

Control or rescue at sea? Aims and limits of border surveillance technologies in the Mediterranean Sea

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The matter of boat migrants crossing the Mediterranean Sea, seeking to reach Europe, is interchangeably defined as a ‘security issue’, requiring stricter border controls, and as a humanitarian issue with corresponding rescue and protection requirements. This paper seeks to understand what role various surveillance technologies, such as radar, satellites, and unmanned aerial vehicles, can play in this respect (legally and technically), in comparison to the role that they are assigned (that is, political expectations). To unravel what surveillance technologies can and cannot do vis-à-vis the aims of control and rescue, there is a need to comprehend what information can be collected and what information is needed to fulfil these objectives. The paper contends that there is a mismatch between the information sought to ‘control’ borders, but which cannot be gathered effectively by or processed using surveillance technologies, and the valuable information needed to perform rescue operations, which these surveillance technologies can supply.

Keywords: border control, humanitarian, Mediterranean, migrants, refugees, search and rescue, surveillance technologies

Introduction

The surge in boat migrants travelling across the Mediterranean Sea since 2013 has spurred renewed debate about how to respond to the challenge of people drowning while seeking to reach Europe. It is seen both as a *humanitarian* challenge given the human lives lost at sea, and, for some, as a *security* challenge, given the number of paperless people arriving on the continent, and the dilemma of how to receive them (or not to receive them). Different stakeholders emphasise one or the other as the main question at hand. Notwithstanding the need for a broader reflection on the asylum and immigration policies of the European Union (EU) in general, and the need to apply the 1951 Convention Relating to the Status of Refugees (Refugee Convention), granting protection to refugees in particular, the issue of boat migrants has been approached via different attempts to reinforce control of the EU’s external borders. Central in this regard has been the development and deployment of

sophisticated surveillance technologies, to increase, in Frontex¹ jargon, ‘situational awareness’ at sea. This paper takes a closer look at the intentions of these surveillance technologies, and critically reviews their limitations, in the specific legal and political context of migration across the Mediterranean Sea.

The phenomena of migrants crossing the Mediterranean Sea is not new, and nor is the EU’s willingness to stem these flows and to seek to control better its external frontiers. The first policy document on the establishment of the EU Border Surveillance (EUROSUR) system was produced in 2008 (European Commission, 2008a). Its legal framework was adopted in October 2013 (Jumbert, 2013), following a long debate between the EU Council and the European Parliament on whether or not to make the rescue of migrants at sea a specific aim. The system itself was launched on 1 December 2013, establishing a mechanism for information exchange among EU member states, using a network of national coordination centres (NCCs). With Frontex as a central coordinator, maintaining and sharing national and European situational pictures, EUROSUR also functions as a hub, facilitating ‘access to state of the art technologies’—Frontex shares information collected by satellites and other surveillance technologies.

The EU maritime border has been subjected to increasing technological surveillance in recent years, with the help of satellite imagery, land-based and airborne radars and cameras, and drones for search and rescue (SAR) missions.² The objectives behind this push towards reinforced surveillance and control of the EU’s external borders, and behind EUROSUR in particular, are threefold: (i) to combat cross-border crime (such as smuggling and trafficking); (ii) to prevent undetected entries of irregular migrants; and (iii) to reduce the number of migrant fatalities at sea (Jumbert, 2013). The different efforts to respond to the recent rise in migrant flows, however, have different emphases: Operation Mare Nostrum, established by the Italian Navy in October 2013, branded itself principally as a humanitarian endeavour (Ministero Della Difesa, n.d.), focusing on SAR, whereas the Frontex-led Joint Operation Triton, which replaced Operation Mare Nostrum in November 2014, only has a mandate to conduct border control activities.³ As this paper will show, though, even the

¹ Frontex is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, and was established by European Council Regulation (EC) 2007/2004 on 26 October 2004.

² Two Schiebel Camcopter S-100 unmanned aerial vehicles were used first in Operation Mare Nostrum in 2013, and then in the joint Médecins Sans Frontières (MSF) and Migrant Offshore Aid Station (MOAS) rescue operation in 2015.

³ Frontex itself underlined that Operation Triton would not have the SAR capacities of Operation Mare Nostrum (ECRE, 2014).

mission concentrating on SAR contributed indirectly to increased border control, and the mission that engaged mainly in border control has an obligation to conduct SAR.

Aerial surveillance technologies often are discussed in the framework of ‘dual technologies’, or the transfer of military technologies to civilian usage (Boucher, 2014; Sandvik, 2015). This study addresses a specific subset of the question of dual application, namely the extent to which the same surveillance technologies are used for *humanitarian* and *security* purposes, both to provide protection *from* and *to* migrants at sea. This duality is rooted even in the practices of border guards, as demonstrated by Aas and Gundhus (2015), who make reference to Europe’s ‘humanitarian borderland’ and the paradoxes of the coexistence between the securitisation of the EU’s external borders and the growing presence of humanitarian references and ideals in border policing practices.

The emerging employment of notably surveillance technologies in the humanitarian field have been investigated in recent scholarship, revealing how ‘humanitarian’ uses bestow a broader legitimacy on these technologies (Karlsrud and Rosén, 2013; Sandvik and Lohne, 2014; Sandvik et al., 2014). In the context of the Mediterranean, the expectation that the same surveillance technologies will help to ‘secure’ the border (by keeping certain ‘unwanted’ elements outside) and make it safer for migrants at sea not only amounts to dual use in the sense of giving the technology a ‘second life’, but also in the sense that the same tools simultaneously have different purposes. Central in conferring humanitarian legitimacy on the deployment of surveillance technologies at sea is the legal obligation of any vessel to extend SAR to people in distress (UNCLOS, 1982, Art. 98 (1)). However, this has increasingly become a security concern, given the widespread perception that active pursuit of the SAR obligation (in)directly makes it easier for migrants to cross the sea, and supposedly creates an incentive for triggering ‘distress’ situations and thus encouraging more people to embark on the risky journey.

