spain, April 15-18, 2005, University of Wales, Aberystwyth, May 13, 2005, and various universities and research institutes in Beijing, China, June 30-July 3, 2005.

- Final drafting of Final Synthesis Report

Jef Huysmans

- Publication of an article in "Counter-Terrorism: Implications for the Liberal State in Europe", CEPS, March 2005.

Claudia Aradau

- Publication of: "Governing Populations and the Ungovernable People: The Liberal State and the War on Terror", in *"Counter-Terrorism: Implications for the Liberal State in Europe"*, CEPS, March 2005.

- Workshop paper: 'Governing Populations and the Ungovernable People: the liberal state and the war on terror', presented at WP6 Workshop: "The implications for the liberal European state of xenophobia and discriminatory practices in light of anti-terrorist legislation.", 11 February 2005.

- Preparation of conference paper: 'Terrorism and the governmentality of risk' (with Rens van Munster) for the COST Programme in Vilnius, 9-10 June 2005.

- Submission to *Economy and Society* of "Governing populations and ungovernable people: the liberal state and the war on terror".

Andrew Neal

- Publication of: "Foucault in Guantanamo: National Disciplinary Exceptionalism:", published in *"Counter-Terrorism: Implications for the Liberal State in Europe"*, CEPS, March 2005.

- Conference paper: "Foucault in Guantanamo: National Disciplinary Exceptionalism:"presented at the BISA (British International Studies Association) Annual Conference, 20 Dec 04.

- Contribution to final synthesis report.

- Re-drafting of deliverable section on "Civil Contingencies Bill"

- Re-drafting of "Foucault in Guantanamo" for publication in forthcoming ELISE special issue of *Security Dialogue.*

III. CONCLUSIONS AND POLICY IMPLICATIONS

In EU Treaties liberty is always the principle against which any state interference on the basis of security must be limited, justified and open to judicial scrutiny. The perspective sketched here, along with the more specific research projects that inform it, suggest an urgent need for much more robust resistance to the marginalization of claims about liberty whenever the necessities of security are invoked. In general terms it might be said that where the possibilities of political liberty are currently being constrained by forms of structural and institutional fragmentation, they ought to be nurtured by imaginative forms of cooperation across existing jurisdictions; and where the possibilities of cooperation and unification are being sought in order to control human populations on a wider scale, they ought to be subject to greater scrutiny and control by many different democratically accountable communities and institutions. The policy implications advanced hereunder follow these principles.

1. The Rule of Law should Monitor Claims for Exception

Faced with the revival of politics of exception that curtails the rule of law at national level and the strengthening of EU networks of control, the European regime of governance should be completed with a number of specific institutional safeguards and the existing ones should be adequately adapted in order to address the rise of new sources of discretionary power in what has been qualified as the area of freedom, security and justice.

1.1. Developing and consolidating effective tools of control

The argument of emergency and calls for derogatory measures by security professionals have to be carefully monitored through the establishment of institutional mechanisms of controls that will counterbalance the power granted to security agents. This should be done at both national and EU levels.

As far as the control of national authorities is concerned:

a) Mechanisms of mutual evaluation or peer review (as proposed under art.III-260 Constitutional Treaty), should lead to regular and thorough assessments as to the practical implementation of police and judicial co-operation.

b) The monitoring function fulfilled by the EU network of independent experts in fundamental rights with regard to the application of the EU Charter at national level should be further promoted, but also completed by thematic reports and

comparable data to be provided by the European Union Agency for Fundamental Rights (see the Proposal for a Council Regulation establishing European Union Agency for Fundamental Rights. Art. 4.1. sets out the tasks of the Agency). Moreover, monitoring should cover not only legislative measures, but also the application of law to individual cases as well as the practices and attitudes by national officials, notably by law-enforcement and security service agents.

c) A more active Fundamental Rights policy at EU level by a specialised agency, in connection with a separate Commissioner for Fundamental Rights, would be completed by ex-ante policy measures the human rights protection mainly provided by courts. Such policy should focus on areas of special interest to the individual residing in the Union: immigration, asylum, criminal investigations relating to terrorism and organised crime. This presupposes the adoption of the proposed decision of extending the competencies of the European Union Agency for Fundamental Rights to the EU Third Pillar [COM(2005)280]. The tasks of such policy might include public awareness activities, extensive dialogue with civil society actors, the exchange of best national practices on basis of interdisciplinary thematic reports, comparable data and, on a longer-term basis, the definition of indicators and benchmarks as well as non-binding codes of conduct in chosen policy-areas.

As far as the control of EU authorities is concerned:

a) The EU legislator should proceed by giving clearly defined mandates to executive agencies concerning their operational powers and the conditions of their exercise (e.g. joint-investigative teams with the participation of Europol's agents). The basic idea should be that liberty is the principle and security should be adjusted to it. To promote liberty, we need to build processes that set the principle of reciprocity at the centre of their functioning. In other words, the professionals of security have to recognize that if they have more capacities and more freedom to check identities, to limit privacy, to connect data bases which were designed for other purposes, they should, equally, accept the lost of their own autonomy and freedom. This means that their activities have to be put under strict scrutiny. In practice, this can be achieved through, for instance, an "special envoy" on data protection working in sensitive teams of EU security professionals and reporting their behaviour; through a more formalized monitoring of their own practices; through frequent assessments of teams handling private data.

b) Effective political monitoring by the European and national parliaments should not be limited to the discussion of annual reports of activities by EU agencies. It might also include participation in hearings before the competent parliamentary committees and the obligation to comply with special requests for information. On a longer-term basis, the European Parliament, and possibly national parliaments, might be associated in the appointment of the heads of EU agencies.

c) ELISE consortium acknowledges that security may sometimes involve secret and speed. However, the actions of security agents must not be exonerated from accountability. An independent body needs to be set up at the EU level. This body dealing with human rights, anti-racism, anti-discrimination and data protection issues should be established with a budget in proportion with that required for the development of SIS II, VIS, Europol and Eurojust. External control by independent supervisory bodies involves a series of options not necessarily mutually exclusive: the creation of a special unit of the European Ombudsman to monitor the correct application of EU security measures. This type of control should be implemented in conjunction with the adaptation of patterns of internal control based on the operation of Joint Supervisory Bodies. Internal and/or external control may also take the form of a physical presence of a representative of the supervisory body within the operational centre of the security agency. In any event, special control mechanisms need to be established with regard to the management of personal data by a Data Protection Officer in liaison with the independent authority on data protection.

d) Furthermore, special procedures of administrative adjudication of individual complaints open to all persons likely to be affected by the operation of EU executive agencies (e.g. access to documents, right to obtain rectification of personal data, right to compensation by the usage of data) are in order. In this context, the option should be considered to invest an independent authority, namely the European Union Agency for Fundamental Rights, in connection with the Commission as the guardian of the Treaties, with the power to investigate allegations of human rights violations by EU institutions in general and by EU executive agencies in particular.

1.2. The requirements of the rule of law

For ELISE members, a strict and consistent application of the rule of law stands as the necessary cornerstone of the European regime of governance as applied in the area of freedom, security and justice. This implies:

a) The introduction of legal provisions as to the means of redress available to individuals in all instances likely to affect their rights and legitimate interests. In particular, the "necessary legal safeguards" with regard to the adoption of lists of persons subject to special restrictive measures (as proposed under art.III-322 CT) must include effective access to the European Court of Justice (ECJ) and the burden of proof should lie with law-enforcement services. Moreover, administrative complaints regarding the operation of EU executive agencies must also make provision for the eventual settlement of the disputes before EU Courts.

b) The adherence to the rule of law in the light of new challenges implies jurisdiction for the judiciary to scrutinize these fields and especially by the ECJ. It remains for the ECJ to determine the scope of its jurisdiction as to national law-enforcement measures initiated at EU level, to define the scope of application of the EU Charter to national measures in general and to decide in which cases natural and legal persons are directly and individually affected by the operation of EU executive networks.

2. To Win Trust the EU should strengthen Social Cohesion

The reaction of selected EU governments to threats of terrorism in 1991 in light of the first Gulf War and post 2001 reveals a temptation to label all foreigners as potential enemies. The two periods are marked by the insertion into legislative texts of exceptions to international obligations to protect refugees. The comparative research carried out by ELISE consortium shows that circumventing human rights norms and regarding all immigrants as enemies have a deleterious effect on social solidarity and trust in national and EU institutions. This may be fought through a set of policy measures that defend equality, solidarity, racial and cultural tolerance; engage "panic politics" through training programmes; promote EU citizenship; and safeguard the rule of law. These measures are spelled out below.

As the reactions to September 11 and, to a lesser extent, the London attacks of 7 and 21 July 2005 have dramatically shown, the professionals of politics and the media have been the first groups to "panic" (in contrast with civilians and even victims). They were unprepared to deal with this kind of events. Their reactions have fuelled resentment

against foreigners residing in the EU. To avoid this kind of behaviour, the EU should set up an emergency crisis group composed of specialists of complex emergency situations, historians, sociologists and psychologists to assess the danger on a larger scale in space and time.

The respect of the fundamental rights and freedoms of every human being (Liberty) and the rule of law (Justice), as guaranteed by international as well as European legal frameworks, need to be taken as a point of departure in security measures envisioned, discussed or adopted. ELISE consortium believes that "security" only comes from the respect and protection of human rights and fundamental freedoms through the rule of law. This major aspect of democracy must not be diminished for foreigners in such times. The right to habeas corpus, to a hearing before a judge on the merits of an application must remain in place not only for nationals, but also for foreigners. In addition, the weakening of rule of law in respect of foreigners, in particular for refugees, the most vulnerable of our communities, on account of heightened fears of political violence does not result in greater security but rather in a diminution of social solidarity and cohesion. And, EU Members States know this too well, culturally and politically fragmented societies offer a fertile terrain for violent political actions. Thus, a politics of solidarity and equality, not a politics of security that undermines democratic rights should be pursued. Equal rights do not mean assimilation or cultural homogenization; they are the premises of a political community that is continuously transformed in a demanding global world.

The right of free movement should be reviewed without so much reference to the economic considerations that continue to limit its full exercise in a number of practical cases. In this sense, all the visible and hidden obstacles inherent to the "freedom to move" need to be openly debated and urgently overcome in order to make free movement and residence rights more inclusive in a enlarging EU. The restrictive transitional arrangements applied to workers coming from eight of the ten new EU Member States should be abolished in conformity with the right of equal treatment and non-discrimination on grounds of nationality, as enshrined by the EC legal framework and the proactive case law of the ECJ. These steps, the aim of which is to foster a successful transition from market citizen to Union citizen should effectively take place for the benefit of all in an enlarged EU.

Security officials involved in the definition and implementation of the fight against terrorism at the national and even the EU level do not have a comprehensive perception of the multiple facets of the issue of political violence, nor of the various stakes related to it. The organization of training seminars at the EU level may allow them to acquire the legitimate knowledge for the construction of an efficient counterterrorism policy including

security, liberty and cultural aspects. For this purpose, these training seminars should address the underlying factors of tensions within EU Member States.

A comparative approach to different periods of time is important in order to learn from each other's experience, especially in a knowledge-based society. It is therefore vital to develop a permanent, independent and interdisciplinary academic working group at the EU level that analyses the patterns of national cultures in relation to political violence and their way to deal with it. The trajectory of each state, the structure of its security services and their articulation, the political games and the previous lessons from antiterrorist policies success or failures should equally be examined.

3. Security Professionals should be Democratically Accountable

The need to provide immediate policy responses and efficient solutions to security challenges dominating the political context, namely terrorism, may also open the way to more radical changes, i.e. the development of EU law-enforcement agencies as organic patterns of power with the power to address binding instructions to their national counterparts. Naturally, such option should be read in conjunction with the evolution of the general constitutional structure of the EU, especially the emergence of a single executive authority directly accountable before the European Parliament. Still, the provisions of the Treaties leave open the option for the gradual transformation of EU executive agencies into organic patterns of power, according to the precedent set by the European Central Bank in the monetary field.

The application of the agency model in the form of independent federal agencies with executive powers over police and judicial action in criminal matters would require a fully-fledged system of federal guarantees, possibly including a nomination procedure involving not only the European but also national parliaments, supervision by an executive authority directly accountable before the European Parliament and, ultimately, the recognition of the EU Charter as the general standard of protection of human rights in the Union and the Member States alike.

EU Governance, in the form of an integrated approach to threats facing the security of the Union as a whole and its citizens, may not be effectively pursued solely on basis of intergovernmental structures under the authority of the Council and/or the European Council, such as the Art.36 Committee or the newly appointed Counter-terrorism Co-ordinator. The European Commission stands as the most qualified independent authority with valuable expertise and policy input with regard to all aspects of security management at EU level, ranging from market security in the broadest sense to the management of information as the main object of networks of control. The functional

synergy between supranational and intergovernmental actors which lies at the heart of the so-called "Community method", should be adequately translated to the EU patterns of power dealing with risks affecting the security of the market as well as individual safety. Consequently, the Commission should be fully and actively involved in the proceedings of the standing committee on internal security (as proposed under art.III-261 CT), in monitoring mechanisms of police and judicial co-operation (as proposed under art.III-260 CT) and especially in future arrangements providing for an integrated EU approach against "man-made disasters" covered by the solidarity clause (as proposed under art.I-43 & III-329 CT).

To sum up, the so-called "democratic deficit," chronic across so much of the EU, is an especially serious problem in the context of security. Thus, the institutional initiatives proposed here need to be driven by a renewed commitment to a politics of accountability: by a willingness to resist seductive claims about the necessity for overriding liberties in the name of security and to ensure that exceptions to the primacy of liberty, equality and democracy under the rule of law are made only after sustained and multidimensional evaluation. There is no reason to abandon the achievements of modern political life to those who have been enabled to speak in the name of security and nothing but security, but there is very good reason to suspect that much too much ground has already been ceded to agencies and institutions which have become used to speaking in this way. Although threats of violence and terror may continue, the potential excesses of a new politics of exception must also be dealt with. This is not simply a matter of "civil liberties." It is a matter that cuts right to the most fundamental principles of modern political life. In the end, it is not a matter that can be left exclusively in the hands of the security professionals, nor even the political professionals. Given the crisis provoked by negative public responses to the proposed European Constitution, this is a particularly good time to establish discussion on a much broader basis.

