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# Controlling the Mediterranean space through surveillance

The politics and discourse of surveillance as an all-encompassing solution to EU maritime border management issues

*La surveillance comme moyen de contrôle de l'espace sécuritaire*

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# Controlling the Mediterranean space through surveillance

## The politics and discourse of surveillance as an all-encompassing solution to EU maritime border management issues

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### INTRODUCTION

In 2008, the European Commission presented a roadmap for building a common European Border Surveillance System, EUROSUR<sup>1</sup>. The system is supposed to be operational by October 2013, and will provide a technical framework for sharing maritime surveillance data and information collected by the various Member States bordering the Mediterranean and thus communicate alerts more efficiently [Seiffarth, 2011]. Its central aims are to reduce the number of undetected entries into the European Union (EU), increase Europe's internal security by preventing cross-border crime, and reduce the death toll of migrants at sea<sup>2</sup>. Border control agents have been put under

sustained pressure by various Human Rights NGO's in recent years, due to the great amount of fatal accidents of migrant vessels in the Mediterranean. The exact death toll has over the years been hard to establish, as there are probably more lost lives than those which are reported. According to the United Nations High Commissioner for Refugees (UNHCR), 1500 migrants lost their lives in 2011 while trying to cross the Mediterranean<sup>3</sup>. The system seeks to address a complex web of security challenges in an environment which, due to both its geography and its being the interface between the African and European continents, is not easy to govern, let alone control.

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Social and Economic Committee of the Regions Examining the creation of a European Border Surveillance System (EUROSUR), COM(2008) 68 final.

<sup>2</sup> Commission Staff Working Paper, "Determining the technical and operational framework of the European

Border Surveillance System (EUROSUR) and the actions to be taken for its establishment", SEC(2011) 145 final, 3.

<sup>3</sup> UNHCR, "More than 1500 drown or go missing trying to cross the Mediterranean in 2011, News Stories, 31 January 2012, <http://www.unhcr.org/4f2803949.html> (Accessed 24.02.2012)

Presented as a straightforward exercise, by virtue of “simply” connecting already existing systems, the creation of an overarching system of surveillance nevertheless also raises a range of ethical and legal dilemmas. First of all, extra-territorial border control pushing the effective border, in the sense of the barrier to cross, is problematic in several respects. Julien Jeandesboz (2012) shows how there is an increased difference between the legal border (the one that corresponds to the legal limits of sovereign nation states) and the borders of control (where the verification of those seeking to cross the border is carried out). When the borders of control actually move into the sovereign space of third countries, this compromises rights to leave one’s country, and potentially also refugees’ rights to protection as they are prevented even from the possibility to seek asylum. On a more principled level, it is also at odds with the freedom of movement upon which the European Union is built. In the face of these dilemmas, there is nevertheless a constant move towards reinforcing the means of carrying out effective border control along the EU’s external border, in order to keep what is defined as unwanted elements outside. In this context, a coordinated surveillance system targets better managing the Mediterranean space, through border guards’ improved “awareness” over what happens at sea, and thus to enable them to interfere before a situation becomes critical, or before it reaches the territorial waters of the EU. Yet, beyond the above-mentioned motivations for setting up such a system, several challenges remain, especially those related to the legalities, ethics and obligations concerning migrants seeking to cross what is one of the most dangerous waterways for this group of people. As will be argued in this article however, although sharing information and alerts may lead to more efficient rescue operations, the constant search for pushing the border of control further out will continue to give relevance to these challenges. A broad set of scholarly work has taken up several of the issues raised here. A consistent