Drones, which have been used mostly in SAR missions but are now emerging as a border surveillance tool, arguably ‘look more like a solution looking for a problem than vice versa’ (Hayes, Jones, and Töpfer, 2014, p. 9). Hence, the central points investigated in this paper are: what is the ‘problem’ that these maritime surveillance technologies are supposed to solve, and what are the possibilities and the limitations inherent both in the technologies and in the specific legal and political context of border control in the Mediterranean region? The paper explores the aims, deployment, and scope of these surveillance technologies to assess

the gap between the functions that they can and cannot fill, and the objectives of protection and control accorded to them.⁴

The study draws on insights from constructivism and critical security studies to illustrate how securitising discourses may allow particular issues to be lifted from the political realm and placed in the sphere of exceptionality, justifying the deployment of certain security responses, mechanisms, and tools (Wæver, 1993; Buzan, Wæver, and de Wilde, 1998). This securitisation of the European border and so-called irregular migration (Huysmans, 2000, 2006) also seeks to create compelling narratives justifying the need for sophisticated surveillance systems to solve the defined ‘problem’ (Crang and Graham, 2007; Monahan and Mokos, 2013). Yet, the deployment is sometimes more important in itself, in providing a *sense* of security, because something visible is being done, rather than actually challenging or changing the root causes of the situation (Jumbert 2010; Triandafyllidou and Ambrosini, 2011). In other words, there is a co-constitutive relationship between the technologies and the social and political environment in which they are deployed (Adey, Whitehead, and Williams, 2011; Gregory, 2011; Boyd and Crawford, 2012), and the meaning and the value one confers on the technologies is just as important as their actual functionalities. More specifically, drawing on key concepts from the field of surveillance studies (Lyon, 2003), surveillance as a form of social sorting is not easily compatible, in the maritime setting, with the goal of sorting people at the external border. As a detecting and sorting mechanism, it is more easily compatible with the SAR obligation, by enabling the rapid location of vessels in distress. Focusing specifically on the transition from Operation Mare Nostrum to Joint Operation Triton (coordinated by Frontex), the paper argues that surveillance does not equal actual control. Surveillance could be used to improve SAR efforts, yet it is employed principally for border control purposes, albeit limited in efficiency (in terms of stopping, sorting, or reducing migration flows). This seems to provide a *sense* of control and of something being done to respond to a seemingly uncontrollable situation.

The paper starts by assessing the specificities of migration at sea and the surveillance technologies available, including their scope and legal and technical limitations. Next it examines two related claims pertaining to how (i) SAR operations function as ‘pull factors’ for migration across the Mediterranean Sea and to the fact that (ii) border surveillance will eventually prevent and reduce migrant flows. The paper contends that neither claim holds

⁴ Some information on background research has been removed to ensure anonymity. This paper draws on findings relating to this work, but also builds on new and additional research. Some insights into the functioning of surveillance technologies is based on observations.

water, but that they affect the formulation of new policies and operations in the Mediterranean so as to keep the SAR component to a strict minimum, while maintaining and reinforcing the border control component. This paradox seems to be explained best by political–security beliefs concerning the need to uphold the demarcation of the EU external border, as a manifestation of sovereignty and of de facto differentiation between the inside and the outside of Europe.

Migrants at sea: particular vulnerabilities and specific rights to protection

According to the International Organization for Migration (Brian and Laczko, 2014), more than 14,600 migrants lost their lives in perilous attempts to cross the Mediterranean Sea between 1993 and 2012. There are three aspects that make migration at sea a particular concern. First, while there are risks associated with migrating in general and with almost any border crossing, migrating by sea is associated with particular hazards. The risk of drowning and vulnerability to weather are even more pressing issue for inexperienced seafarers in unseaworthy vessels, frequently deprived of lifejackets and with little, if any, swimming ability. Illustrative of this is how climate affects migration flows across the Mediterranean, which reportedly increase in the second quarter of every year with the beginning of spring and a calmer sea (Frenzen, 2014; Warnes, 2014). A spokesperson for the Italian Red Cross in Lampedusa told IRIN News (2011) that the numbers ‘swell on days when the sea is calm. When there is a strong cross-wind, there are usually no boats at all’. This also shows that risks at sea do affect migration, contrary to the claims that the SAR obligation creates an incentive to travel in less and less seaworthy vessels to ‘trigger’ a situation of distress.

The second particularity of the sea, illustrating an underlying awareness of the special vulnerability of human beings at sea, is that it comes with a specific legal obligation, under the 1982 United Nations Convention on the Law of the Sea (UNCLOS): to bring search and rescue if one comes across another vessel in distress (Article 98). Known as the SAR obligation, this applies to anyone at sea, irrespective of the jurisdictional maritime zone in which the boat finds itself, the nationality of the people on board, and the circumstances in which they are found. The obligation to provide assistance to save life at sea is further detailed in two conventions adopted under the auspices of the International Maritime Organization (IMO): the 1974 Convention on Safety of Life at Sea (SOLAS Convention); and the 1979 Search and Rescue Convention (SAR Convention). Further obligations can be found in the 1989 International Convention on Salvage, also adopted within the framework of

the IMO.⁵ On the basis of the SAR Convention, the world's oceans have been divided into 13 search and rescue areas, in turn divided into search and rescue regions, under the responsibility of individual countries. These regions do not correspond to the maritime zones, and do not affect in any way the delimitation of state boundaries. The EU as such has no competence in the area of SAR and therefore is not party to any of the aforementioned conventions, but the masters of member states' ships deployed in the context of joint patrols coordinated by Frontex are covered by their obligations (Jumbert and Rijpma, 2012). A fulfilled rescue operation includes the disembarkation of the rescued at a 'safe harbour'. This responsibility also puts any border control or border surveillance effort at sea in a particular situation, as information gathered, for border control purposes, can, and often will, contain information on vessels in distress (Jumbert and Rijpma, 2012). Hence, increased border control is likely also to mean increased needs for SAR.