4. Policy Recommendations

In view of the supremacy of the principle of liberty in respect of which security must always be subsidiary, the allocation of budgetary resources to the defence of freedom must exceed that allocated to security. Accordingly, any increase in budget allocation for security measures and the security industry must be accompanied by an equivalent and proportionate percentage increase in budget allocation for programmes enhancing freedom. We therefore make the following recommendations in respects of bodies to consolidate the meaning and exercise of liberty.

The establishment of:

a) A Commissioner for Fundamental Rights with all the institutional implications that it involves.

b) A fully independent Fundamental Rights Agency which has the full scope of tasks as set out in the Proposal for a Council Regulation establishing a European Union Agency for the Fundamental Rights [COM(2005)280, June 2005].

c) A special branch of this Agency which has the power to send specialized data protection agents, without advance notice, to any place where Member States authorities are effecting data collection and management both within the Union and abroad, to ensure the conformity of such data collection and management activities with EU law, Article 8 of ECHR and other international commitments.

d) A special Unit of the European Ombudsman to monitor the correct application of EU security measures.

e) A permanent, independent and interdisciplinary, academic working group to advice the Commissioner and the Fundamental Rights Agency on European liberty and security.

f) An emergency crisis group composed of specialists of complex emergency situations, historians, sociologists and psychologists to assess the danger on a larger scale in space and time.

In the elaboration of activities for the protection of freedom the following procedures must apply:

a) The European Commission should be fully and actively involved in the proceedings of the standing committee on internal security, in monitoring mechanisms of police and judicial co-operation and especially in future arrangements providing for an integrated EU approach against "man-made disasters" covered by the solidarity clause.

b) Any Agency established by the EU must be directly accountable to the European Parliament and its activities subject to review by the European Union Agency for Fundamental Right and subject to the power of the Commissioner for Fundamental Rights.

c) Wherever individuals, rights and legitimate interests are engaged by measures taken either at the EU level or at national level as results of EU law, there must be effective and comprehensive legal remedies including appeal rights and ultimate supervision by the ECJ.

d) Equality is the fundamental principle of citizenship and inimical to restriction on freedom of movement. The limitation on freedom of movement of workers, nationals of eight of the 2004 accession countries should be lifted forthwith.

e) The right to habeas corpus and to a hearing before a judge on the merits of an application must be respected not only for nationals, but also for foreigners and guaranteed not only at the national level but also by the EU.

IV. DISSEMINATION AND EXPLOITATION OF RESULTS

This section provides a summary of the strategy for dissemination in the ELISE project. The Centre for European Policy Studies (CEPS) (Workpackage 3 and 7) has been mainly assisted by Sciences Po (Workpackage 1) in the achievement of the overall strategy. This, together with the active participation by all the rest of the network members, has ensured that the dissemination and exploitation of the results reach as widespread an audience as possible. In particular, the dissemination strategy of the ELISE project has materialized trough the following channels:

1) Setting up, maintenance and continuous improvement of the ELISE Consortium's website – www.eliseconsortium.org. During the second year of the project (1st October 2003 – 1st October 2004), the ELISE website received a total of 43,830 visits. During the third year (between October 2004 and September 2005) there have been a total of 46,200 visits, which represents an increase of around 15% in comparison with the previous period. These figures show how the website's popularity has increased substantially since it was originally settled in 2002, and during the progress of the research carried out by the different teams. In addition, most of the official websites of the teams participating in ELISE contain a link to its website and a brief description of the research project.

2) Creating an ELISE Video compiling in a unique tool the final research findings and remarks by each of the Workpackage leaders. The video intends to present in a dynamic way the ELISE Research Programme, and maximize the scope of the overall dissemination and exploitation of results.

3) ELISE CD-ROM containing the ELISE video (15 min.), as well as 4.000 pages of research bringing together all the papers and deliverables carried out by the different teams during the continuation of the project. The CD-ROM also includes a selective compilation of anti-terrorist legislations of the EU-25. Few copies are hereby attached.

4) Publication of the individual deliverables in scientific journals and collective volumes. The papers delivered by the ELISE teams have become part of journals, collective volumes and books. For example, this is the case of a book co-edited by Prof. Elspeth Guild and Prof. Didier Bigo on "Controlling Frontiers: Free Movement into and within Europe" published by Ashgate, London in 2004. Some of the deliverables have also been included as articles of scientific journals such as: European Law Journal, European Journal of Migration and Law, Alternatives:

Global, Local, Political, Confliti Globali, etc. The publication of some of the deliverables in these venues has ensured the diffusion of the scientific results in the scientific/academic community at the European level and beyond. Moreover, the French Team (Workpackage 1) has prepared several special issues of Cultures & Conflits directly linked to the ELISE research programe. The Centre for Migration Law of the Radboud University of Nijmegen will publish a book compiling some of the deliverables made under the umbrella of the project. The University of Athens and the UK team will respectively publish books including some of their ELISE papers. The Italian Team has created a journal Confliti Globali which has provided a perfect framework for disseminating the research done in ELISE.

5) Availability of some of the ELISE Deliverables in the individual official websites of each of the partners. See for example the CEPS website: www.ceps.be. The publication of the CEPS deliverables in such a short time has ensured a direct impact and immediate exploitation strategy of the research carried out by Workpackage 3. You may see also the publications section of the Centre for Migration Law of the University of Nijmegen (http://www.ru.nl/law/cmr/), as well as the Cultures & Conflits website www.conflits.org.

6) Organization of conferences and events (See table below for more details). In addition to the events originally foreseen in the work programme of the project, other additional ELISE workshops and conferences have also taken place. A good example has been the organization of a series of workshops set up of the so-called "Research Group on Exceptionalism" by Workpackage 1 (Sciences Po). The Centre for European Policy Studies (CEPS) has equally organized a series of Lunchtime meetings and roundtables linked with ELISE. All these and other events provided an excellent opportunity to present and disseminate the work of ELISE, and to make publicity of the respective publications and papers finalized by each of the teams of the ELISE Consortium.

7) Presentation of the ELISE project in external seminars, conferences, workshops as well as other public meetings across Europe, Canada, the USA as well as Australia. Among many others we may highlight for instance the following events: setting up ELISE panels at the International Studies Association (ISA) Annual Conferences (which took place in Canada and the US) with 1000+ participants as well as academics from Europe, the United States and Canada; The launch and presentation of ELISE at the CEPS International Advisory in 2004 and 2005, at the Palais d'Egmont to 200 participants including policy-makers, academics, diplomats, journalists.

8) Creation of a bilingual electronic newsletter by Culture & Conflits which contained general information about all the ELISE-related activities - for more details see http://www.conflits.org/breve.php. The ELISE project has been equally disseminated via the CEPS newsletter, which is available in electronic as well as hard copy in a monthly basis (You may download the PDF versions of the CEPS newsletter since October 2004 at http://www.ceps.be/cepsnews_list.php;

9) Strong links with policy-makers and media. During the lifetime of the project the links with the policy-making level have been of utmost importance. Also, the contacts with the media (TV, radio, newspapers and magazines) have been considerably strengthened.

10) The institutes participating in the network should ensure a wide diffusion at the national level not only through this type of meetings, but also because they are recognized in their own country as an important source of research and policy advice by policy-makers and the media. Research done within the network should thus have a wide echo throughout the EU.

11) A strong follow up strategy will be ensured in the stage after the formal finalization of the project. ELISE will lead to the creation of more collective volumes and books compiling further research that has been carried out during the three years of the project. This will be specially the case for Workpackages 1, 4 and 5. The ELISE Final Synthesis Report will be widely distributed and publicized. This Report will be also translated into the respective languages of the partners of the consortium such as French, Italian, Dutch and Greek in order to reach a wide public in the countries of origin of each of the partners. The Final Results and policy recommendations will be widely disseminated in the media. The links with the media will be strengthened thought the publication in newspapers and magazines of an article summarizing the final results of ELISE. This article will be equally translated into the different languages of the partners and it will be sent to journals and periodicals at national level in order to disseminate the final results of ELISE. Finally, the ELISE CD-ROM will be disseminated by each of the ELISE teams in their respective national arenas.

For more information you may see the first and second annual progress report submitted to the Directorate-General for Research of the European Commission

Table 3. Main Dissemination Activities — Events/Conferences

Partner	Result
WP1 (Sciences Po)	ELISE Roundtable '*Les libertés publiques á l'heure de l'Etat d'exception permanent*', Centre d'études et de recherches internationals (CERI) & Sciences Po (Paris), 19 September 2003.
WP6 (Keele University and King's College London)	ELISE Workshop 'Rearticulating the Politics of Liberty and Security: Globalised Exceptionalism and the Transformation of the Modern State', Centre for International Relations, Department of War Studies, King's College, University of London, United Kingdom, 30 January 2004
WP3 (The Centre for European Policy Studies)	ELISE Conference 'Policy implications and restructuring of police and army in antiterrorist fights — The problem of legitimacy and globalised response mechanisms in light of the 11 March events in Madrid', Centre for European Policy Studies, CEPS, Brussels, 18 and 19 June 2004.
WP4 (Centre for Migration Law), and WP6 (Keele University and King's College London),	ELISE Workshop, 'Dutch Criminal and Administrative Law Concerning Trafficking and Smuggling of Human Beings', Place: University of Nijmegen, Centre for Migration Law, 7 September 2004.
WP2 (University of Genoa)	ELISE Workshop, 'Citizenship, Social Cohesion and EU Security', University of Genoa, Italy, 8 April 2005.
WP5 (University of Athens)	Conclusive meeting of the ELISE Project, University of Athens, Island of Tinos, 27 and 28 of May 2005.
WP3 (Centre for European Policy Studies)	ELISE Final Conference, 'Who manages Security? Who enjoys Liberty?', Centre for European Policy Studies, CEPS, Brussels, 16 September 2005.

V. REFERENCES AND BIBLIOGRAPHY

1. The ELISE Network Reports

1) ELISE - State of the Art;

2) First Synthesis Report – Report on Security and Civil Liberties - The extent to which there is an emergence of a common set of European values in matters of security and civil liberties: Comments on the "Report on the situation of fundamental rights in the European Union and its Member States in 2002" drafted by the E.U. Network of Experts on Fundamental Rights (CFR-CDF);

3) ELISE DECLARATION The Aftermath of 11 March in Madrid;

4) Interim Report (IGC 2004) titled "Security issues and critical institutional balances in the on-going IGC

5) Second Synthesis Report - Report on Security and Human Rights, Guild E. (ed), Security and Human Rights: The Variable Subject of the EU Constitution, Civil Liberties and Human Rights;

6) Third Synthesis Report - Report on Security and Social Cohesion; and

7) ELISE Final Synthesis Report and Executive Summary.

2. Completed ELISE List of Deliverables and some Complimentary Work

Workpackage 1: Freedom, security and danger: conceptual tools, survey of anti-terrorist measures and challenges posed by them
Sciences-Po

Bigo D., Globalized-in-security The Field and the Ban-opticon, 2003.

Bigo D., Internal and External Security after September 11.

Bigo, D., "Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion" in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Edited by Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak, Leiden, Martinus, Nijhof publisher, 466p, p 90-127.

Bigo, D., "Les entreprises de coercition para-privées: de nouveaux mercenaires?", in Les entreprises de coercition para-privées: de nouveaux mercenaires, *Cultures&Conflits*, 52, Hiver 2003, p 5-11.

Bigo, D., "Global (in)security: the field of the professionals of unease management and the Ban-opticon » in *Traces: a multilingual series of cultural theory*, n°4, (Sovereign Police, Global Complicity), english ed. Jon Solomon, Naoki Sakai (University of Hong Kong, 2004). University of Hong Kong Press. Also in Japanese, edition by Iwanami Shoten, and Chinese by Sanlian Shudian.

Didier Bigo, Elspeth Guild, *La mise à l'écart des étrangers. La logique du Visa Schengen*, *Cultures&Conflits*, n°49, Printemps 2003.

Bonditti P., « Technologisation » de la frontière: vers un état de peste généralisé?, octobre 2004.

Bonelli L., "An "invisible, faceless" enemy Police, intelligence and anti-terrorism services post 11 September 2001" (NP).

Bonelli, L., "Formation, conservation et reconversion de dispositions antisubversives. L'exemple des renseignement généraux", in Sylvie Tissot (dir.), *Reconversions militantes*, Limoges, Presses universitaires de Limoges, 2004.

Cantegreil J., Some Remarks about the "Balance" between Security and Liberty: A Legal Perspective.

Guittet E.-P., « Coopération sans frontières, frontière de la coopération antiterroriste en Europe », Chantiers Politiques, ENS, n°2, 2004.

Bayon N., Masse J-P., « L'altermondialisme au prisme de l'exceptionnalisme: les effets du 11 septembre 2001 sur le mouvement social européen » (NP).

Tsoukala A., "Democracy against Security: The Debates about Counter-Terrorism in the European Parliament, September 2001- June 2003" Alternatives, Boulder, Lynne Rienner, vol. 29, n°4, 2004.

Three papers published in the special *Cultures&Conflits* issue of the journal *Alternatives* (vol. 29, n°4) edited by Lynne Riener:

- *Philippe Bonditti*, "From Territorial Spaces to networks: A Foucaldian Approach of the implementation of Biometrics"

- *Emmanuel Guittet*, "*European Political Identity and Democratic Solidarity After 9/11: the Spanish Case*";

- *Anastassia Tsoukala*, "Democracy Against Security: The Debates About Counter-terrorism in the European Parliament, September 2001-June 2003".

Tsoukala A., "The Counterterrorism Policies in the EU Countries after the Terrorist Attacks of 09.11.2001: Public Discourses on the emergency Thesis" (NP)

Militaires et sécurité intérieure - C&C n°56 – 2004

Suspicion et Exception - C&C n°58 - 2005

Workpackage 2: Freedom of movement, immigration policy and "conflict of citizenship
University of Genoa

Dal Lago A., "The split Empire. American strategy and the role of Europe".

Rahola F., Guareschi M., "Liberty and security after September 11th: notes on a still marginal debate".

Sacchetto D., "The practices of EU actors (officials, entrepreneurs and NGO) towards the Euro-Mediterranean countries", March 2005.