corpus of literature on securitization of migration [Bigo and Guild, 2005; Huysmans, 2000, 2006; Lutterbeck, 2006; Ceyhan and Tsoukala, 2002] shows how migration is not only politicized but is taken out of the field of politics and described as a security issue that requires extraordinary measures. This approach is useful to understanding how border security has become a high-level priority within the EU and the way civil-military and military security agents are involved in initiatives such as EUROSUR. Yet, this branch of the literature does not address the challenges raised during border surveillance operations at sea, regarding the rights of asylum seekers or the obligation to rescue a vessel in distress. How can surveillance aimed at preventing undetected entries into the EU be combined with the legal obligations of non-refoulement and rescuing vessels in distress? Then, issues related to surveillance have been widely studied. Indeed, surveillance studies can be considered a separate branch within the field of security studies, at the crossroads of criminology, political science and international relations. But the international aspect is less studied (for examples, see Lyon, 2003; Bigo, Bonelli, Deltombe, 2008; Bigo, Piazza, 2011; Bigo, Bonditti, Jeandesboz, Ragazzi, 2011; and from the perspective of financial surveillance: Amicelle, Favarel-Garrigues, 2009) because the practice of carrying out extra-territorial surveillance, not to mention surveillance at sea, is still in its infancy. There is however an emerging set of literature, often critical, on the EU Border Agency Frontex (established in 2004 and operational from 2005), its security practices [Jeandesboz, 2008] and the development of a humanitarian discourse to justify the agency’s policies [Horsti, 2012; Tondini, 2010] as well as its legal status [Rijpma, 2010; Gammelthoft-Hansen, 2011]. There have also been many attempts to understand the politics of border control, immigration and asylum requests of the various Member States and the EU as a whole and the implications on migratory flows of the various policing

activities [Carling, 2007; Carling-Hernandez, 2011; Lutterbeck, 2006; de Haas, 2008]. Yet there have been few attempts to understand the discourse and the politics of surveillance technologies as an all-encompassing solution to the challenges faced in this particular geographical environment. This article aims to better understand the discourse legitimating the need for a more robust surveillance capability at the external borders of the EU, by looking at what can be qualified as the main “drivers”, but also the main points of contention, or “obstacles”, in the process of establishing such a system.

The driving factors for setting up a coordinated surveillance system can be identified mainly as the socio-political beliefs in migration and other cross-border issues as a threat to the EU’s security (the “securitization” of migration) and in the ingenuous and all-powerful character of technological solutions. The points of resistance lie mainly in the geography of the Mediterranean sea (that is, not all of it can be put under constant surveillance) and the legal grey zones and obligations

with which border guards are compliant, according to whether they are in their own territorial waters, the international seas, or in the territorial waters of third states. The question this article investigates is: How do the “drivers” and “obstacles” for setting up a surveillance system in the Mediterranean shape the discourse about the need for more surveillance?

We argue that the two distinct but increasingly interwoven socio-political beliefs function as the backbone for the EUROSUR initiative as the solution to all border related problems in the Mediterranean. Indeed, the securitization of migration and other cross border challenges are presented as the key *problems* to which the technological tools of surveillance and information systems are presented as the most adapted *solution*. Yet, the geographical obstacles and legal points of contention cannot be overlooked. As we look closely at the rationale for increasing surveillance at the external border of the EU, we see that what could become obstacles in this process is not only *integrated* into the discourse, it also *feeds* it.

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## POLITICAL DRIVING FORCES FOR INVESTING IN SURVEILLANCE TO BETTER MANAGE THE “COMPLEX SECURITY” CHALLENGES IN THE MEDITERRANEAN

Amid increased security measures aimed at controlling the external borders of the EU, surveillance has come to be seen as a useful tool to improve control over the maritime border areas. Surveillance is supposed to improve the “situational awareness<sup>4</sup>” without hampering the natural flow of authorized vessels, whether commercial, military or private.

### Understanding surveillance in the maritime context

Over the past decade, surveillance has become an increasingly important security

measure in various sectors of society and is understood as an efficient tool to combat different kinds of threats to Europe’s internal and external security. But what does it mean to carry out surveillance? David Lyon defines surveillance as mainly a process of social sorting via increased digitalizing of our everyday activities [Lyon, 2003]. He stresses the increasingly everyday character of surveillance, yet the concept of sorting is useful to understand the more “traditional” police and intelligence surveillance because it enables to separate the unwanted from

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<sup>4</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System

(EUROSUR), Brussels, 12.12.2011, COM(2011) 873 final.

the wanted, the abnormal from the normal and the criminal from the lawful. Indeed, surveillance generally has two goals: *preventing* unwanted behavior, by creating a sense of “being watched”<sup>5</sup>, and *detecting* any unwanted behavior that does occur, to “better” respond and deal with it. From a political or social science point of view, surveillance can be understood as “the process of watching, monitoring, recording, and processing the behavior of people, objects and events in order to govern activity” [Jenness, Smith, Stephan-Norris, 2007]. This definition underlines that surveillance is not strictly confined to watching and observing, but also records and processes what is being observed; the finality is to govern the observed activity. Hence, in a narrow sense, surveillance can be understood as the process of keeping something under close observation, in this case the EU external maritime border. However, because the very aim of surveillance is ultimately to eliminate certain unwanted activities, surveillance politics and practices can be neither understood nor assessed as simply the act of watching. Instead, surveillance in the Mediterranean maritime context should rather be understood as a three-part process: watching, collecting information, and finally, reacting to an observed abnormal situation.