Third, one of the main specificities of the maritime *border* lies in the fact that there are no official border checks at sea, so there are no legitimate points at which to cross at sea (Lutterbeck, 2006; Monzini, 2007; Wolff, 2008; Jumbert, 2012). Similarly, while fences can be erected along a land border to keep migrants out, this is impossible at sea (Carling, 2007b). Yet, once a migrant finds himself or herself within the territorial waters of a state that he or she is trying to reach, or even arriving on its shores, then he or she has technically already crossed the border. Whereas one can legitimately ask for permission to cross a border at a border checkpoint on land, this possibility does not exist at sea. The result is that, de facto, migrants are taken as 'illegal', not only from the moment they touch the shores of an EU member state but also even from the point at which they embark on a vessel that sets its course towards Europe. This extra-territorialisation of EU border control and, as a result, the criminalisation of migration, has been widely depicted as contradicting fundamental rights (Bigo and Guild, 2005; Den Hertog, 2013). It also overshadows the fact that arrival by sea is one of the points of entry stipulated by the EU itself, alongside entering by air or land (European Commission, EU Immigration Portal, 2016).

A central point in discussions of migration flows across the Mediterranean Sea is whether or not those arriving are 'refugees', with a right to international protection, or what is frequently referred to as 'economic migrants' or merely 'migrants', a category emerging to depict 'all of the others', those who do not fall under the definition of a refugee—although in

⁵ This convention, applying in principle only to private parties, standardises the rules related to salvage and the compensation thereof.

practice, these distinctions are not only hard to make, but also create a false sense of ‘either or’ (Carling, 2015). The 1951 UN Refugee Convention prevents potential refugees from being returned to a place where they have a well-founded fear of being persecuted, for reasons of nationality, membership of a particular social group, political opinion, race, or religion. This obligation not to return is known as the principle of non-refoulement, and applies when European border controls are conducted outside of European borders. However, a person must be physically present in the country where he or she is seeking to apply for asylum. According to the UN Refugee Convention, ‘illegal arrival’ in a country should not affect an asylum application, and for most people fleeing their native countries there is no other means of arriving in Europe than the ‘illegal’ way. Migrants who attempt to make their way into Europe generally are branded as ‘illegal immigrants’, because they lack papers or a visa that would grant them right of entry. There is nothing illegal, though, about the act of embarking on a boat headed for Europe: as stipulated in the 1948 Universal Declaration of Human Rights, everyone has the right to *leave* their own country (Article 13, Paragraph 2). All countries can decide for themselves who is allowed to cross their borders, but referring to migration as illegal even before the migrants have reached Europe and had a chance to present their case seems misguided. The term ‘illegal immigrant’ is principally used in political and public discourses, to refer to the ‘illegal residency’ or ‘illegal labour’ of these migrants (Undocumented Worker Transitions, 2008). Suggesting that the migrants themselves are illegal has increasingly become a way of depriving them of their humanity and basic human rights. ‘Irregular’, as well as a number of other similar terms, have been proposed as alternatives to refer to migration that does not follow a regular path (authorised prior to embarking on the journey), but in practice they come with many of the same connotations as ‘illegal’.

Surveillance technologies at sea: from scope of deployment to legal and technical limitations

New surveillance assets and systems of information exchange have been and currently are being developed specifically to enable typical migrant boats to be detected more easily. Illustrative of this is how different EU-funded research and development projects in the field of border security, including PERSEUS, SEABILLA, and I2C, are all, in different ways, set up to develop new surveillance tools and solutions expressly to spot small fishing vessels or rubber boats (Hayes and Vermeulen, 2012), which traditional surveillance mechanisms based on radars or satellites usually find too hard to see.

Maritime surveillance: equipment, vision, and capabilities

Currently available surveillance tools can detect the movement, origin, size, and speed of a vessel. Demonstrations of recent state-of-the-art technology reveal that some of the maritime patrolling airplanes are capable of producing rather clear real-time images, down to the level of seeing the movement of people on board a vessel, yet too indistinct to distinguish facial or physical characteristics.⁶ As part of the EUROSUR framework, neighbouring EU member states can now share ‘national situational pictures’, through their NCCs, to update each other on the general state of affairs, but also to share punctual alerts, such as on a vessel in distress or a vessel heading in the direction of another member state (Frontex, n.d.). Among the indicators, several may highlight a suspicion of a migrant vessel: is the port of origin a typical point of departure for migrants bound for Europe? In which direction is it heading? The size and speed of the vessel are also indicators that may reinforce or refute a presumption of having detected a vessel carrying unauthorised migrants, but only insofar as it fits with a pre-defined (stereo)typical case of migrants crossing the sea. As Packer (2006, p. 392) notes, ‘identities become risk assessment algorithms of mobilities. It is not who is a threat, but what vehicular movement can be used to predict a threat’. This in turn leads to the idea that this movement can be put under ‘total surveillance and remote control’ (Amoore, Marmura, and Salter, 2008, p. 97). Once a vessel is located, if it does not report to any Automatic Identification System (AIS), as all international vessels of more than 300 gross tonnage and all passenger ships regardless of size are compelled to do (SOLAS Convention, Chapter IV), this will add to suspicion. Such radio communication equipment is especially designed to improve the chance of rescue in the event of an accident, including satellite ‘emergency position indicating radio beacons’ (EPIRBs) and ‘search and rescue transponders’ (SARTs) (SOLAS Convention, Chapter IV). The unseaworthy vessels used to transport migrants generally do not have operating AIS installed, in part because they seek to cross the sea, through territorial waters, without prior authorisation. However, *confirming* that a vessel is carrying unauthorised migrants can occur only through a close-up and real-life encounter with the vessel. And strictly speaking, one will probably know first whether the ship is in need of assistance, and then whether it contains migrants seeking to reach Europe.

Operation Mare Nostrum was presented primarily as a SAR operation, launched following the sinking of a boat carrying more than 500 migrants on 3 October 2013 (BBC

⁶ PERSEUS eastern campaign demonstration event, Piraeus, Athens, 15 October 2014.