Sacchetto D., "The change in the relations between the actors of EU countries and the Euro-Mediterranean societies".

Palidda S., Rahola F., "The change in the paradigm and practices of migrations government".

Palidda S., "The change in the security paradigm in Europe as new practices in citizenship".

Rahola F. – "The victim's side".

Ciccarelli R., "European citizenship in question".

Palidda S., "The changes in the social construction of urban security and the new relationship police-citizens as new practices of European citizenship".

Palidda S., "The changes in the pacific and negotiated management of social protest".

S. Palidda - Migration between Prohibitionism and the Perpetuation of Illegal Labour.

Dal Lago A., "The Global State of War.

Conflitti Globali Journal – Presentation.

Work package 3: External Border and Security Policies including their impact on other policy areas
Centre for European Policy Studies (CEPS)

Apap J., Carrera S., "Progress and obstacles in the area of Justice and Home Affairs in an enlarging Europe", CEPS Working Document, n°194, June 2003 and in In Apap, J. (ed) *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, pp. 1-26, Edward Elgar Publishing: Cheltenham, UK.

Apap J., Carrera S., "Maintaining Security within borders: towards a permanent state of emergency in the EU?", CEPS Policy Brief, n°41, November 2003 as well as in *Alternatives: Global, Local, Political Journal*, vol. 29, no. 4, October 2004, pp. 399-416.

Apap J., Carrera S., "Towards a proactive immigration policy for the EU?", CEPS Working Document, n°198, December 2003

Apap Joanna, Bigo Didier and Lodge Julliet, *Data Protection in Justice and Home Affairs: An Opportunity for Transatlantic Dialogue*, Centre for European Policy Studies (CEPS) commentary, July 2003.

Apap J., Carrera S., "Judicial Cooperation in criminal matters. European arrest warrant: a good testing ground for mutual recognition in the enlarged EU?", CEPS Policy Brief, n°46, February 2004

Apap J., "Towards Closer Partnerships. Requirements for More Effective JHA Cooperation in an Enlarged EU", CEPS Working Document, n°211, October 2004

Apap J., "Problems and Solutions or New Member States in Implementing the JHA Acquis", CEPS Working Document, n°212, October 2004

Carrera S., "What does free movement mean in theory and practice in an enlarged EU?", CEPS Working Document, n°208, October 2004, as well as in European Law Journal, Vol. 11, Issue 6, November 2005.

Carrera, S. & D. Bigo, From New York to Madrid: Technology as the ultra-solution to the permanent state of fear and emergency in the EU, CEPS Commentary, Brussels, April 2004.

Apap, J. (ed.), Justice and Home Affairs in the EU - Liberty and Security issues after Enlargement, Collective Volume, Edward Elgar Publishing, March 2004.

Apap, J and S. Carrera, Spain new regularization process: Is that the way forward?, CEPS Commentary, March 2005.

Apap J. and Tchorbadjiyska A., "What about the Neighbours? The Impact of Schengen along the EU's External Borders", CEPS Working Document, n°219, March 2005

Carrera S., "Integration' as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU", CEPS Working Document, n°219, March 2005 as well as in In Collective Volume II, H. Schneider (ed.), Migration, Integration and Citizenship, pp. 109-138, Maastricht: The Netherlands.

Work package 4: Immigration, asylum policies and responses to terrorism
Radboud University of Nijmegen

Guild, E., Exceptionalism and the Rule of Law in the EU: Crime and the EU's Constitutional Future in an Area of Freedom Security and Justice.

Guild, E., Exceptionalism and the Rule of Law in the EU: the case of long term resident immigrants.

Guild, E., Exceptionalism and the Rule of Law in the EU: the case of race discrimination,

Guild, E., The State of Exception, the Judge, the Foreigner and Human Rights: Three Challenges from the UK Courts.

Coleman N., "Gulf War to Gulf War Years of security concerns in immigration and asylum policies at European Level"

Nijmegen Team, "Immigration and Asylum Law. The impact of terrorism: The Netherlands: 1990-1 (the Gulf War I) and 2001 (The War on Terrorism)", September 2003

Saas C., "Exceptionalism and the Rule of Law in the EU: The changes in laws on immigration and asylum in France in respect of terrorist fears", September 2003

Davy U., "Immigration, Asylum, and Terrorism: How do they relate in Germany?"

Bonetti P., "Terrorism, Asylum and Immigration in Italian Law"

Bonner D., Cholewinski R., "Immigration and Asylum Law: the impact of terrorism. The case of the United Kingdom: A contrast of the Responses of its Legal and Constitutionnal Orders to the First Gulf War (1990-91) and the Post 9/11 'War' on Terrorism"

Book – "The Legal Elements of European Identity; EU Citizenship and Migration Law", European Law Library, Kluwer Law International, 2004.

Work package 5: Security issues and the reshaping of the EU institutional framework
University of Athens

Governance, Security and the Individual in the European context: techniques of exercising power, institutional re-arrangements and individual safeguards

Governance and Government at European Level: Conceptual Tools to Deal with Security Challenges in the European Union may, June 2003

Security, liberty and the individual under the European regime of governance: between market and political integration sept 2004

Draft Constitutional Treaty of the European Union: Constitutional Architecture and Institutional Implications in the Area of Freedom, Security and Justice, September 2003

Institutional building in the area of FSJ: Mapping Specialized Committees and Agencies

Security issues and critical institutional balances in the on-going IGC march 2004

Work package 6: Liberty, Security, and the Limits of Modern Politics
Kings' College London / Keele University

Jabri V., "Anti-terrorist legislation in the United Kingdom: Exceptional Politics in the Liberal State"

Walker R.B.J., Neal A. W., "Notes on European Liberty and Security: Problems, Principles and Contradictions"

Jabri V., "Totality and Globalised Warfare: Implications in the Security/Liberty Problematique"

Neal A. W., "The Civil Contingencies Bill"

Jabri V., "The Matrix of War, Global Exceptionalism, and the Liberal State

Jabri, V. "Critical Thought and Political Agency in Time of War", in International Relations, Vol. 19, No 1 (March 2005).

Walker R.B.J., "Sovereignties, Exceptions, Worlds"

Counter-Terrorism. Implications for the Liberal State in Europe, ELISE Collective Volume, CEPS, 2005

Neal A. W., "Cutting off the King's head": Foucault's "Society Must Be Defended" and the Problem of Sovereignty, Alternatives, Boulder, Lynne Rienner, vol. 29, n°4, 2004

Alternatives: Global, Local, Political, Vol. 29, #4 (2004).

For more information you may see the ELISE CD ROM or each of the ELISE Annual Reports

7.3. Conferences and Events

ELISE Deliverables: Conferences and Workshops/Programmes

The programmes and minutes of each of the ELISE events have been duly presented in previous progress reports to the European Commission.

ELISE Roundtable "Les libertés publiques á l'heure de l'Etat d'exception permanent", Centre d'études et de recherches internationals (CERI) & Sciences Po (Paris), 19th September 2003.

ELISE Workshop "Rearticulating the Politics of Liberty and Security: Globalised Exceptionalism and the Transformation of the Modern State", Centre for International Relations, Department of War Studies, King's College, University of London, United Kingdom, 30th January 2004.

ELISE Conference "Policy implications and restructuring of police and army in antiterrorist fights - The problem of legitimacy and globalised response mechanisms in light of the 11 March events in Madrid", Centre for European Policy Studies, CEPS, Brussels, 18th and 19th June 2004.

ELISE Workshop, "Dutch Criminal and Administrative Law Concerning Trafficking and Smuggling of Human Beings", Place: University of Nijmegen, Centre for Migration Law, 7th September 2004.

ELISE Workshop, "Citizenship, Social Cohesion and EU Security", University of Genoa, Italy, 8th April 2005.

Conclusive meeting of the ELISE Project, University of Athens, Island of Tinos, 27th and 28th of May 2005.

ELISE Final Conference, "Who manages Security? Who enjoys Liberty?", Centre for European Policy Studies, CEPS, Brussels, 16th September 2005.

VI. ANNEXES

1. WP4: Exceptionalism and the Rule of Law in the EU: Terrorism, Asylum and Immigration in Italian Law

Paolo Bonetti(*)

University of Nijmegen

CONTENTS:

---

* Associate professor of constitutional law at the University of Milano-Bicocca. Member of the Executive Council of the Association for Legal Studies on Immigration (ASGI). Translation by Kelly O'Connor. Under the supervision of Prof. Elspeth Guild.

1. Terrorism and regulation of immigration and asylum in Italian law before and during the First Gulf War (1991).

1.1. Domestic terrorism and international terrorism in the Italian experience up to 1990

In the Italian experience, terrorism since its inception in the late 1960s was almost always perpetrated by one of the numerous Italian criminal organizations of opposing political extraction composed of Italian citizens. A sweeping criminal and police legislation was passed to counteract this phenomenon in 1975, which gradually grew more powerful and diversified, but still does not provide for specific sanctions against foreigners convicted of acts of terrorism. As a result, sanctions against these individuals arise from application of the ordinary laws in force on the issue of foreigners and the ordinary regulations prevailing as regards prevention and suppression of terrorism.

In fact, while Italy has been besieged by hundreds of terrorist attacks of varying political stamp, hundreds of persons have been killed and injured, and thousands of arrests and convictions have been made by the magistrature that all but wiped out domestic terrorism, the only major episodes of international terrorism in Italy by foreign terrorists before 1991 both occurred in 1985 and both were related to the Palestinian issue.

On 7 October 1985, the Achille Lauro cruise liner, with more than 400 passengers on board, was hijacked by four Palestinian terrorists: after two days of high drama and the death of one American passenger, Leon Klinghoffer, the hijacking ended when the aircraft carrying the hijackers back home was forced down by US military planes and landed at the Italian military base of Sigonella, where the hijackers were arrested by the Italian authorities against the wishes of the American military which wanted their immediate handover to American authorities. Specifically, four Palestinian terrorists seized the Achille Lauro cruise ship near the Egyptian coast and threw a Jewish-American wheelchair-bound passenger overboard. The Italian and Egyptian governments negotiated with the head of the Palestine Liberation Organization (PLO), Abu Abbas, to grant safe passage to Belgrade in exchange for the lives of the other passengers. The American government opposed this deal and the United States air force intercepted the terrorists' aircraft, forcing the aircraft to land at the Sigonella NATO base, and subsequently arrested the terrorists, claiming the right of the United States to capture, pursue and punish terrorists anywhere they are found. The Italian military encircled the US aircraft and then-Prime Minister, Bettino Craxi, demanded the terrorists be freed, arguing that the sovereignty of the Italian nation was at stake. The American government was compelled to reverse its decision: after many frantic telephone negotiations between top government officials, it was decided that the four perpetrators of the terrorist attack would be arrested and detained by Italian authorities. There was

no evidence against Abbas and it was decided to not detain him. Two days later, he disappeared. Fifteen days after that, the Italian magistrature issued a warrant for the arrest of Abbas, but it was too late. In 1986, Abbas was tried and convicted in absentia and was sentenced to life in prison by Italian magistrates, for his role as architect of the ship hijacking. In fact, after the handover of the four Palestinian terrorists behind the plot, the Palestine Liberation Organization had dispatched Abu Abbas to negotiate. On 11 October, an Egyptian airliner headed for Tunisia with the four hijackers and Abbas on board was forced by US aircraft to land in Sigonella. The terrorists were transferred to a prison in Siracusa and Abbas was escorted to Rome's Fiumicino airport because he was still then considered a witness and was allowed to leave for Belgrade. On 19 November, the public prosecutor's office of Genoa issued an arrest warrant against Abbas, charging him of instigating the terrorist action. On 23 May 1987 Abbas was sentenced to life in prison by the Court of Assizes of Genoa, confirmed by the decision of the Supreme Court on 10 May 1988. In the meantime, the leader of the PLO had fled to Iraq. Meanwhile, on 12 October 1985, the United States issued a warrant for the arrest of Abbas and demanded his immediate extradition, but on 17 January 1988, the American government revoked the warrant.

On 27 December 1985, at the international airport of Fiumicino in Rome, terrorists of the extremist group Abu Nidal, with sprays of automatic weapons and grenades, brought carnage in the boarding area of the Israeli El Al and the American TWA airlines. By the time it was over, 13 passengers were left dead while 70 more were wounded and four terrorists had been killed by the police.

1.2. Terrorism in legislation and in Italian immigration and asylum practices since 1990

In Italian legislation, no single specific legislation dealing with terrorist attacks by foreigners has been approved since the first Gulf War in 1991, nor do we have any reports of the ordinary anti-terrorism legislation applied against foreigners.

It is useful to remember that until 30 June 1990, aliens illegally residing in the territory of the state were permitted to adjust their status under Law Decree 416 of 30 December 1989, which was modified and converted to Law 39 of 28 February 1990.

1.2.1. Terrorism as an impediment to filing an application for recognition of refugee status.

However, Article 1, subsection 4 lett. d) of that law (still in force) foresees that the impediments to admissibility of applications for recognition of refugee status include the situation in which the foreigner (a) is convicted in Italy of one of the crimes foreseen

under Article 380, subsections 1 and 2 of the Code of Criminal Procedure, (b) is a threat to state security, or (c) belongs to organized crime groups (mafia) or other organizations dealing in drug trafficking or terrorist organizations.

It is best to remember that Article 380 of the Code of Criminal Procedure - in 1991 and today - identifies the crimes requiring the arrest of an individual under suspicion of committing certain crimes. One of these provisions is found under Article 380 section 2 lett. 1), which cites crimes committed for the purpose of spreading terror or subversion of the constitutional order, for which the law establishes a conviction and sentence of between 5 and 10 years in prison.

In these cases, the border police deny entry of the foreigner applying for asylum and execute the order with immediate escort to the border. The order can be appealed to the Regional Administrative Court (TAR) without any suspensive effect on filing the petition.

Authorities have criticized this provision because it doesn't correspond to the *criminality provision* of Article 1F of the Geneva Convention of 1951 on the status of refugees and thus appears as an inadmissible exception to the principle of *non refoulement* foreseen by Article 33 of the same Convention: furthermore, it does not foresee that the impediment is applicable only in the case of final conviction for one of the crimes cited in Article 380 of the Code of Criminal Procedure[42]. In addition, it isn't clear if the case of belonging to terrorist organizations can also involve situations in which the alien was neither convicted nor investigated and the information originated from confidential and unverifiable police sources.