### Securitization of migration

Current European approaches to the Mediterranean are the result of years of successive efforts to bring the southern neighbors closer or to keep them at a certain distance. That is, various EU initiatives have, on the one hand, attempted to build a cohesive relationship with the southern neighbors, based on cooperation and the willingness to unite around a set of common values, and, on the other, sought to effectively manage the space

that separates them through various security policies. The Barcelona Process started with the Euro-Mediterranean Partnership (EMP) in 1995, an initiative aimed at building a strengthened relationship between the EU and the Maghreb and Machrek regions. The security section of the EMP essentially refers to the objectives of building a “peaceful, secure and stable Euromed region, underpinned by sustainable development, rule of law, democracy and human rights”<sup>6</sup>. The failure of the Middle East Process led to a halt in the evolution of the Barcelona Process, and the 2003 European Neighbourhood Policy (ENP) thereafter became the reference forum, yet focusing mainly on bilateral exchanges between the EU and its closest neighbors in the east and in the south [Bilgin, 2009]. The specific cooperation with the Mediterranean neighbors was relaunched in 2008 as the Union for the Mediterranean (UfM).

Although the goals of building a strengthened relationship and a certain “Mediterranean community” were relatively stronger in the early years of the Barcelona Process, those to reinforce security measures, notably in managing the EU border to the south, have become predominant in the recent years. Migration was not a central issue in the first stages of the Euro-Mediterranean cooperation but has now become a focal point of the relationship between the northern and southern shores. Migration across the Mediterranean has also become increasingly securitized, notably following 9/11 in the United States (2001) and the Madrid (2004) and London (2005) bombings, which effectively led to the association of the “fight against terrorism” with improved control over the EU’s external borders, specifically immigration from the south of the Mediterranean. As Carling and Hernández-Carretero point out, “strategies for managing unauthorized

<sup>5</sup> The idea of surveillance having a preventive or even disciplining effect has been theorized by Michel Foucault through the “panopticon” metaphor, in *Discipline and Punish: The Birth of the Prison*, Paris, Gallimard, 1975, 318 p.

<sup>6</sup> European External Action Service, “Political and security partnership”, [http://www.eeas.europa.eu/euromed/political\\_en.htm](http://www.eeas.europa.eu/euromed/political_en.htm) (accessed 1 May 2011)

migration from Africa are formulated and implemented in a field of tension between several policy narratives” (2011). The policy narratives they refer to revolve around security (for Europe), cooperation (between Europe and third countries) and protection (of migrants) where security is deemed the dominant approach. The “need” to secure the EU’s borders is generally justified by referring to “threats” of cross-border crime, trafficking and smuggling, and irregular migration<sup>7</sup>. The latter is central among the driving factors for increased control over the sea, and constantly mentioning irregular migration with threats of crime, trafficking—and sometimes terrorism—directly increases the vision of immigration as a security matter and a potential threat.

It is in this context of securitization of irregular migration from North and Sub-Saharan Africa that surveillance, coordinated among the EU Member States, has come to be seen as the most appropriate tool to manage Europe’s maritime borders to the south. Indeed, building a “fortress Europe” according to a more traditional view of security, through higher walls and tighter security checks at border crossing points, would not benefit the EU either politically or financially. Considering the geographical nature of the southern part of the EU’s external border, being a maritime border, there is also a natural limit to the extent to which it can be entirely “covered” by border checkpoints. Frontex, the EU border agency, already struggles with bad publicity and an image of a hard-enforcing security agent that uses any means available in its attempts to stop unwanted migrants at the borders. Surveillance to distinguish between desirable and undesirable flows of people and goods at sea is, therefore, emerging as the supposedly most adapted tool to control this rather uncontrollable space. The

uncontrollable character of both the Mediterranean and migrant flows across it seems to further underscore surveillance as the most appropriate tool: A coordinated surveillance system would be much more flexible (using mobile radar platforms, for example) than building a thick wall, only to have migrant routes shift to another point of entry. The objective of avoiding to build a fortress Europe will however have to be reviewed at some point or another, because this fortified system of detection will function as a de facto wall for extra-European travellers, although an invisible one.