News, 2013). Besides the scale of the tragedy (in excess of 360 lives lost), what also shocked European audiences was that it sank so close to European shores, less than one kilometre off the coast of the Italian island of Lampedusa (Heller and Jones, 2014). The boat had caught fire when someone on board sought to attract the attention of coastguards, as it was early in the morning and still dark (Yardley and Povoledo, 2013). In itself, this aspect of the tragedy was used implicitly to underline the need for improved surveillance efforts. The objectives and mandate of Mare Nostrum included more broadly: ‘to improve maritime security, patrol sea lanes, combat illegal activities, especially human trafficking, and tackle the Mediterranean humanitarian emergency in the Sicily Straits’ (Ministero Della Difesa, n.d.). The operation had at its disposal one amphibious vessel (with command and control features and medical facilities on board), one to two frigates (also with medical care capabilities), helicopters ready to be deployed to Catania or Lampedusa, a marine brigade team in charge of inspecting the vessels and ensuring the safety of migrants, a coastal radar network and Italian Navy AIS, different maritime aircraft, including one with forward looking infrared (FLIR) equipment, two unmanned aerial vehicles (UAVs), or camcopters, two submarines, and a logistic site for support in Lampedusa (Ministero Della Difesa, n.d.). On average, five Italian Navy ships and their air units and as many as 900 military personnel have been deployed at any given time. In other words, it became a robustly equipped operation, costing up to EUR 9.5 million per month, more than six times the initially planned amount (*The Economist*, 2014). The operation rescued more than 150,000 people, and apprehended 330 alleged smugglers and seized five ‘mother ships’ in the process. The latter term refers to the larger vessels that sail from the North African coast, before disembarking the migrants on to smaller vessels on the high seas, so that the smugglers avoid arrest, while probably counting on the migrants being rescued by European SAR agencies or border guards. Although mainly focused on SAR, Mare Nostrum also allowed the Italian Navy to carry out extra-territorial patrols, detaining alleged smugglers among the rescued migrants.

Joint Operation Triton took over from Mare Nostrum on 1 November 2014, under the coordination of Frontex. In the first few months, it deployed three open sea patrol vessels, two coastal patrol vessels, two coastal patrol boats, two aircraft, and one helicopter in the central Mediterranean (Frontex, 2014a). Its operational area covered the territorial waters of Italy, as well as parts of the SAR regions of Italy and Malta, but this was much smaller than that of its predecessor. Frontex Executive Director Gil Arias Fernandez said at this time: ‘I would like to underline that Operation Triton focuses on border control and surveillance. Having said that saving lives will remain an absolute priority for Frontex’ (Frontex, 2014a).

Following a sharp increase in the number of migrants seeking to cross the Mediterranean Sea, but also in the number of fatalities at sea in the first two or three weeks of April 2015, Frontex expanded its operation in the following month. During the ‘peak summer season’, as many as 12 patrol boats, 9 debriefing and 6 screening teams, 6 offshore patrol vessels, 3 airplanes, and 2 helicopters were to be deployed, and the patrolling area was expanded to include areas up to 138 nautical miles south of Sicily (Frontex, 2015b). The new Frontex Executive Director Fabrice Leggeri stated: ‘[w]e have dramatically increased the deployment levels in the Central Mediterranean to support the Italian authorities in controlling its sea borders and in saving lives, too many of which have already been tragically lost this year’ (Frontex, 2015b). An important component of this extended mission is the debriefing teams, gathering intelligence on so-called smuggling networks in Libya and other countries of transit, in order to dismantle them.

Legal and technical limitations, and the case of Jamaa Hirsi and Others vs. Italy

Generally speaking, there are no international conventions or treaties dealing with and regulating border surveillance as such, and especially surveillance beyond national borders and in international waters. Each state is sovereign up to its own border, and can organise the surveillance of its border as it wishes and in accordance with its own national regulations. Within the framework of the EU, it is the Schengen Borders Code (SBC) that regulates the conduct of surveillance at the border. Twelve nautical miles beyond the coastline, surveillance has to be carried out within the framework of relevant international conventions and treaties. Then, if surveillance occurs in the territorial waters of third states, this amounts to surveillance of their sovereign territory and should be performed within the framework of agreements with the concerned third states (and still in accordance with international law and regulations).⁷ Independent of which part of the sea is put under watch, and of the existence or not of return agreements with third countries, the obligation of non-refoulement in practice makes it impossible for any border guard to stop a migrant vessel and to prevent it from entering or returning it to its port of origin, because he/she will not have sufficient information to hand to judge whether those on board have a right to international protection.

Operation Mare Nostrum contrasts with Italy’s practice of conducting ‘push-back operations’ just a few years earlier (Human Rights Watch, 2012). Starting in May 2009 and continuing until the beginning of the ‘Arab Spring’ in 2011, Italian coast guards would

⁷ cf. Schengen Border Code, Articles 3.b and 13.1 on pre-border control [OK?].

forcibly return migrants intercepted at sea to Libya under the umbrella of a ‘Friendship Pact’ between Italy and Libya, signed in August 2008 (Human Rights Watch, 2009). The practice was firmly denounced by human rights organisations, and in February 2012, the European Court of Human Rights condemned Italy in the case of *Hirsi and Others vs. Italy* (ECRE, 2012). The case was filed by a group of Eritrean and Somali migrants, who had been returned to Libya after being intercepted in international waters.⁸ In particular, they claimed a violation of Article 3 of the European Convention on Human Rights, on the prohibition of torture and inhuman and degrading treatment, owing to the way in which they were treated when intercepted, the fact that they were taken back to Libya, and the claim that they were being chain-refouled (Jumbert and Rijpma, 2012). Libya has not ratified the Geneva Convention, does not have a proper system to process asylum applications, and has become known over the years for its bad treatment of migrants (Human Rights Watch, 2006). Italy was condemned for having breached the principle of non-refoulement, as well as for violations of the European Charter of Fundamental Rights’ prohibition of inhuman and degrading treatment (on two accounts) and the prohibition of collective expulsions (European Court of Human Rights, 2012). The extra-territorial character of the operation, within the framework of a cooperation agreement between an EU member state and a third country, and the fact that the case was filed by non-European citizens were seen as likely to mark future practices and jurisdiction in the field of maritime border management (Jumbert and Rijpma, 2012). Indeed, even though it was filed by non-European citizens, and that the operation occurred outside of Italian territorial waters, the court showed that the migrants were under the jurisdiction of Italian authorities.