1.2.2. Terrorism as an impediment to adjustment of status and as grounds for judicial or administrative expulsion or deportation of aliens.

The official published statistics of 1991 report that, of the foreigners arrested, none was arrested or reported for crimes of massacre, arson, or violent attack.[43], nor for other terrorist crimes.

It is important to add that the adjustment of status that was allowed by Law 39/1990 provides expressly (Art. 9, section 1) that the only category of aliens present in Italy at the date of 31 December 1989 whose legal status could not be adjusted were those who had been convicted in Italy with a sentence passed without appeal of one of the crimes

---

[42] Cf. F. PEDRAZZI, Comments on Art. 1, in B. NASCIMBENE, *La condizione giuridica dello straniero*, CEDAM publishers, Padua, 1995, p. 138.

[43] Cf. Caritas of Rome, *Immigrazione dossier statistico 1992*, Sinnos editrice, Rome, 1992, p. 142; Caritas of Rome, c138.

cited in Article 380, section 1 and 2 of the Code of Criminal Procedure or who were considered a threat to state security. Even in these cases, there had been no orders of denial of adjustment of status motivated by conviction of crimes of terrorism or of affiliation with terrorist groups.

Finally, it is important to remember that the same Law 39/1990 on the issue of immigration provided that terrorism is an impediment to issue of entry permits, entry to the territory of the state and issue of residence permits and constitutes a reason that legitimated judicial or administrative deportation of the alien.

Firstly, legislation on non-EU immigration provided that the border police stations were required to deny entry at the border - by means of a written and justified order - to non-EU foreign nationals (even valid visa holders) if there were reports of these individuals as threats to state security or as persons belonging to organized crime groups (mafia), organizations dealing in drug trafficking or terrorist organizations (Article 3 subsection 5 of Law 39/1990). This provision afforded a large degree of discretion because the law did not specify where the reports had to come from, nor what they had to say nor did the provision define the concept of "threat to state security".

Secondly, legislation on non-EU immigration provided that the Chief of Police had the power to deny issue of a residence permit for, among other reasons, justified reasons relating to protection of state security and public order or health (Article 4 subsection 12 of Law 39/1990). These were generic provisions that afforded a large degree of discretion. The "reasons relating to state security and public order" seemed to allude to these very foreigners who, despite holding a visa, would have been denied entry to the border (cfr. Article 4 subsection 5 and 6 of Law 39/1990), as these were foreigners who had been deported or reported as a threat to state security or as persons belonging to organized crime groups (mafia), organizations dealing in drug trafficking or terrorist organizations.

At that time, terrorism was more or less expressly included as grounds for judicial or administrative deportation orders of the non-European Union aliens from the territory of the state.

In particular - then as now - deportation as a measure of security must be applied by the criminal courts against the alien who has been convicted of a serious offence (and who has served the prison sentence) or against foreigners sentenced to jail for a period of no less than 10 years (Article 235 subsection 1 Penal Code) or probation (regardless of its duration) for one of the crimes against the status of the state, punished in the Penal Code (Article 312 Penal Code). These crimes include conspiracy for the purposes of

terrorism or subversion of the democratic order (Article 270-bis), terrorist attacks or acts of subversion (Article 280 Penal Code), abduction for the purposes of terrorism or subversion (Article 289-bis).

In this regard, it is important to specify that numerous members of Islamic terrorist organizations after 1994 were investigated and frequently convicted in Italy, in some cases with final sentences; however, their convictions primarily involved crimes of criminal conspiracy (Article 416 Penal Code) with the intention of promoting illegal immigration, trafficking forged documents, etc., as well as other specific crimes. This is contingent on the fact that - as illustrated later in this work - in the Italian legal system, the crime of criminal conspiracy for the purposes of *international or domestic* terrorism was inserted in Article 270-bis Penal Code with Law Decree 374 of 18 October 2001, converted into Law 438 of 15 December 2001. Therefore, in the sentences in question, while it is explicitly recognized that the conduct of those convicted did indeed fall under the umbrella of criminal conspiracy with Islamic terrorism groups, this conduct was punished with less serious penalties than those provided under the new effects of Article 270-bis Penal Code.

This provision also foresees mandatory deportation ordered as an administrative measure by the Prefecture against the alien sentenced without appeal of one of the crimes provided under Article 380 subsection 1 and 2 Code of Criminal Procedure (Article 7 subsection 1 Law 39/1990), which as already mentioned, include crimes of terrorism.

Finally, there was the provision (comparable to the one in force today) which provided that in exceptional cases, for reasons of protection of public order or state security, deportation could be ordered (non-mandatory deportation) by the Ministry of the Interior against the foreigner either transient or resident on the territory of the state (Article 7 subsection 5 of Law 39/1990). A comparable measure was adopted based on specific agreements with Members States of the European Community[44] when the incident involves foreign nationals reported for the purposes of barring entry or considered threats for public order, national safety or international relations of one of the contracting states. The measure was executed with immediate escort to the border and can be appealed by the Regional Administrative Court of Lazio.

It is important to remember that the concepts of public order and national security are some of the most ambiguous in the Italian legal system.

[44] Cfr. the Convention applying the Schengen Agreement.

The Constitutional Court had several times attempted to define the concept of "public order" frequently construing it as the "legal order underpinning community life"[45], the "institutional order of the prevailing regime" which results from a "legal system in which objectives permitted to co-members and social groups can only be achieved using the instruments and through the measures envisaged by the law and modifications or exceptions to these cannot be introduced through forms of coercion or even violence"[46] or, in a more comprehensive definition, as the set of the "fundamental rules set forth by the Constitution and the laws underpinning the legal institutions in which the positive order is expressed in its constant adaptation to the evolution of society"[47]. As a result, the Court had regarded that the threat posed by an individual with respect to public order "cannot consist in simple demonstrations of a social or political nature, which are regulated by other legal provisions, but rather, external manifestations of restiveness or rebellion to the legislative precepts and the legitimate orders of public authority, manifestations that can easily give rise to states of alarm and violence clearly threatening for the general welfare of the citizens."

In practice, this type of deportation was implemented against the Albanians convicted of committing acts of devastation or looting in some of the places where they were given shelter after a group of refugees landed in Italy in February 1991, but certainly not against terrorist suspects.

The notion of state security seems to have been inserted to allude to cases in which serious political or international tensions arise against citizens of a country whose government has become hostile or in cases where it is certified that a foreigner is in some way involved in espionage or other terrorist conduct against the State of Italy, perceived as a state-community and as a state-apparatus.

In practice, this latter form of deportation was implemented in the 1990s in a few cases against foreign spies or against high level foreign exponents in Islamic fundamentalist organizations, against whom there was insufficient evidence to incriminate them for terrorist crimes.

[45] Cfr. Constitutional Court, ruling 2/1956, 25/1965, 138/1985
[46] Constitutional Court, ruling no. 19/1962.
[47] Constitutional Court, ruling no. 18/1982.

2. Terrorism and aliens in Italian law from 2001 to today

Even after the terrorist attacks in September 2001, the Italian legal system has not yet enacted a specific provision against foreign terrorists. As a result, to date, preventive and repressive measures against aliens suspected of or convicted of committing acts of terrorism arise from application of the ordinary provisions that aim to prevent and punish terrorism (since 2001 expressly extended to acts of international terrorism) and application of the general provisions on the status of foreigners (which were radically changed between 1998 and 2002).

2.1. A general overview of Italian criminal legislation and law of procedure as it relates to international terrorism after 2001.

Italy responded swiftly to the terrorist threat after 11 September 2001, in compliance with the relevant resolutions taken by the United Nations and with several regulatory instruments adopted by the European Union.

Pursuant to Law 438/2001, urgent measures were taken for preventing and counteracting crimes committed for the purposes of international terrorism: the new provision views and punishes as criminal offences acts of promotion, organization, sponsorship and support of groups present on the national territory whose objectives are to carry out terrorist activities abroad; it also attributes more power to the investigative and repressive apparatus, including new provisions regarding covert surveillance and seizures, but ensuring control of the judicial authorities over these operations.

First and foremost, pursuant to the modifications introduced with that legislation in 2001, conspiracy for the purposes of international terrorism is a crime (Article 270-bis Penal Code). Therefore, today, promotion, establishment, organization, running, or sponsorship of groups whose objectives are to carry out acts of violence for the purposes of international or domestic terrorism carries a prison sentence of 7 to 15 years while participation in these terrorist groups carries a prison sentence of 5 to 10 year prison sentence. In addition, the new Article 270-ter of the Penal Code sets forth that providing cooperation to the members of terrorist groups carries a penalty of incarceration of up to 4 years.

The major innovation of the modification to Article 270-bis Penal Code is its extended definition of the purposes of terrorism. Subsection 3 of the provision establishes that objectives of terrorism also apply when the acts of violence are committed against a foreign state or international institution or organization. This provision appears very broad, because the concept of international institutions and organizations can include a

wide range of possibilities. While the former can include institutions established through international conventions, such as the UN, NATO, and the European Union, more difficulties arise in determining the exact boundaries of the notion of "international organization". It isn't clear whether, by using this form of expression, the intention was to specify only supranational organizations with legal status or also private associations with international scope[48]. It would be preferable to adopt a more extensive interpretation of the notion of organization because terrorist attacks on private associations could have a high demonstrational value (consider for example a terrorist attack intending to wreak havoc on one of the many NGOs that deal with daily problems related to violence and peace-keeping around the world). We have to remember that the appreciable effort by the legislature to provide a definition of international terrorism has been resolved in the explanation of the international scope of the crime, while the real definition of the phenomenon is resolved in ineffectual repetition: namely, that terrorism is a violent act committed for purposes of spreading terror. In the absence of a domestic provision to use as reference for interpretation of the new provision, the only possibility is to make reference to international provisions that have attempted to provide a definition of terrorism but which are fairly incomplete in many aspects.

In any case, in compliance with the Italian Constitution, we should remember that the legal asset protected by the provision continues to be the status of the state of Italy, in that Italy must be considered an international public entity, holder of the duty-right (undertaken internationally) to repress any act of violence that can endanger international security perceived as the peaceful cohabitation of peoples and states. With the new incriminating provision, therefore, the objective is to afford protection against acts of terrorism, thus expressing repudiation for any form of violence as foreseen by Article 11 of the Constitution, through which Italy agrees to limitations of sovereignty where they are necessary to allow for a legal system of peace and justice between nations.

In addition to the regulations introduced in 2001, it is important to remember that for the purposes of suppressing acts of terrorism, other provisions contained in the Penal Code are quite relevant. A few are listed here below:

1) Article 110 attaches responsibility to complicity with others in the crime and, therefore, makes it possible to incriminate sponsorship of individual acts of terrorism;

[48] Cfr. PISTORELLI, in *Guida al diritto*, 3 November 2001, n. 42, p. 84.

2) Article 240, subsection 1, makes it possible to seize sources of financing;

3) Articles 273 and 274, respectively, makes punishable the illicit establishment and participation in international associations;

4) other cases in point, such as terrorist attacks, devastation, looting and massacre and violent attacks against the constitutional bodies or regional assemblies are provided for under Articles 280, 285, and 289;

5) Article 289-bis establishes the penalty for abduction of persons for the purposes of terrorism;

6) Article 294 involves the possibility of attacks against the political rights of citizens;

7) Article 306 punishes the formation and participation in armed groups;

8) Article 312 provides for security measures ordering the deportation of aliens from the territory of the state if convicted for the aforementioned crimes; the alien is deported after first serving out the prison sentence.

Furthermore, Article 1 of Law 15/1980 provides that in the cases where the objective of terrorism or subversion of the democratic system is not considered a crime, the penalty foreseen under the law for any crime punishable with sentences other than life imprisonment is increased by half, when the crime is committed for such purposes.

The provisions introduced with the law issued in 2001 also establish the possibility of using preventive telephone surveillance, laying down, however, that preventive measures can be authorized only when there are investigative elements that justify such precautionary action. Telephone surveillance can be done for 40 days and may only be extended for another 20. This surveillance is valid only for investigative purposes and cannot be used in criminal proceedings or for public disclosure. Publishing the texts of the wire taps, or broadcasting them over the radio can carry a penalty of six months to three years imprisonment. The provision also states that information or security services agents or the police cannot be punished if, during an attempt to thwart international crimes of terror, they themselves commit crimes such as acquisition, substitution, or concealment of cash, weapons, documents or drugs. In any event, these operations must be previously authorized by the Chief of Police, the General Commander of the Carabinieri, and the Financial Police, which must inform the public prosecutor's office.

In the scope of the new provision emanated in 2001, the ability to operate "under cover" under judicial control is certainly important from a preventive perspective, especially

during investigations for crimes of terrorism. Even the ability to make preventive telephone surveillance, under the direct responsibility of the prosecuting attorney and for an appropriate amount of time, provides a tool of knowledge of the contexts that have demonstrated excellent potential as regards national and international security. It also provides for shifting the territorial jurisdiction for crimes relating to the terrorist criminal actions to the prosecuting attorney's office at the Court of the capital city of the Judicial District, which should streamline the work of the magistrature.

It is important to remember that in Italy, investigations are underway in Rome for crimes of international terrorism in relation to the 11 September tragedy in New York, for which the Italian judicial system has partial jurisdiction due to the fact that Italian citizens were involved. There are also other preliminary investigations underway against Algerian nationals suspected of belonging to organizations connected to *Al Qaeda.*

Taking a closer look at the contents of Law Decree 98 of 5 April 2001, converted into Law 196 of 14 May 2001; Law Decree 353 of 28 September 2001, converted into Law 415 of 27 November; Law Decree 369 of 12 October 2001; Law Decree 374 of 18 October 2001 converted into Law 438 of 15 December 2001; Law 7 of 14 January 2003; and Law 34 of 14 February 2003, we can see that all of these laws together represent the responses offered by Italian legislation at various levels to adapt the means to counteract the resurgence of criminal activity for the purposes of domestic terrorism or sedition and especially, manifestations of the phenomenon of international terrorism.