As well as these legal limitations, there are also technical limitations as to what surveillance technologies can do in terms of ‘sorting’ people at sea, according to the definition of surveillance as a sorting process (Lyon, 2003). No matter what the level of sophistication of new surveillance technologies, they cannot distinguish remotely between those who are entitled to international protection and asylum, and those who are not. There have been efforts, by Frontex and individual member states, to define certain safe countries to facilitate and speed up return processes. Yet, this still does not enable surveillance technologies to determine whether a detected vessel is safe to return, based solely on the port of departure, as departing vessels often carry migrants with very different backgrounds and

⁸ Referring back to an earlier Agreement of 13 December 2000, and especially the implementing Protocol on Cooperation in the Fight against Irregular Migration between Italy and Libya, concluded on 29 December 2007.

countries of origin. It is impossible to assess, using just surveillance camera information, where people are from—even with high-resolution cameras—and trying to do so would be illegal and profoundly problematic. This processing needs to be done by competent authorities on land, not by automatic surveillance nor as part of an interception at sea. This means that surveillance technologies are relegated to filling a dissuading function, rather than contributing actually to stopping migrants at sea borders.

The aims of EUROSUR: what scope within the legal and technical limitations?

Shortly after the commencement of Operation Mare Nostrum, EUROSUR, the EU Border surveillance system, was launched. In addition to improving information exchange mechanisms among member states, it seeks to help with the upgrade of coastal countries' 'situational awareness' through increasingly sophisticated surveillance means, and notably the use of UAVs. EUROSUR's first two aims are to combat 'illegal immigration' and cross-border crime (Jumbert, 2013). Its third aim is 'to contribute' to protecting and rescuing more migrants, in the sense that the information collected will also serve SAR purposes (Jumbert, 2013). While reducing 'irregular' or 'illegal' immigration to Europe is probably the strongest driver behind EUROSUR and associated efforts, the obligation to offer SAR also applies to the border patrols receiving information on vessels in distress. Highlighting EUROSUR's rescue-enabling function is also a way of legitimating it and gaining approval for the large investments needed. Indeed, one of the few updates from Frontex since the launch of EUROSUR is entitled 'EUROSUR tools play key role in boat rescue' (Frontex, 2015a).

It is interesting to evaluate the three aims of EUROSUR in relation to the outlined scope and limits of the surveillance technologies. First, the aim of reducing cross-border crime, such as drug smuggling, human trafficking, and the movement of potential terrorists across European borders, receives relatively less attention here. Such activities in principle constitute legitimate police operations (upholding the law), and intercepting a suspected vessel at sea is supposed to succeed the gathering of relevant intelligence and precede the examination of the suspects who have a right to due process and not to be discriminated against in any manner. Surveillance mechanisms may help border police to gather information on the position, direction, and other relevant characteristics of a suspected vessel. Augmenting surveillance of actions in certain areas may also serve to dismantle a given route. The central concern in this context is that 'irregular migration' is placed in the same lot as criminal activities, contributing to the criminalisation of migrants at sea in general. Overall, while 'irregular migration' along the southern border of the EU appears to be the

main concern and driving force behind the establishment of systems such as EUROSUR, highlighting the need to reduce cross-border crime acts as a legitimating factor in strengthening policing initiatives along the border.

Second, the aim of reducing ‘undetected entries’ as stated in earlier EUROSUR policy documents (European Commission, 2008b) and ‘combat[ing] illegal immigration to Europe’, as formulated in the EUROSUR regulation, can be decomposed into two distinct objectives: (i) to prevent unauthorised migration to Europe (that is, reduce numbers); and (ii) to enhance the detection of those who enter (that is, reduce *undetected* entries). A wide pool of scholarship shows that there is little dissuading effect in border surveillance and border control (see, for example, Lutterbeck, 2006; Carling, 2007a; de Haas, 2008). When both the push and pull factors of migration are strong enough, migrants will try anyway, and if they are stopped they are more likely to try again. Indeed, there is little that border guards can do to stop migrants at the border. Stopping a migrant vessel and preventing it from continuing on its journey to Europe, can, as explained, amount to a breach of the non-refoulement principle (if diverted or sent back), and if a migrant vessel is stopped and not assisted, this can amount to a situation of non-provision of rescue to people in distress at sea, if the vessel is or claims to be in distress. It is possible that a vessel does not claim to be in distress, and does not want to be rescued, but simply to continue with its journey. Given the condition of many migrant vessels today, however (badly equipped and overcrowded), stopping or diverting them would probably amount to the *creation* of a state of distress. In practice, detecting migrants along the border, before they are ‘taken in’ to a European port, is nevertheless a way to register them and, as soon as possible, to include them in a system for processing their claims for asylum and visas, or, if not granted, for a means of return. Such detections also satisfy the political purpose of giving a *sense* of increased control, both through greater awareness of what happens at the border and through the sense of mastery that comes with a vertical, top-down view (Wall and Monahan, 2011; Neocleous, 2013). As such, the surveillance system may well, by virtue of its simple existence, fulfil the objective of decreasing the number of *undetected* migrants entering the EU, but not so much the *number* of migrants entering.

Third, because the surveillance technology available is developed to spot ‘typical’ migrant vessels, it is also likely to pick up possible emergency signals and locate more rapidly vessels in distress. Location, speed, and direction are essential characteristics when seeking to pinpoint a vessel reported to be in distress. The current development of airborne camera surveillance (unmanned or manned, remotely piloted) is first and foremost driven by

Frontex's defined need to boost 'situational awareness' and control of the EU's external borders. These technologies are better suited, however, to assisting SAR operations, by alerting, locating, and sharing potential vital information with relevant users. The EUROSUR legislative document states that the surveillance and collected information will 'contribute' to rescuing more migrants at sea, because this may prove crucial in distress situations (European Parliament and Council of the European Union, 2013).