These provisions have modified the Penal Code, the Code of Criminal Procedure, the Penitentiary System, and the regulations in force regarding measures of prevention and have authorized the ratification and execution of the known international convention on repression of sponsorship of terrorism and suppression of terrorist bombings, dictating the provisions for adaptation of Italian law.

In evaluating the multi-part set of regulations ensuing especially after emanation of Law Decree of 18 October 2001, converted with amendments into Law 438/2001, it is important to remember that the final text resulting after the conversion into law by the Parliament is a bit different from the text of the Law Decree that was approved by the Government.

First and foremost, Article 1 of Law 438/01, dedicated to "conspiracy with international terrorist groups" defines and/or adapts the cases relevant for criminal purposes in order to include criminal actions committed in the country, but whose objective is aggression against a foreign state, an international institution or an international organization.

In converting Law Decree 374 of 18 October 2001, the legislature decided to work through substitution of Article 270-bis of the Penal Code (previously entitled "groups with objectives of terrorism and subversion of the constitutional order"), inserting into the index the specification "domestic or international" after the phrase "objectives of terrorism" and introducing a third subsection, according to which "for the purposes of criminal law, the objectives of terrorism also apply when acts of violence are carried out against a foreign country, an international institution, or international organization."

Perhaps it wasn't quite clear in its relationships with "subversion of the democratic order", which still remains in the title and in the body of the new Article 270-bis of the Penal Code, this diction represents "an authentic interpretation" of the purposes of terrorism that can have repercussions on Article 1 of Law 15/1980, a provision that introduces the aggravation of the purposes of terrorism as a special circumstance.

Also worthy of note is that in addition to the leaders, promoters and organizers of the groups in question, also included is the figure of "sponsor" whose definition is included in Article 18 of Law 152 of 22 May 1975 (which makes the anti-mafia prevention measures, pursuant to Law 575 of 31 May 1965, also applicable to various categories of "subversive" or potentially subversive individuals, according to the specific definitions given). A sponsor of terrorism is "any person who supplies amounts of money or other assets, conscious of the purposes they will be used for"; note that even this provision is modified by Article 7 of the law resulting from conversion of the law decree in question, by inserting crimes with objectives of domestic or international terrorism, along with crimes intended to undermine public order in the state.

For "apical" individuals of the group, as identified in subsection 1 of Article 270-bis of the Penal Code, the penalty is imprisonment of seven to ten years, while conversion into law increased the penalty for those taking part in the association, now five to ten years in prison;

Subsection 1 bis of Article 1 of the law under review inserts into the Penal Code Article 270-ter which punishes with up to four years in prison providing cooperation and assistance to members of a group with domestic or international terrorist objectives, punished by Article 270-bis of the Penal Code, while subsection 2 of the Article in question inserts biological and radioactive weapons into the notion of weapons of mass destruction under Article 1 of Law 110 of 18 April.

As a result, by effect of Article 1 of Law 15/1980 which today includes international terrorism and for the new penalties of the rewritten Article 270-bis of the Penal Code (which today also punishes international terrorism) nearly every crime of terrorism is

included in the crimes specified in subsection 2 of Article 380 of the Code of Criminal Procedure, under which officials and criminal police officers must arrest any person caught in the act of committing the crime. These crimes also legitimate arresting a person suspected of a crime even if not caught in the act but where the individual is considered a flight risk. Police generally make arrests for suspects of crimes punishable by at least two years and a maximum of six years of imprisonment, or for crimes involving weapons of mass destruction.

Crimes committed for the purposes of domestic or international terrorism must be subjected to the common evaluation of the precautionary needs provided under Article 274 of the Code of Criminal Procedure, even if, in these cases, the precautionary needs can be quite remarkable because they are nearly always "serious crimes" often with the use of weapons or other means of personal violence, as well as crimes related to organized crime" according to the provisions under letter c) of the aforementioned article, or are committed by individuals who are considered a flight risk.

After the modifications introduced by Law 196/2001, crimes of subversive conspiracy (Art. 270 subsection 3 Penal Code) and armed association (Art. 306 subsection 2 Penal Code) are expressly inserted in subsection 2 letter a) number 4 of Article 407 of the Code of Criminal Procedure; b) Art. 270-bis subsection 2 Penal Code, for the punishments changed, plainly falls under Article 407 subsection 2, letter a) number 4.There are multiple consequences of interpolation of the text of Article 407 subsection 2 letter a) number 4 of the Code of Criminal Procedure, caused by the provisions cited above.

First and foremost, the maximum duration for preliminary investigations for the crimes considered rises to the maximum (two years) and the procedure for extending the term, by effect of the express applicability of paragraph 5-bis of Article 406 of the Code of Civil Procedure, to the crimes under review, is made without the cross-examination foreseen by subsection 3-4-5 of the same Article 406 of the Code of Civil Procedure. The intervention is justified as these are crimes for which certification the investigations are usually quite complex and necessitate the strictest confidentiality.

Other repercussions are found regarding the term of the preventive detention.

In this perspective, it is necessary to consider Article 301 subsection 2 bis Code of Criminal Procedure regarding the duration and abolition of the measures laid down for evidence-gathering needs; Article 303, subsection 1 letter a) no.3 Code of Criminal Procedure and letter b) no. 3 Code of Criminal Procedure, in the same way as the provisions of the duration of the preventive detention are projected toward the maximum; Article 305 subsection 2 of the Code of Criminal Procedure as regards

extension of the preventative detention in the phase of preliminary investigations which can be requested by the prosecuting attorney when "serious precautionary needs" apply and particularly complex certifications are underway, especially if related to investigation of organized crimes and crimes pursuant to Article 407 subsection 2 letter a) no. 4 Code of Criminal Procedure; Article 307 subsection 1 bis Code of Criminal Procedure as regards cumulative application of the precautionary measures indicated by Articles 281- 282 – 283 Code of Criminal Procedure in the event of release upon lapse of the terms. Other important provisions are found under Article 347 subsection 3 Code of Criminal Procedure and provision 112 of the Penal Code, as regards communication of news of the crime to the prosecuting attorney by the criminal police, which, for the offences identified under Article 407 subsection 2 letter a) numbers 1 to 6, must be given immediately, in the oral form and be immediately followed by written notification.

The result is that acts of terrorism falling under the provisions under Article 407 Code of Criminal Procedure, are included in the list of "acts of organized crime". In fact, after all the variations imported by the anti-Mafia legislation, the Supreme Court of Cassation[49] now believes that the notion of organized crime – initiated by Law 15/80 in the section that supersedes the previous Article 340 Code of Criminal Procedure – hinges on Articles 274 and 407 Code of Criminal Procedure.

The evident inclusion of terrorism into organized crime has required a parameterization of this phenomenon to other aspects, procedural and otherwise, once normally used in the criminal system against organized crime.

As a result, Sections 3 and 4 of Law 438/2001 regulate the means of finding proof, such as through searches, surveillance, and "undercover" operations by the criminal police, adapting them to the higher incisiveness required by the nature and characteristics of the criminal conduct to investigate.

Let’s remember that Law 431/2001 brought to establishment the Financial Security Committee, set up within the Ministry of Economics and Finance, chaired by the Director General of the Treasury. It is comprised of 11 members and includes representatives of the Ministries of the Interior, Economy and Finance, Justice, and Foreign Affairs, the Bank of Italy, the National Commission for Companies and the Stock Exchange (CONSOB), the Italian Banking Association, the Italian Exchange Office, the Police Forces, the Carabinieri Corps, the Financial Police, and the National Anti-Mafia Bureau. The FSC is responsible for preventing terrorist organizations from exploiting the Italian financial system; it coordinates the Italian action to combat sponsorship of terrorism; and it is responsible

[49] Cf. Cass. VI Criminal section, ruling 7 January -4 March 1997, Pacini Battaglia

for measures of freezing the assets of individuals or bodies related to terrorist organizations. To carry out its monitoring and coordination functions, the Committee acquires information in the possession of the public administrations, including in exception to the provisions regarding confidentiality of office, and can ask the Italian Exchange Office and the Monetary Police Department to make investigations. In addition, the law establishes the penalties for failure to comply with European Community regulations bearing bans on transfer of financial assets, services or resources that directly or indirectly involve persons or organizations related to terrorism. The Committee monitors implementation of the EU regulations that govern these matters. The FSC also supervises application of the sanctions adopted by the Security Council and approves the proposals for insertion of individuals or authorities in the list of the Penalty Committee against Al Qaeda and Talebani. As of 31 December 2004, the total value of financial assets frozen by the Italian administrative authorities amounted to approximately 500,000 euro; in addition, assets and property were seized on order of the judicial authorities for another 4 million euro.

Finally Law 7 dated 14 January 2003 authorized ratification of the New York Convention of 9 December 2002 regarding repression of sponsorship of terrorism, completing the regulations that give execution to the international treaties against international terrorism. Under this law, authorities or companies suspected or found to be involved in sponsoring terrorism are ordered to pay fines up to 500,000 euro and to close down their activity. The law also sets forth that any amounts seized are to be allocated to a fund for victims of terrorism, to which all victims of international terrorism have access. The law extends the disciplinary measures provided for crimes of money laundering, as well as crimes related to sponsoring terrorism, if committed in conducting banking or professional business or other activity subject to authorization, license, registration or other qualifying title.

2.2. Criminal proceedings and judicial divergence in applying the new criminal laws relating to international terrorism to foreign nationals.

The difficulties in the action to legally counteract international terrorism - which must involve efficiency and guarantees, avoiding shortcuts or gaps in the evidence-gathering phase - arise from interpretational differences, due to lack of a consolidated law on the new types of international terrorism provided by the crimes under Article 270-*bis* Penal Code, as regards the elements necessary for configuration of the conduct of participation to an association with the purposes of international Islamic terrorism.

Since 1993, several isolated episodes of violent radicalization against the West or Christianity have been reported in the Islamic community in Italy, for the most part

made up of foreign nationals, which generally erupted during demonstrations against the participation in the war in Bosnia and in Chechnya and later, after 2001, in support of international terrorist groups such as *Al Qaeda*, or military groups that operate against the American military occupation in Iraq. In this regard, the investigative action has led to the arrest of several individuals (nearly all foreigners); some were subsequently convicted (based on the anti-terrorism legislation approved in 2001) and others were released by the magistrates because the charge of inciting violence or participation in international terrorism was not proved or because the action of resistance to military forces of occupation based on international provisions in force regarding armed conflict that legitimate this resistance was considered not punishable. The aliens found not guilty of crimes of terrorism were still convicted of other crimes or were nevertheless deported (pursuant to a removal order by reason of protection of public order or national security by the Ministry of the Interior), despite the fact that ordinary and administrative judges by request of the parties involved subsequently revoked the orders due to a lack of evidence of the concrete and current threat to public order or national security.

Since the anticipation of punishability cannot be reduced to persecution of ideas, the boundary between ideological support of fundamentalist radicalism and participation in terrorist associations needs to be identified. It is not merely a problem of evidence-gathering, but it is primarily a legal problem.

The problem had already come up with emanation of the old Article 270-bis of the Penal Code, which only punished terrorism or subversion of the constitutional order.

According to the Court of Cassation[50] Article 270-bis was considered a crime of abstract threat, but, in order to not run into objections based on unconstitutionality, it was necessary to certify elements appropriate conduct to offend the rights protected. It would seem to be antinomy not easily overcome. But it is important to remember that in jurisprudence, while anticipating problems of constitutionality with regard to "abstract threat", the current usage is that it is vital to consider those crimes in a criminal system, when it imposes the need to intensively protect - therefore, by anticipating the thresholds of punishability up to abstract threat - certain assets and especially when ascertainment of a concrete threat can reveal itself to be more difficult precisely for the "intangible" nature of the asset protected.

Especially interesting was the ruling issued in 2000 (726/2000) by the judge during the preliminary hearing at the Court of Bologna in relation to a trial against non-European

[50] Cfr. Cass. I Criminal section, ruling 21 November 2001.

Union nationals accused of conspiring to commit crimes in foreign countries (in particular Algeria). The prosecutors had considered applicable the hypothesis of crime under Article 270-bis Penal Code in the original text, arguing that, at least indirectly, the Italian constitutional system was impaired by a violent subversive association whose actions are against a foreign country, since it would be in the interest of the state to protect its relationship with other foreign states. The judge pronounced a ruling to not proceed with the trial since the legal asset protected by the provision in question was only the constitutional system, and as a result, the conduct directed at striking foreign countries did not fall into the area of the criminal offence.

Pursuant to similar rulings pronounced after the attacks of September 2001, Article 270-bis of the Penal Code was modified by introducing conspiracy for the purposes of international terrorism. In this regard, the previous paragraph demonstrated the continuing indistinctness and ambiguity of the notion of international terrorism and this appears confirmed by the legal debates that have come up on the subject.

In fact, the ordinance of the judge of the preliminary investigations of the Court of Milan pronounced in January 2005 created a sensation[51].

In the proceedings of the trial against Noureddine Drissi (Morocco), Kamel Ben Mouldi Hamarouni (Tunisia) and other non-European Union nationals of Islamic states, charged with the crime under Article 270-bis of the Penal Code (conspiracy to terrorism), for having carried out the role of direction, organization or simply participation in the criminal plot (against "governments, military forces, institutions, international organizations, civilians, and other objectives - regardless of where they are located, in Western countries or otherwise, considered "infidels" or enemies....") and charged with the crime under Articles 110, 81 cpv Penal Code and Article 12, paragraphs 1 and 3 of the Consolidated Immigration and Foreigners' Status Act approved with Legislative decree 286/1998 (modified in Law 189/2002), to have procured "illegal entry of a number of individuals into the territory of the state, or... in other countries" with the aggravating circumstance of the objectives of terrorism (Section 1 of Law 15 of 6 February 1980). The magistrate, in declaring to not have jurisdiction over the case, ordered "immediate" transfer of the documents to the Prosecuting Attorney in Brescia, who revoked the precautionary detention measure against two of the accused, excluding the existence of the aggravating circumstances of the objectives of terrorism provided under Article 1 of Law 15/1980, on the wake of a contention which aimed to eliminate the definition of terrorist from the charges against the defendants standing trial, which

[51] Cfr. Court of Milan, GIP Milan, Forleo, ord. 24 January 2005, no. 28491/04 R.G. N.R., N.5774/04 R.G. G.I.P.

would have allowed their release from prison even if limited to the disputed hypothesis of crime. In short, on conclusion of the preliminary investigative phases, there was found be an expediency in separating the definition of "warrior" from the more compromising, serious and dangerous "terrorist" because the judge considered the individuals standing trial as the former type of enemy combatant ("warrior") and not the latter ("terrorist"). The decision clearly dismantled a significant portion of the charges against the aliens, sustained based on the alarm caused by the discovery of such a "seditious cell" in Milan. The logic gathered from the interpretation of that ruling/ordinance is that it considers the plot by foreigners against a certain armed coalition of states - in which the host state is a member - an action of war waged in the context of international conflict, and therefore legitimate from the perspective of international law and not an offence nor a risk for the civil community, where the plot is uncovered.