The background to how this text came into being is central to understanding the compromise that lies behind this wording. Parallel reading of the EUROSUR draft regulation of 2011 and subsequent or suggested amendments by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) (European Parliament, 2013), and then by the Presidency of the Council of the European Union to the Committee of Permanent Representatives (COREPER) (Council of the European Union, 2012), illustrate well the different directions in which EUROSUR, as a policy tool and as a legal instrument, was drawn. While the draft report by the LIBE Committee, under the leadership of Rapporteur Jan Mulder and published in July 2012, adds a number of references to the security and protection of the rights and lives of migrants at sea, the Presidency of the Council seeks to reduce the future system's responsibilities for tackling SAR operations at sea. Its justification is based on two premises: (i) SAR responsibilities are already covered by the SOLAS Convention, supplementing UNCLOS; and (ii) it would create a legal basis for SAR at sea 'for which the Treaties have not attributed a competence to the Union' (Council of the European Union, 2012, p. 2).

The text suggested by the Presidency of the Council thus emphasises EUROSUR's objectives of 'preventing and combating illegal migration and cross-border crime', yet relegates the humanitarian function of saving more lives to a possible consequence of the first two goals: preventing migrants and suspected criminals from crossing the border 'consequently contribut(es) to better protecting and saving the lives of migrants' (Council of the European Union, 2012, p. 5)⁹. Whereas this report replaces 'irregular migration' with 'illegal migration', the Mulder report (European Parliament, 2013) does the opposite. Furthermore, the Mulder report also mentions 'the protection of the lives of migrants'

⁹ The whole sentence reads: 'EUROSUR [...] provides these authorities and the Agency with the infrastructure and tools needed to improve their situational awareness and reaction capability **at the external borders of the member states of the European Union for the purpose of** [...] detecting, [...] preventing **and combating** [...] **illegal** migration and cross-border crime [...] **and consequently contributing to better** protecting and saving *the* lives of migrants [...]'. Brackets indicate where something has been erased, whereas bold text indicates what has been added.

whereas only the first two objectives are mentioned in the Presidency of the Council document. It does so four times throughout the text, as well as in an introductory paragraph that states that EUROSUR should ‘considerably improve the operational and technical ability of the Agency and Member States to detect and track these small vessels, leading in the mid-term to a considerable reduction of the loss of migrants and refugees at sea’ (European Parliament, 2013). In addition, there are five supplements relating to the rights of migrants and the legal obligations of EU member states (such as asylum, non-refoulement, and search and rescue), and three additions relating to the protection of personal data, notably in possible future exchanges of surveillance with third countries (European Parliament, 2013).

That the EUROSUR regulation does not accord any explicit role to any SAR authorities, among those agencies that will collect, exchange, and receive information, supports the idea that EUROSUR will only *contribute* to rescue, through its collected information, without aiming explicitly itself to reduce the number of fatalities at sea. However, a more coordinated surveillance effort, with a mutual alert system, can have a positive impact on the SAR efforts of border guards as it makes it more difficult for anyone to claim ‘we didn’t see anything’ or that there was uncertainty about in whose area of responsibility a vessel in danger found itself. Indeed, increasingly coordinating surveillance efforts is also a way of making the ‘watchers watch over each other’.

Claims about the effects of border surveillance: reducing SAR and reinforcing border control

As the previous section reveals, the aims of surveillance technologies deployed along the EU maritime border are in practice conditioned by legal and technical limitations. They appear to be best suited to helping to improve SAR capacities, and much less to stopping migrants at the frontier. This section analyses two related claims regarding how (i) improved SAR capacities function as a ‘pull factor’ for migration across the Mediterranean Sea, and (ii) border surveillance functions as a border control mechanism (and thus, presumably, in reducing the number of irregular migrants entering the EU). While I argue here that the two are difficult to sustain, paradoxically, they have contributed to downplaying the role of SAR, and to giving greater room to the border control aspect, as shown in the mandate of Operation Triton, the successor to Operation Mare Nostrum.

SAR as a 'pull factor' for migrants? The case of Operation Mare Nostrum

Sceptics of more 'liberal' immigration and asylum policies tend to see the stepping up of rescue capacities in the Mediterranean as an incentive for more migrants to attempt to cross the sea. This was evident in the position of the United Kingdom, which was made public a few days before Operation Triton was due to commence. Apropos rescue operations, former Minister of State of the Foreign and Commonwealth Office Baroness Joyce Anelay stated: '[w]e believe that they create an unintended "pull factor" . . . thereby leading to more tragic and unnecessary deaths' (Nielsen, 2014). The leader of the Italian far right Northern League, Matteo Salvini, went further, claiming that Italian Prime Minister Matteo Renzi and Interior Minister Angelino Alfano are 'stained with blood' (*The Economist*, 2014).

Yet, the picture is more complex than one in which greater rescue capacity serves as a 'pull factor' for more migrants. Five different elements call into question this claim. First, Operation Mare Nostrum was in many ways set up as a consequence of the large-scale drowning incident off Lampedusa on 3 October 2013, but also due to the realisation that that was only one incident among a larger number of attempts to cross the sea during the second half of 2013 (*The Economist*, 2014). Hence, the increase started before the Italian operation began and continued thereafter.

Second, not only Italy, which orchestrated the massive SAR effort, but also Greece saw a surge (by an estimated 142 per cent) in the number of migrants arriving in the first four months of 2014, most probably owing to intensification of the conflict in Syria (*The Economist*, 2014). The majority of migrants arriving in 2014 were Eritreans, with Syrians constituting the second largest group (Philips, 2014). Others originated from Egypt, the Palestinian Territories, and Sudan (Squires, 2014). Increased tensions and the eruption of new conflicts in Europe's broader neighbourhood were at the root of much of the migration stream in 2014. In other words, the claim that the increased rescue capacities of Italy led to a peak in the number of migrant seeking to cross the Mediterranean Sea seems to miss important aspects of the larger picture.

Third, increased instability and insecurity in Libya, a country through which a high proportion of migrants transited before embarking on the journey to Europe, may have forced more migrants to leave sooner (instead of transiting during longer periods)—general lawlessness has strengthened this as a point of departure for informal criminal networks organising and facilitating migrants' journeys. Libya used to host 1.5–2.5 million foreign workers before the revolution in 2011, and, according to the International Organization for

Migration (Brian and Laczko, 2014), close to 800,000 fled to neighbouring countries during this period.