In actual fact, exoneration of the suspects was structured on two generally relevant legal problems.

The first problem relates to the charges that can be filed before the judge for the purposes of the verdict. The judge defined as information from confidential and approximate sources and "non evidence" the so-called "intelligence sources", namely investigative acquisitions not otherwise specified, reports from American organizations or the German BKA, emerging from "international cooperation contexts". The judge also deemed the acts committed by the accused abroad not relevant to the destruction and not assisted by the guarantees that the Italian legal system sets up to protect the right of defence.

The second problem regards the notion of global terrorism. Article 270-bis Penal Code punishes international terrorism but fails to define it (due to this generic definition, the discussion centered on a "crime of variable geometry", an expression that has nothing to do with the need for the area of intervention of criminal law to be carefully defined). If a plot is uncovered of violent acts to be committed by foreigners outside of Italy and in times of peace, but as part of armed conflicts underway in other countries, the judge must make the distinctions that the law, starting with international law, suggests. Therefore, the Judge of Milan underlined that the "cell" in which the suspects operated in the context of the American attack on Iraq and the military occupation of that country (the definition used by the United States and Great Britain as occupying powers is found in resolution 1483 in May 2004 of the U.N. Security Council). Then, that judge looked for the definition of the word as elaborated by scholars of legal law and international law, laying down how they drew the line separating guerrilla warfare and terrorism, with particular concern for the objectives of the acts of violence. Therefore, by arguing

broadly and basing these arguments on the international conventions approved or currently in negotiation phases between countries (which made the ruling subject to criticism because it is not possible to apply provisions that are not yet in force), the judge deemed that groups which, to achieve various objectives, strike military and civil objectives indifferently are terrorists as they spread indiscriminate terror in the population; on the other hand, guerrilla warfare is when one fights a foreign occupying power by using a clandestine and paramilitary apparatus, directing acts of violence against military targets, even if, at times, this action has unintended effects on the civilian population. The magistrate also confirmed that even if one was to extend the concept of terrorism to every act of violence committed in a context of war or foreign military occupation by non-institutional forces, the result would be to strip the people of their right to self-determination and independence. Having established this, the next step was to evaluate the evidence gathered against the defendants on a case by case and time by time basis in order to identify the particular context in which these defendants committed their actions.

However, several judicial declarations expressed by the aforementioned ruling/ordinance of the magistrate in Milan were immediately debatable: 1) based on the UN Global Convention on Terrorism, "projected" in 1999, justification could be found for those who practice violent acts or guerrilla warfare in contexts of war, even if they are not acting as institutional militias, provided the provisions of the international human rights are not violated: 2) lacking an exact regulatory definition of "terrorism" the definition may include actions intended to sow terror and shock "indiscriminately in the civilian population in the name of an ideological and/or religious belief, posing as crimes against humanity;" 3) the extension of the criminal protection to acts of guerrilla warfare, even if violent, would lead to "an unjustified support of one of the forces on the field."

As a result, on the case recently heard by the magistrate in Milan, the magistrate presiding over the preliminary inquiries at the Court of Brescia pronounced a completely contradictory ruling[52], because in his opinion, the assertions were the result of a poor application of the provisions because

1) the UN Global Convention on Terrorism in 1999, which allegedly provided justification for the "acts or guerrilla warfare" was merely "projected" and not "resolved", and as a result, cannot be used in reference as the "prevailing international law" because its lack of approval is due to the disagreement expressed by the member states regarding its content. Furthermore, even if it had

[52] Cf. Court of Brescia, GIP Spanò, ord. 31 January 2005 no.13805 / 2002 RGNR, N. 17692 / 2003 RG GIP

been approved, it would only become part of the Italian legal system if ratified in Italy by a law authorizing its ratification.

2) in the ruling issued by the Milanese magistrate, information from the so-called "open sources" were declared invalid, however no explanation is given as to what criteria was used to base these judgments, nor how they were filtered through the rules of procedure. Even the assertion to prefer not to show support "for one of the forces on the field" can have uncertain boundaries, where the distinction between "justified guerrilla warfare" and "terrorism" is made according to the "tyrannical" nature of the adversary; in any event, the magistrate should not have taken one of the debatable positions, because the exclusively "political" assessment required of a judge in assigning significance to the expression "terrorism objectives" considered in Article 270-bis of the Penal Code is the one indicated in Article 12 subsection 1 of the provisions of the law in general, which elevates the "intention of the legislature" to a primarily interpretative criteria. In light of the common opinion of the political community (or better, the political communities) which produced Article 270-bis of the Penal Code (along with other comparable provisions), violent acts committed using "kamikaze" methods by individuals touting Islamic extremist ideologies against military units currently deployed in Asia (including an Italian contingent) cannot be qualified as legitimate and justified "guerrilla" acts but can only be defined to every effect as acts of "terrorism".

3) as the Supreme Court of Cassation has repeated several times, the crime of cross-border involvement is a crime of presumed *de jure* danger; an estimate of the scope of the danger in question cannot be made based on the evidence of what the defendants concretely intended to do (or better, based on the absence of proof regarding what they would be able to do), otherwise it would generally be necessary to wait for the deadly results of the violent acts to accurately define what kind of crime is being dealt with. Besides, it doesn't appear possible to draw a dividing line between "guerrilla warfare" and "terrorism" since, regardless of the terminological questions, once the organization is set up to execute a plan of violence, it is impossible to know if this will act surgically and "humanitarianly" with respect to specific military targets or if it will use cruel and inhuman methods against unarmed and defenceless civilians and a diverse range of unintended objectives.

Precisely that investigation, according to the magistrate in Brescia, supplies the proof of how the Cremona-based cell, initially only involved in sponsoring, training and recruiting

guerrillas, unexpectedly decided to diversify its strategy against the foreign policies of the Italian government, deemed excessively close to the United States, by setting its sights on organizing two attacks in Cremona and Milan with the objective of massacring the highest possible number of civilians. What's more, observation of the scenes of daily bloodshed bombarding us constantly can offer plenty of examples of how experience has shown that opposition to institutional armies, armed, according to the magistrate in Milan, with "the highest levels of offensive potential" and Islamist combatants, precisely by reason of imbalance of the forces in play, is not waged predominantly on the military or guerrilla field, but with hateful and inhuman actions directed at causing the widest media resonance. However, on the point, the reasoning of the Milanese magistrate appeared to the magistrate in Brescia to be confused, since the latter excluded the terrorist nature of Ansar Al Islam, while admitting that the organization gravitates in "areas notoriously marked by terrorist inclinations" and despite the fact that it includes among its members individuals who openly declare terrorist objectives ("terrorist objectives, most likely held by only some of its members"). Therefore, on a logical level, it seems difficult to conceive how the same organization, having a unitary ideological extremist violent matrix, can have supporters who practice group retaliation while terrorism is exercised by these members only as individuals.

On the other hand, the Court of Cassation, in limiting the area of criminal relevance, made a distinction for the purposes of punishability for the crime under Article 270-bis of the Penal Code, between the conduct of association with violent plots and the mere assumption of ideological positions ("the crime ascribed to the defendants, representing a potential threat, provides protection for one specific plan of violence and against those persons who take part in the plot, proposing the task of carrying out acts of violence; they do not consider the merely ideological positions, not accompanied by tangible and real violence, provided that these positions receive protection from the democratic and pluralistic system that is being fought against")[53], while never making reference to the distinction made by the Milanese magistrate.

2.3. Application of the provisions on extradition of aliens suspected of acts of international terrorism

Worth mentioning is an apparently contradictory case law concerning extradition of aliens suspected of acts of international terrorism, including in consideration of Article 10, subsection 4 of the Constitution that prohibits extradition of foreigners for political offences, except for crimes of genocide.

[53] Cfr. Cass. VI Criminal section, ruling 13 October 2004, Laagoub.

In particular, let's look at two proceedings with different outcomes.

In the first, the VI Criminal Section of the Court of Cassation, in application of the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997 and ratified and executed in Italy pursuant to Law 34 of 14 February 2003 found that extradition of an Egyptian national detained in Italy was legitimate since achieved by a warrant for the international search and apprehension in reference to the Madrid train bombing by terrorists on 11 March 2004. The Supreme Court proclaimed that the purpose of international conventions is to establish the jurisdiction between states in the event that two states proceed for the same event, with an exclusive preference for the country where the terrorist crime was perpetrated (in this case, Spain), notwithstanding the fact that if, in the course of investigations underway in Italy, investigators uncover formation and operation of terrorist conspiracy separate from the conspiracy object of investigation in the Kingdom of Spain, Italian judicial authorities can claim jurisdiction.[54]

A contradictory decision [55] was pronounced in the case of the former Imam, Rafik Mohamed, suspected involvement in the violence that caused twenty-four deaths in Casablanca. Rafik was not extradited to Morocco and will soon be released unless he is detained for another reason by effect of a ruling of the VI Criminal Section, of the Court of Cassation which overturned the decision of the Appeals Court of Brescia, which in February 2004 had issued a ruling in favour of the request for extradition filed by the Attorney's Office of Rabat. Rafik, charged with "conspiracy to carry out acts of terrorism, collection of funds for execution of acts of terrorism and possession and use of explosives" was arrested in October 2003 on execution of the international arrest warrant issued by the Public Prosecutor's office at the Court of Appeals in Rabat; the indictments included his connections with the terrorist "Salafiya Jihadiya" group. The Supreme Court denied the existence of grounds for extradition and ordered the immediate release of the defendant based on the principle contained in Article 25 of the Constitution, according to which "no punishment is allowed unless provided by a law already in force when the offence has been committed."

[54] Cf. Cass., VI Criminal section, ruling 3 December 2004, n.47039/2004.
[55] Cf. Cass., VI Criminal section, ruling 27 January-15 February 2005, n.5708/2005.

2.4. Application to foreign terrorists of the Italian provision regarding immigration and asylum

Italian legislation on immigration and the legal status of aliens was completely rewritten pursuant to the Consolidated Immigration and Foreigners' Status Act, approved with Legislative Decree 286 of 25 July 1998, modified and amended several times, notably by Law 189/2002.

In the terms of this comprehensive law on immigration, terrorism is not specifically mentioned but can be indirectly perceived. In fact

a) terrorism is implicitly included as one of the impediments to entry and residence of the foreign national in Italy

b) terrorism is implicitly included as one of the prerequisites for orders to expel the foreign national from Italy: either by denial of entry and/or via an administrative or judicial deportation order

c) terrorism is one of the impediments to filing applications of recognition of the refugee status.

As regards terrorism as an impediment to filing the application of recognition of the refugee status, refer to the matters illustrated in paragraph 1.2.1.

2.4.1. Terrorism as an impediment to the entry and residence of aliens in the territory of the state.

Terrorism represent implicit grounds to preclude the entry and residence of the alien in the territory of the state, partly because terrorism is defined as a threat to public order and national security and partly because, as illustrated above, crimes of terrorism fall under the crimes indicated by Article 380 Code of Criminal Procedure.

In the first place, terrorism represents an impediment to entry by the alien in the territory of the state from many perspectives:

1) according to Article 4, subsection 3, of the above-mentioned Legislative decree 286/1998, as modified by Law 189/2002, Italy shall deny entry to any foreign national who is considered a threat to public order or national security or the security of one of the countries with which Italy has signed agreements for removal of internal border controls and free circulation of persons, or who has

been convicted of the crimes specified under Article 380 Code of Criminal Procedure;

2) Article 4, subsection 6 of the above-mentioned Legislative decree 286/1998 provides that foreign nationals who must be deported or have been reported, based on international accords or conventions in effect in Italy, for deportation or denial of entry for serious grounds to protect public order, national security or protection of international relations shall not enter the territory of the state and shall be denied access at the border, unless they have obtained special authorization or the period of the ban on access has elapsed.

For the reasons specified in points 1 and 2, a foreign national convicted or suspected of terrorism or included on the lists of individuals drawn up by the European Union as members of or sponsors of terrorist organizations or reported as such by Italy or other countries in the SIS (Schengen Information System) cannot obtain issue of an entry visa and must be denied entry at the border. Italy, as part of the Schengen Convention, ratified pursuant to Law 388/1993, must make cross-checks of the names on the SIS for every visa application and, for citizens of sensitive countries, make security checks in consultation with other member states. It is important to remember that based on Article 2 subsection 2 of the aforementioned Convention, for protection of public order or national security, a contracting party can consult with the other contracting states and decide that checks be made on the national borders for a certain period of time according to the needs of the situation. If needs of protection of public order or national security requires immediate action be taken, the contracting state involved adopts the measures necessary and informs the other contracting states of these measures as soon as possible. Also, therefore, subsection 2 of Article 4 of the aforementioned legislative decree 286/1998, as modified by Law 189/2002, provides that short-term denial of an entry visa need not be motivated by reason of public order or national security in order to protect the confidentiality of sources of information and the safety of Italian diplomats abroad with regard to criminal threats.

Secondly, since terrorism is one of the impediments to entry into the territory of the state of Italy, reports of individuals suspected or convicted of crimes of terrorism (including subsequent to regular entry of the foreign national in the territory of the state) prevents issue and renewal of residence permit and represents legitimate reason for its revocation. Based on Article 5, subsection 5 and 6, of the above-mentioned Legislative decree 286/1998, issue or renewal of the residence permit shall be denied and if, a residence permit has been issued, it shall be revoked when the prerequisites required for entry or residence in the territory of the state are lacking or come to lack and the denial

or revocation of the residence permit can be adopted based on international conventions or agreements, rendered executive in Italy, when the alien does not meet the conditions of residence applicable in one of the contracting states, save for applicability of serious reasons, in particular of a humanitarian nature or resulting from constitutional or international obligations of the Italian state.

Thirdly, the individual suspected or convicted of acts of terrorism precludes issue or requires revocation of the residence permit, namely the right of indefinite residence which can be issued to the foreign national after 6 years of legal, consecutive residence and which nearly always prevents the foreign national from being deported from the territory of the state. In fact, the residence permit cannot be issued to any alien who has a judgment or conviction, final or preliminary, pending against him for one of the crimes specified under Article 380 Code of Criminal Procedure, which include crimes of terrorism. After the residence permit is issued, it must be revoked if a preliminary or final conviction ruling was issued for one of these crimes (Section 9, subsection 3 of the above-mentioned Legislative decree 286/1998). Added to this is the fact that any alien holding a residence permit who is suspected of terrorism, but not investigated or convicted by the Italian magistrature can still be deported for serious grounds of protection of public order or national security (Article 9, subsection 5 and Article 19, subsection 2, lett. b) of the above-mentioned Legislative decree 286/1998).

2.4.2. Terrorism as a prerequisite in the administrative or judicial orders of expulsion of the foreign national from the territory of the state. Administrative and legal practices.

Terrorism is an implicit reason that legitimates adoption of administrative or judicial orders of expulsion of the foreign national from the territory of the state because terrorism is one of the threats to public order and national security, and because, as illustrated above, crimes of terrorism are included in the crimes specified by Article 380 Code of Criminal Procedure.

In the first place, as illustrated under point 2.3.1, terrorism is grounds to order denial of entry at the border, which is executed with immediate escort to the border and repatriation by the carrier.

Secondly, conviction of a crime of terrorism requires that the magistrate order the security measure of deportation of the alien convicted of the crime. This measure is executed with immediate escort to the border as soon as the individual has served the related prison sentence (Article 312 Penal Code; Article 15 Legislative decree 286/1998). Remember that, based on Article 16, subsection 5 of Legislative decree 286/1998, as

modified by Law 189/2002, the alien convicted of terrorist crimes must serve out the entire sentence in Italy because this type of crime is among those specified by Article 407, subsection 2, lett. a) Code of Criminal Procedure, which does not allow deportation of the alien as replacement for or as an alternative to imprisonment.

Furthermore, the alien investigated in Italy for one of the crimes of terrorism cannot be deported from the territory of the state until conclusion of the criminal procedure that concerns him. In fact, Article 13, subsection 3-sexies of Legislative decree 286/1998, introduced by Law 189/2002, provides that the magistrate cannot grant authorization to execution of the administrative deportation order when taken against a foreign national for one of the crimes indicated by Article 407, subsection 2, lett. a) Code of Criminal Procedure, which, as already mentioned, also includes crimes of terrorism.

Thirdly, the Ministry of the Interior can order an administrative deportation order for reasons of protection of public order or national security against any alien, even in transit or who holds a valid residence permit. This order is executed by immediate escort to the border by the police and can be appealed only by formal petition (which does not stay execution of the order) (Article 13,subsection 1 of Legislative Decree 286/1998).

In the recent administrative practices, the Ministry of the Interior has made use of this exceptional deportation order for reasons of protection of public order or national security against an alien for which the magistrature has ordered acquittal for crimes of terrorism, but which the authorities for public security suspected of belonging to criminal associations having terrorist objectives.

In truth, the prerequisites of the administrative order issued by the Ministry of the Interior for reasons of public order and national security refers to vague notions (public order and security) that lend themselves to wide discretion in evaluation and are streaked with political considerations [56].

On its own, the notion of security can be connected to a situation where citizens are assured to the extent possible peaceful exercise of their rights of freedom that the Constitution guarantees[57]. However, with reference to national security, the legislature intended to allude not only to the security and safety of its citizens (state - community) but also the security of public powers (state -apparatus). Public security is ensured not only when there is current compliance with or expected future observance of the legal

[56] With regard to the analogous ministerial deportation order that was provided by Law 39/1990, M. CUNIBERTI, *La cittadinanza*, Padua, 1997, pp. 282-283 argued that it was an act with distinctly political nature especially when its prerequisites comply with grave needs of international policy.
[57] Also, the Constitutional Court, 23 June 1956, no. 2, in *Giur. cost*., 1956, p. 651.

provisions that preside over ordinary civil life, but when there is "public order" perceived as a tangible state of peace.[58].

In any event, the conformation of the prerequisites is so terse that it enables the most diverse interpretations and applications, including in consideration of the fact that the order is immediately executive and applies to foreign nationals legally resident in Italy, including those holding a valid residence permit, and minors. However, in the case of a deportation order to be executed against a alien minor, preventive jurisdictional vetting would be applicable, as foreseen by the special provision Article 31, paragraph 4 of the Consolidated Act, so that, in that case, the Ministry of the Interior would have to order the Police Chief to submit a request to the competent juvenile court to execute the order.

The legislature does not provide that the grounds must refer to real and current threat or danger, founded on objective circumstances. As a result, the order could be implemented merely on the basis of uncorroborated suspicions or circumstances no longer current or even based wholly on considerations of political expediency.

In fact, in the past, jurisprudence has underscored that the presence of an alien can disrupt public order even beyond his current behaviour ([59]), because it holds that disturbances to public order can be based solely on the conduct of the alien or based on his presence in the territory of the state when his or her nationality, ideas held, or attitudes demonstrated even in a previous period can cause alarm or "turmoil" in the public opinion, or represent an immediate threat for state security (such as, for example, due to the presence of the alien in zones of military interest) ([60]).

Similar concepts of the grounds of protection of public order - frequently reflecting provisions subsequently repealed, of the consolidated act on public security, emanated during the Fascist regime - appear to be of dubious compatibility with the current constitutional and legislative order.

From a legislative perspective, these concepts appear to be partly outdated when you observe that in the prevailing provisions, threats or danger to national security based on the presence of the alien in zones of military interest - provided such presence is involuntary - might be handled with a less drastic instrument than a ministerial deportation order: the administration has an alternative tool that could be similarly effective without the need to implement an order that would strip the alien of his ability

---

[58] Also, A. PACE, *Problematica delle libertà costituzionali. Parte speciale*, Padua, 1992, pp. 285-286.
[59] Cf. G. BISCOTTINI, *L'ammissione ed il soggiorno dello straniero*, in *Scritti giuridici in memoria di V.E. Orlando*, 1, Padua, 1957, page192.
[60] A. BARBERA, *I principi costituzionali della libertà personale*, Padua, 1967, p. 216.

to reside in the country and would prohibit his legal return to Italy and the other Schengen countries for ten years. Article 5, subsection 6 of Legislative Decree 286/1998 gives the Prefect this discretion in prohibiting residence of aliens in municipalities or localities that involve military defence of the state. This prohibition, which must be communicated to the alien concerned by the local public security authorities or by public notice, is executed with removal of the alien by the police; it is implicit that such removal is not an expulsion from the territory of the state but rather, only a removal from locations subjected to "no residence" regulations.

Furthermore, it is important to observe that the order could be adopted in consideration of the danger to public order or national security not only by behaviours demonstrated by the foreign national (for example, acts of espionage or cooperation with terrorist groups), but also the mere presence of the foreign national on the territory of the state, which could lead to hostile or threatening reactions against the Republic of Italy by other countries or impairment to international relations of the country or other allied nations, which apply the Schengen Agreements.

It is quite clear that the vagueness of the prerequisites of this administrative deportation order can lead to a limitation on the freedom of travel and residence, based on reasons of security and on political reasons, but even in this latter case, it is possible that the legislature has drawn up an unconstitutional measure, since a restrictive measure founded on these grounds is expressly prohibited by Article 16 of the Constitution and, as regards legally resident aliens, this would infringe on Article 2 of Prot. 4 of the European Convention on Civil Rights. In any event, a deportation order would be wholly illegitimate if implemented against any person only by reason of the fact that the individual is a citizen of a certain country, pursuant to enactment of the provision prohibiting collective deportation of foreigners, under Article 4 of of Prot. 4 of the European Convention on Civil Rights.

Beyond the attempts to lay down limits to this type of deportation, there is still the consideration - which absorbs every other - that an administrative deportation order, founded on vague references to public order, is unconstitutional because it violates the legal reservations pursuant to Article 10, subsection 2 of the Italian Constitution. The Ministry of the Interior has the right to adopt the order in relation to facts or conduct that are not even vaguely identified by legislative provisions, but whose contents only the Ministry itself is called to identify and therefore, the administrative authority is not limited to qualifying conduct whose elements are in some way already determined by provisions, but is authorized to identify content that makes it possible to provide.

On the other hand, ministerial deportation orders of foreign nationals founded on mere circumstances that the mere presence of the foreigner in Italy can cause alarm or protests in the Italian public opinion for the type of legitimate association, ideas professed, or attitudes demonstrated (including during legitimate meetings or publications) can scarcely be considered in compliance with the constitutional system which protects the freedom of assembly, association, and manifestation of ideas.

Yet, this is exactly what happened in the recent administrative practices and Italian justice system.

On 17 November 2003, the Ministry of the Interior issued a decree ordering the deportation from Italy of eight non-European Union nationals who were legally resident in Italy for suspicion of serious threats to public order and national security.

Specifically, the Minister of the Interior, Giuseppe Pisanu, ordered the deportation of Fall Mamour, alias Abdul Kadel, alias el Fkih, citizen of Senegal, otherwise known as the "imam of Carmagnola", for "disturbing public order and threats for national security". According to a press release issued by the Ministry of the Interior, the Senegalese had already been reported for his involvement as a collector of suspicious finances and for a long time, in particular after the bloodshed of Italian military police sent to Nassiriya in Iraq, had become a major player in dangerous initiatives, especially in the current context of international terrorism. The action, on the grounds of material discovered in Mamour's home pursuant to a search, stirred scandal because the alien deported professed himself to be a minister of the Islamic cult and was a fairly well-known figure by the public opinion for his ambiguous declarations through which he justified the actions of the most notable members of the international Islamic terrorism group, with whom he stated to be in contact. He was also married to an Italian citizen and has children of Italian citizenship. His family decided to follow him to Senegal at the time of execution of the deportation order. This is the only type of order for which there is no ban on deportation due to parentage or marriage with an Italian citizen, since the residence permit revoked from the Senegalese national had been issued for family reasons to maintain family unity with his Italian daughter. Furthermore, the Ministry also ordered deportation of seven other Islamic fundamentalists. They were suspected of having ties with international terrorism and had been previously arrested and escorted to the Police precincts of Turin: Assam Kalid, Hamrad Nabil, Bouchraa Said, and Boutkayoud Mbarek from Khourjbga (Morocco); Sadraoui Azzeddine from Ouled M'Hamed (Morocco); Lamor Noureddine, from Bani Smir (Morocco); Charef Macine, from Boufark Blida (Algeria). According to a press release issued by the Ministry of the Interior, these individuals were also deported based on reports of proselytizing and promoting and

cooperating with Islamic terrorist groups and several of them allegedly participated in training sessions in paramilitary camps for "mujaheddin"; two of the individuals had relations with militiamen taken prisoner in Afghanistan by the US military. In particular, the name of Noureddine Lamor appears in the investigation coordinated by the prosecuting attorney at the Court of Milan, Mr. Stefano Dambruoso, who, through numerous arrests and convictions, successfully dismantled the Milanese extremist network, which provided support to the "Salafiya Jihadiya Group of Preaching and Combat" and was also responsible for recruiting combatants to send to training camps in Afghanistan. Another of the seven Maghrebs, Said Bouchraa, resides in Reggio Emilia where he was a member of the Mosque in Via Adua, in which he occasionally filled the role of Imam, and the brother of the former president of the Islamic Cultural Center, annexed to the mosque. The Police of Turin referred that the seven individuals had been the focus of investigations by the DIGOS for the past three years.

However, these deportation orders were discussed in the public opinion because shortly prior, the magistrate responsible for overseeing the preliminary investigations at the Court of Turin had recently refused the demand by the prosecuting attorney's office of Turin to issue preventive detention orders against the seven deportees.

What's more, it is important to remember that the Administrative Court of Lazio in November 2004[61] had issued the cancellation of the administrative deportation order issued by the Ministry of the Interior against Fall Mamour because the TAR considered that it was based on inconsistent and uncorroborated claims of threat and danger of the individual and his public statements, which contained contradictory contents.

2.5. Developments in the police investigations and criminal proceedings against foreigners investigated for crimes of terrorism after 2001

Since 2001, the investigations in progress of foreign nationals accused of crimes of terrorism are so frequent that press information estimates that as many as several hundred foreigners present in Italy are involved, but in actual fact, many investigations are founded primarily on evidentiary elements against the foreigners and are unable to reach a conviction.

In this direction, note that the investigation begun in February 2002 on the wake of the intelligence information regarding the risk of several embassies, three Moroccan citizens were arrested, found to be in possession of a detailed map of the area around the British

[61] Cf. TAR Lazio, I ter. section, ruling no. 15336 of 11 November 2004, in *Diritto, immigrazione cittadinanza*, n. 4/2004, pp. 148-152.

Embassy in addition to tools suitable for document forgery. The operation was completed with the arrest of another six Moroccan citizens, who were in possession of maps of the water supply system of Rome and four kilograms of potassium ferrocyanide as well as several blank forms for issue of resident permits. In fact, in the end, the Second Court of Assizes in Rome in April 2004 exonerated the twelve foreign nationals accused of being Islamic militants suspected of having ties with cells close to Al Qaeda. According to the magistrates of the Court of Assizes, the evidence of the charges levelled against the twelve Islamic defendants did not exist and therefore, they were exonerated with the broadest formula. The judgement completely overturned the arguments of the public prosecutor. The only defendant to be sentenced to six months of jail was the Moroccan, Faycal Carifi, who despite having only one leg, was accused of receiving a stolen motor scooter. All the defendants spent nearly a year and half in preventive detention. The magistrate brought together the various members of the investigation that involved, respectively, five Moroccans accused of possession of ferrocyanide, three non-EU citizens accused of ties with the Al Harmini mosque in via Gioberti in Rome, and four Moroccans accused of possession of false documents: all were accused by the public prosecutors of belonging to an organization with terrorist intentions, whose leader was allegedly Pakistani citizen, Naseer Ahmad. Public prosecutors, Franco Ionta and Erminio Amelio, had sought an eight-year jail sentence against Hamad. However, during the preliminary inquiries before the trial, the circumstances emerged that eliminated the accusations against the defendants of terrorist intentions and led to exoneration of the defendants of all charges.