Fourth, the journey towards Europe also starts long before people reach the coast of North Africa, as demonstrated by the accounts of migrants who made it to Europe (*The Guardian*, 2014). Little seems to indicate that would-be migrants are aware of the stepped-up or -down rescue capacities of the EU in the Mediterranean as their journey begins, whether in Eritrea, Somalia, Sudan or Syria, or that they would make their decisions based on this information (Sideways Film, 2012; *The Economist*, 2013; *The Guardian*, 2014). If enhanced SAR capacities at sea have affected migration flows in any way, it is more likely that they have done so by making a highly dangerous route relatively and slightly safer to cross, and not by encouraging more people to flee already unbearable living conditions. In this sense, the presence of SAR capacities outside the territorial waters of Italy and towards the coastline of Libya may have contributed further to concentrating the flow of migrants along this route.

Mare Nostrum has also targeted specifically those who seek to make it easier to cross the Mediterranean Sea: the much-debated migrant smugglers and facilitators. The Italian operation led to the arrest of at least 330 detected smugglers (Ministero Della Difesa, n.d.), usually identified among the migrants (DW, 2014). The idea driving these law enforcement initiatives is that they serve to dismantle smuggler networks, and eventually will discourage them from sending more people over. A lot of questions remain unanswered, however, when it comes to smuggler networks: who are the supposed ‘smugglers’ caught on board the fishing boats? Were they supposed to return to North Africa to continue with smuggling activities, or are they themselves seeking a form of protection or to stay in Europe? Are they connected in this action to other criminal networks in Europe that organise informal labour for the migrants?

The critical migration literature has helped to nuance widespread perceptions about human smuggling across the Mediterranean, while also warning against the pitfalls of criminalising the smugglers (Carling and Hernandez-Carretero, 2011; Andersson, 2014). As Carling and Hernandez-Carretero (2011, p. 45) note, ‘human smuggling is highly heterogeneous’, and much of it is small scale rather than being part of the activities of organised criminal networks, and migrants often ‘get the service they pay for without being exploited’. Moreover, the terms ‘smuggling’ and ‘trafficking’ are sometimes used interchangeably in the media (Human Rights Watch, 2015), strengthening the blame put on the smugglers while creating an impression of migrants potentially embarking on a journey against their will, when in fact there is a demand for this ‘service’. This also casts doubt on

the effects that arresting the suspected smugglers on board the migrant vessels will have, as long as there is a ‘market’ and demand for assistance to cross the sea.

Fifth, one should also differentiate between the ‘fences’, meaning the efforts to stop migration at the border, and the ‘gatekeeping’, referring to internal controls, as described by Triandafyllidou and Ambrosini (2011) in their study of the immigration policies of Greece and Italy. Both countries have been criticised for their poor treatment of asylum seekers and their inability to stem immigration flows, resulting in a strong ‘fencing’ of their borders. Yet, both also have relatively weak internal controls, especially in the informal labour market where immigrants usually are employed. Triandafyllidou and Ambrosini (2011) show how significant investments are driven by the media and the political visibility accorded to irregular border crossings. As long as gatekeeping is weak, however, such policies are inefficient as ‘irregular migration is within society and has to do more with the economy and the labour market rather than with border controls’ (Triandafyllidou and Ambrosini, 2011, p. 271). A similar argument has been advanced by Hein de Haas (2008): as long as the demand for informal labour in Europe remains as high as it is, border control or surveillance efforts will have a minimal effect.

Border surveillance as a tool to prevent and dissuade migrants? From Spanish SIVE to Frontex’s Triton

How should one understand the shift from Operation Mare Nostrum to the Frontex-led Operation Triton, which has been presented as only for border control, not SAR? Italy’s move from push-back to massive rescue efforts through Mare Nostrum is remarkable, but to some extent expected in the light of the condemnation by the European Court of Human Rights in the Hirsi and Others case, and the need to ‘do something’ following the large shipwreck outside off Lampedusa in October 2013 (as well as changes in government). The shift to Triton can seem more paradoxical, but it must be viewed as a response to Italy’s call for assistance, and perhaps also as a response to the belief that Mare Nostrum functioned as a pull factor for migration. What is more, it is a reaffirmation of long-held thinking that border surveillance has a dissuasive effect on migrants.

As shown above, while increased surveillance and control has little, or at least an uncertain, impact on the number of migrants crossing the Mediterranean Sea, there are several studies on, and indications of, how border management efforts affect migrant routes to Europe (see, for example, Lutterbeck, 2006; Carling, 2007a). The erection of a fence along the Greece–Turkey border has probably contributed to an increase in the flow of migrants via

the Aegean Sea (Popp, 2014). The introduction of the SIVE (Sistema Integrado do Vigilancia Exterior) system to monitor Spain's external borders in 1999, and expanded in subsequent years to include the whole Andalusian coast by 2007, is believed to have had a similar outcome (Carling, 2007b). The SIVE system includes long-distance radar systems, advanced sensors that can detect heartbeats at a distance, thermal cameras, night viewfinders, infrared optics, helicopters, and patrol boats (Vallet, 2014). It has become a much-celebrated example within border management circles and the industry, as it drastically reduced the number of migrants along the routes put under surveillance (Alscher, 2005). Yet, there are reports of how it has contributed to the diversion of migrant flows from the narrow Strait of Gibraltar to longer routes to Europe (Carling, 2007a; de Haas, 2008). Indeed, as one route is blocked, it may affect the use of other routes (Alscher, 2005). As de Haas (2008, p. 1312) points out, this measure of increased border surveillance, followed by interceptions, impacts majorly on migrants by diverting and diversifying routes across the Mediterranean:

In reaction to intensified border patrolling in the Strait of Gibraltar, Maghrebi and sub-Saharan migrants started to cross the sea from more eastern places on the Moroccan coast to mainland Spain; from the Tunisian coast to the Italian islands; from Libya to Italy and Malta; from Algeria to Spain. Since 1999, migrants in Morocco have increasingly moved southward to the Western Sahara in order to get to the Canary Islands, a Spanish territory in the Atlantic Ocean.

He adds that this has led to an unintended increase in the stretches of the border that 'require' surveillance, as points of 'irregular' entry are multiplying. By seeking to avoid border patrols, migrants have also been forced to travel new routes over the years, often with longer stretches on the open sea and thus more dangers along the way (Carling, 2007a). Those migrants seeking to avoid the gaze of border guards are also likely to find themselves further away from any means of rescue should a problem occur. Despite being widely criticised for this last point, the SIVE system has by and large been taken as a model for the development of EUROSUR. Border guards and Frontex generally have acknowledged the diversification of routes, and the point has been used to underscore the need for establishing a European-wide surveillance system (Ferrer-Gallardo, 2008; Jeandesboz, 2011). However, there has been a shift in recent years, probably related to the quasi-cessation of push-back operations since the start of the 'Arab Spring', followed by the judgement of Hirsi and Others vs. Italy, towards boat migrants rather *seeking* the attention of border guards and rescue agents. Along with this change, though, is the fact that facilitators or smugglers more rarely

follow migrants all the way across the sea, or send minors in their place, for fear of harsh reprisals of up to 10–15 years imprisonment for those who are caught (Muzi, 2014).

The launch of Triton should be seen therefore as a ‘return to normal’ after Mare Nostrum, in the sense that the main focus again became ‘border control’, although rescue efforts have also been increased within Triton owing to increased needs in 2015. Although the efficiency of actual border control is limited, as seen in the previous section, these monitoring activities nevertheless contribute to upholding the effective *sense* of a border, as part of the common imaginary of the delimitation of Europe versus the outside world (Vaughan-Williams, 2009).

Understanding the purposes of ‘border surveillance’ in a legal and technically restricted space

Given the above arguments about how border surveillance technologies are legally and technically ‘limited’ in their stated aims to stem irregular migration at the border, it is worth questioning the actual use of maritime border surveillance. Typically it is presented as a concrete ‘response’ to the challenges at sea both to the European constituencies concerned with increased ‘irregular immigration’ to Europe, and to those concerned with the plight of migrants at sea. If detection of migrant vessels cannot serve to stop migrants at the border, in order to divert or return them, then there seems to be three other purposes sustaining the continued ‘need’ for maritime surveillance. The first is justified by the need to detect situations of distress, so as to carry out SAR operations when needed. Even if anti-immigration is probably a stronger driving factor behind the great investment in improved border control capacities, such as EUROSUR, maritime surveillance seems best adapted for conducting such SAR operations. The superposition of the aims of performing border control (keeping irregular migrants out) and protecting migrants’ lives (by providing SAR, and bringing them to a safe harbour) have indeed allowed these surveillance capacities to be developed, along with a certain illusion of reinforcing border control capacities.

Second, the aim of detecting concrete attempts to cross the border also serves to reduce *undetected* entries, as stipulated in earlier EUROSUR policy documents. It also supports the objective of combating illegal activities such as drug smuggling and human trafficking, both to apprehend those suspected of involvement and to prevent future infringements.

Third, enhancing general situational awareness yields a sense of control, both on the level of the professionals (such as border guards, navies, and Frontex) engaged in managing

the external borders of the EU, as well as on the level of policymakers who can reassure their constituencies that there is knowledge, monitoring, and supervision of what is going on, and it is not a situation that is ‘out of control’. Investing in surveillance also gives a sense of effective response, while at the same time being a less visible, and thus less controversial, form of control than detention centres along the European border. What seems to be taken into account less is that increased awareness of, and concrete information on, events at sea also creates new responsibilities to respond. In other words, more sophisticated surveillance tools will also generate more information on vessels in distress, and hence potentially trigger the need for more SAR operations. When Frontex insists that Triton is not a SAR operation,¹⁰ it is important to remember that its patrolling vessels still fall under the SAR and SOLAS Conventions that specify a responsibility to offer search and rescue to any vessel in distress.

Conclusion

Political and public debates have been lively since April 2015, when another large vessel sank in the Mediterranean Sea and more than 900 migrants were feared dead (Yardley, 2015). People differ in their views on the main issue in this regard. Is this first and foremost a humanitarian crisis on the doorstep of Europe? Is it a crisis concerning European borders and vast amounts of migrants looking to enter? Or it is a crisis of European immigration and asylum policies, forcing migrants in search of a better life to travel this deadly and dangerous route? Part of the broader picture are the numerous crises in Europe’s larger neighbourhood, driving many to flee and to seek not only better opportunities, but also basic protection. Given that reception capacities in a number of the immediate neighbouring countries are cracking under the pressure placed on them by already large numbers of displaced people, migrants are forced to travel further. Despite this vast and complex picture, border surveillance technologies are continuously being proposed as a solution: to improve ‘situational awareness’ through new and better coordinated means of collecting information on what happens at sea, and to assert ‘control’ over the fluid and evasive maritime borders.

As mandates are adapted, current border management efforts evaluated, and new potential approaches assessed, it is important to keep in mind the way in which migrant flows and strategies are in turn shaped by the different means of surveillance, control, and rescue. Battles over how to define the issues at stake also influence how the objectives of

¹⁰ ‘While saving lives is an absolute priority in in all maritime operations coordinated by Frontex, the focus of Joint Operation Triton will be primarily border management’ (Frontex, 2014b).

surveillance technologies are defined, and determine how their success is evaluated. Hence, in the current context, surveillance technologies might not be seen as successful in terms of reducing the number of migrants or preventing them from entering, yet in terms of detecting and gathering information on what is happening at sea, it might well meet the defined goal. Indeed, that is also a form of control: asserting sovereignty and power at the border.

As shown here, the type of information that border surveillance can collect is best adapted to support SAR missions. Yet, EUROSUR and Joint Operation Triton reveal a reluctance to stipulate ‘rescuing’ migrants as an explicit objective. Rather, it is used as a legitimating factor when needed. Finally, as seen with the Operation Mare Nostrum, conducting SAR missions can also be a form of control, allowing for intelligence-gathering, the detection of people (allegedly) connected to smugglers’ networks, and the registration of migrants entering Europe. While migrants may not be stopped at the maritime border, it may, from a border security perspective, be seen as a better option at least to detect them, in order to ‘manage’ better arrivals. From a humanitarian perspective, however, an evaluation of not only the need for rescue at sea, but also the broader protection needs of those fleeing various forms of insecurity, is essential.

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