On the other hand, reports on the state of security sent by the Ministry of the Interior to Parliament between 2002 and 2004 illustrate the comprehensive and very wide-reaching picture of investigative actions carried out in Italy against aliens involved in crimes of terrorism, even if the trial results of the investigations could disprove the accusations.

In any case, in 2001-2002, in response to a rise in the threat levels, the Ministry of the Interior noticed the need to lay down new counter strategies that would provide an even more effective response to the challenges posed by the international terrorist centres. An aggressive impetus was provided to international cooperation of preventive and investigative police in the area of the European Union and other bilateral and multilateral forums. From a strictly operative perspective, cooperation with the services of specialized police forces of European partners, the United States and other states of the international anti-terror coalition was further enhanced, with a view to developing joint investigative activities such as the ones currently in progress. In the picture of Italian and Spanish cooperation, a new team was founded with a view to ensuring timely reference in relation to investigative needs emerging in relation to the incendiary anarchical and insurrectional

documents sent on Spanish terror instilled by the "Cell against Capital's Jail and its Jailers and Cells".

Substantial efforts have been made on the fight against sponsorship of terrorism between 2001 and 2002. The work done by the Financial Security Committee set up at the Ministry of Economics and Finance and the information gathered by police have made it possible to "freeze" the assets and cash belonging to sixty-seven suspects.

Elsewhere, in 2002, the police wrapped up several investigations against Islamic terrorist networks operating in Italy, which have led to the arrest of fifty-five individuals (some of whom have already been convicted) suspected of involvement or support, logistical assistance, and in some cases, direct participation in such groups. In September 2002, the police in Gela arrested 15 Pakistani citizens in possession of forged documents discovered on board the "Sara" mercantile ship, reported by international intelligence sources as a vehicle belonging to Al Qaeda. Investigations were initiated on an international scale against the suspects, who are still being held in Italy. Another important success was the capture on 28 September 2002 of the Tunisian citizen, *Baazaoui Mondher Ben Mohsen*, a key player in Islamic terrorist activities. Finally, also quite important was the operation ended last October with the issue of a preventative detention order by the investigating magistrate in Milan against Maghreb citizens considered members of the radical Islamist cell *Hamza il libico,* located in the Lombard capital and formed mainly of Tunisians supplying forged documents.

Between 2003 and 2004, reports for investigations continued to grow.

On 18 November 2003, as part of the inquiry that led to the administrative deportation orders by reason of protection of public order and national security issued by the Ministry of the Interior (as illustrated in paragraph 2.4.2), 23 house search ordinances were executed and the public prosecutor's office of Turin issued 11 writs of summons for involvement in international terrorism and forged documents.

Also as part of the preventive initiatives, on 2 April 2003, the police, working with the Carabinieri Corps, set up a wide-reaching operation against more than 100 non-European citizens resident in Italy, whose names emerged in the course of investigations or information in connection with radical Islamist activities. Some 70 house search ordinances have been executed and 90 foreign nationals were brought in for questioning at the respective police headquarters.

Forty-six individuals were arrested during investigations conducted by the police in Italy between July 2003 and June 2004 as part of the inquiry on international terrorism. The

action to counteract Islamist organizations focused on breaking up the specialized logistics structures supporting radical groups or members originating from their home countries and identifying and dismantling several cells operating in Italy, nearly always composed of persons trained ideologically and militarily in the training camps in Afghanistan, whose primary objective was to recruit and select volunteers to dispatch to areas of inter-ethnic conflict, such as Iraq or Chechnya. Specifically, the Ministry of the Interior reported several operations:

- 18 October 2003 - arrest of three Moroccan citizens suspected of involvement in the Casablanca bombing on 16 May 2003 and wanted in Morocco for the crimes of setting up terrorist organizations, contract execution of terrorist acts, and possession and use of explosives.

- 28 October 2003 – arrest of two Algerian citizens, suspected militants of the Islamic fundamentalist group Takfir Wa'l Hijra and charged with criminal conspiracy for the purposes of promoting illegal immigration, counterfeiting and receiving forged documents, along with other crimes.

- 28 November 2003 – Arrest of six members of the so-called Mera'i Group suspected of criminal conspiracy for the purposes of international terrorism. Preventive detention orders in Italian jails were executed at the end of the second phase of the investigations which in March and April 2003 had led to the arrest in Milan of five Islamists suspected of belonging to a cell actively involved in recruiting and dispatching mujaheddin in training camps managed by the Ansar Al Islam terrorist organization.

- 24 February 2004 – arrest of four Moroccan citizens for their involvement in international terrorism, suspected of being members of a radical Islamic structure whose primary objective was to recruit and select volunteers to dispatch to areas of inter-ethnic and religious conflict. The arrests took place at the end of a lengthy investigative activity, conducted on a plot formulated by Islamic fundamentalist groups to carry out against the Duomo in Cremona and the underground train system in Milan. The criminal proceedings were still in progress as of June 2005.

- 1 April 2004 – Arrest of five alleged members of the Turkish terrorist group DHKP-C. The preventive detention orders in Italian jails were executed by the D.I.G.O.S. of the Police headquarters in Perugia and by the R.O.S. of the Carabinieri against three Italians (belonging to the Anti-imperialist movement) and two Turkish nationals, for the case pursuant to Article 270-bis Penal Code. Concurrently, another five

ordinances were issued against as many Turkish nationals resident abroad, suspected of the same crime.

- 9 May 2004 - Arrest of five alleged fundamentalist Islamist terrorists, four Tunisians and one Algerians, resident in the province of Florence and Siena and members of the Sorgane (FI) mosque, considered members of a Salafiya structure responsible for indoctrination and recruitment of combatants to dispatch to Iraq through Syria. At the same time, several searches were executed at the homes of other aliens, alleged to have ties with the aforementioned group, during which documents and other computerized material - in Arab - was seized.

- 7 June 2004 - Arrest of two Islamic extremists investigated for allegations of belonging to an international terrorism organization, with other members resident in Belgium, France and Spain. In particular, one of them, presumed to be a member of the Egyptian terror group, Al Jihad, was believed to be one of the planners of the 11 March terrorist attack in Madrid. At the same time in Belgium, police arrested 13 individuals of primarily Maghreb origin.

The results acquired in the most recent investigations conducted in Italy would seem to confirm the theory that there is a wide-reaching logistical network which has completely reorganized the mujaheddin movement, transforming it from an assembly of individual groups operating without a unified combat strategy into an authentic international organization fighting for the Jihad.

Investigations conducted in Milan and Parma between April and November 2003 revealed the existence of an association of Islamic extremists, with connections in Syria, particularly active in recruiting and dispatching mujaheddin into areas of inter-ethnic or religious conflict such as Afghanistan and north-eastern Iraq, where there were training camps for unconventional weapons, controlled by the fundamentalist organization Ansar Al Islam, closely connected with Al Qaeda. The cell, with branches in other cities in Northern Italy and Germany, comprised mainly of individuals trained ideologically and militarily in the training camps in Afghanistan, were responsible for logistical support of the movement, through procurement of forged identification and dispatch of large sums of money to combatants, while two Kurdish Iraqi citizens, arrested during the operation, were found to be involved in promoting illegal immigration of their countryman into Italy.

Also worth noting was that two of the individuals arrested on 4 April 2003 for conspiracy in international terrorism, formerly resident in Germany, were found to have had contact with members of the so-called Group of Hamburg, headed up by Mohamed Atta, operating coordinator of the 11 September attacks.

One specific threat indicator in Italy was the audio-message broadcast on 18 October 2003 and attributed to Osama Bin Laden, in which the Saudi sheik -who had cited our country on 12 November 2002 in a similar message - claims "the right to strike all countries that cooperate in military operations with the Americans", among which Italy.

It follows that even Italy, like the other Western allied partners, is believed to be exposed to the risk of Islamic terrorist acts, by reason of the certified presence in our country of fundamentalist organizations already operating in Afghanistan and Iraq and the military commitment to re-establish law and order in these two countries. This scenario was the backdrop to the 12 November 2003 attack against the structure hosting the command of the Italian forces stationed in Nasiriyah (Iraq) that led to the death of 19 Italian citizens, including two civilians.

At the same time, *the investigative activity* conducted in Italy has permitted completion of several operations, while intensive technical work of prevention is also being done. More specifically:

- Milan-Parma 31 March/28 November 2003 - the arrests of the so-called Mera'i Group confirmed existence of a wide-reaching logistics network that completely reorganized the movement of the cross-border mujaheddin made up of foreigners of several ethnic groups and in contact with the similar groups operating in Europe (especially Belgium, Great Britain, France, Germany, and Spain) and on several continents. The 14 restrictive orders issued by the Judicial Authorities of Milan at the end of the two different phases of the operation (April and November 2003) involved six foreign nationals, among which for the first time, individuals of Kurdish Iraqi and Somali citizenships, gravitating around the places of Islamic worship in Lombardy and Emilia;

- Milan, 1 April 2003 - in the scope of the BAZAR investigation conducted by the Carabinieri Corps of the military, three preventive detention orders were executed against three Tunisian citizens for crimes of involvement in international terrorism;

- on 18 October 2003, police agents in Cremona arrested the Imam of the Florence mosque, a Moroccan originally from Casablanca, wanted in Morocco for crimes in connection with terrorist involvement, contract execution of terrorist acts, possession and use of explosives. The alien was suspected by the Rabat authorities of belonging to the Salafiya Jihadiya Islamic fundamentalist group, whose sympathizers are alleged to have connection with the engineering and execution of the Casablanca bombings the previous May. This individual was being

monitored for the radical tone of his preaching in the mosques of Florence and Cremona, and had already been investigated in a criminal trial in connection with a plot to attack the Duomo of Cremona and the underground train system in Milan, for which an order for his arrest was issued as a suspect in the crime, later reduced to preventive detention order. On the same day, the state police in Varese made the arrest for extradition of a Moroccan Islamic extremist, a 33-year-old man originally from Casablanca, wanted in Morocco for the crimes of founding a terrorist group, contract execution of terrorist acts, collection of finances to be used to sponsor terrorism, and use and fabrication of forged passports. This individual, resident in Italy and already investigated in the 1990s, was suspected of belonging to the Moroccan Islamic Combat Group, an armed organization set up in 1993/1994 by the veterans of the war in Afghanistan which intended to overturn the institutions of the Kingdom of Morocco. Simultaneously and as part of the same investigation, another Moroccan citizen was arrested in Florence, also wanted internationally;

- in Ponte Chiasso (CO), on 19 August 2003, following identification in Switzerland and the subsequent escort to the border by the Swiss authorities, the Carabinieri Corps of the military arrested a Tunisian fugitive already convicted by the Court of Bologna for "criminal conspiracy" as part of the "Winds of War" investigation;

- on 28 October 2003, during the ongoing investigations of a cell of Algerian extremists, militants of the Islamic fundamentalist Takfir Wa'l Hijra, suspected of creating a logistical support structure for their countrymen of the same group, state police agents executed three orders of preventive detention issued by the judiciary authorities of Cassino against two Algerians and one Italian for crimes of criminal conspiracy to promote illegal immigration, counterfeiting, and receiving false documents, with the assistance of others. One of the suspects, an Algerian citizen, previously resident in Frosinone and subsequently domiciled in France, and his brother were suspected by the Public Prosecutor's Office of Paris of sponsoring a group of Salafiya Jihadiya terrorists operating in Algeria through the proceeds made from illegal trade of counterfeit goods. The second Algerian was detained because he had been previously arrested on the force of an international arrest warrant issued by the Algerian authorities for his involvement in terrorist associations while the Italian citizen, resident in Cassino, had specific previous charges against him and was suspected of having provided false statements of employment for 20 non-European nationals for the purposes of regularizing their status in the country;

- in Turin and in seven other provincial capitals, on 18 November 2003, police agents executed 23 house search ordinances with the connected writs of summons for suspected involvement in international terrorism and forged documents, as part of the investigations of a group of Maghrebs gravitating in the area of orthodox Islam, suspected of having recruited and dispatched young mujaheddin to the Al Qaeda training camps in Afghanistan. During the operation, notice of deportation orders was served on six Moroccans and one Algerian for compulsory escort to the border for serious disturbance of the public order and threat to state security;

- in Milan, on 28 November 2003, the Carabinieri Corps of the military arrested and detained a Moroccan citizen on the restrictive order issued by the prosecutor's office of Milan as part of the "Bazar" investigations.

2. List of participants

Table 4. List of participants

Partner number	Work package	Organisation Name	ELISE Contact Persons	Department
1	WP3	Centre for European Policy Studies (CEPS)	Elspeth Guild Thierry Balzacq Sergio Carrera	Justice and Home Affairs
2	WP5	National Capodistrian University of Athens	Nicholas Scandamis	Department of Law
3	WP1	Sciences-Po, Institute d'études politiques	Didier Bigo	Department of Political Science
4	WP4	University of Nijmegen	Elspeth Guild	Centre for Migration Law
5	WP2	University of Genoa	Salvatore Palidda	Faculty of Educational Sciences
6	WP6	Keele University	Robert J. Walker	School of Politics
7	WP6	King's College London	Vivienne Jabri	London Centre of International Relations

European Commission

EUR 23129 — EU RESEARCH ON SOCIAL SCIENCES AND HUMANITIES — European Liberty and Security: Security Issues, Social Cohesion and Institutional Development of the European Union - ELISE

Luxembourg: Office for Official Publications of the European Communities

2007 — 164 pp. — 21,0 x 29,7 cm

ISBN 978-92-79-07578-0

How to obtain EU publications

Our priced publications are available from EU Bookshop (http://bookshop.europa.eu/), where you can place an order with the sales agent of your choice.

The Publications Office has a worldwide network of sales agents. You can obtain their contact details by sending a fax to (352) 29 29-42758.

KI-NA-23129-EN-N

Publications Office
Publications.europa.eu

ISBN 978-92-79-07578-0