### **Belief in security technologies as ingenious and all-powerful to deal with the complex and evasive challenges in the Mediterranean**

This search for ever more information and “awareness” about the threats “out there” is indeed driven mainly by two factors: the *nature* of the so-called new threats, as seen above with migration being impossible to contain, or even less to stop, and the imaginary surrounding the possibilities of information technologies.

### **Unpredictable and asymmetrical “new threats” and the need for information and surveillance to increase awareness**

Not only migration and the political objective to sort out the so-called illegitimate travelers from the legitimate ones but also, more broadly, the way new threats are described in EU and UN policy documents<sup>8</sup> implicitly call for information technologies in general and surveillance technologies in particular to deal with these threats. The main novelty of security challenges in the post-Cold War era, especially after 9/11, is presented as being the unpredictability and asymmetry of threats. Unpredictability

<sup>7</sup> Op.cit., “Proposal for a Regulation...(EUROSUR)”, COM(2011) 873 final.

<sup>8</sup> See for example: European Commission, Communication from the Commission on Conflict Prevention, COM(2001)211 final

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0211:FIN:EN:PDF> (Accessed 30 April 2012); UN report on interdependence. Report by the Secretary-General of the United Nations, “In Larger Freedom: Towards Security, Development and Human Rights for all”, September 2005, <http://www.un.org/largerfreedom/> (Accessed 30 April 2012).

means that we don't know where, when or how a threat may materialize; asymmetry refers to the different nature of current threats compared to an imagined past where states were threatened by other states. Today, fluid and diffuse organized crime and terrorist networks are among the threats that individual states and the EU as a whole consider their main security challenge. Both of these characteristics encourage using information and surveillance technologies to learn more about the threats. J. Peter Burgess (2009, p. 316) shows that "[t]his new emphasis on technological responses to insecurity is justified in governmental arenas through the argument that this drive is rendered necessary by the environment of new global threats of the post-bipolar era". In other words, the very nature of current threats, whether real or perceived, to European internal and external security encourages technological responses. Their asymmetric character and unpredictability render technological tools of surveillance, information collection and processing ever more useful, as they seek to deal precisely with the asymmetric (that is, "not like us") and unpredictable (that is, we don't know when or how it may "hit"), as they attempt to paint a picture of the threats "out there". Information and surveillance technologies seek to know the unknown to make it less threatening. This is supposed to have as a trickle-down effect to better anticipate threats and enable more proactive responses.

Increased awareness about a possible threat seems in itself to reduce its threatening character, while supposedly enabling security agents to respond in a more targeted and efficient manner. Investing in information systems and high-level technology also gives new impetus to a military and para-military sector, at a time when defending the EU against large-scale attacks from the outside has become irrelevant. It also provides the security industry with a new market; what we can call the information race has replaced the arms race. However, this information race raises many ethical concerns,

notably about the right to privacy and data protection, as more and more databases are cobbled together in one way or another. Problems can occur when wrong data is shared across several databases; even if corrected at the source, the secondary databases might not be corrected. It could also be problematic if asylum seekers' demands are treated solely based on automated data processing, as explicitly forbidden by the EU Data Protection Directive (Directive 95/46/EC). We will not discuss this further here, as these issues are addressed elsewhere (for example, see Fuster, De Hert, Gutwirth, 2011), but will focus on how surveillance technologies, as a tool of security, emerge as the seemingly appropriate and unavoidable solution to the security challenges in the Mediterranean.

### **Less fallible than humans: objectivity and neutrality of surveillance technologies?**

There is a general belief that security technologies, especially surveillance technologies, are ingenuous [Guittet and Jeandesboz, 2010]. "Seeing" is argued to be a neutral and innocent act. Observing what's happening within a given space should, according to security industrials, not raise any ethical questions: it is about recording what is already "out there". As we argue, surveillance cannot be understood as only the act of watching but should also be understood as the acts of analyzing the information collected and reacting to abnormal or suspect behavior that is observed. We examine below the presumptions about information and surveillance technologies being neutral and objective, because these characteristics are the main driving factors towards increasing and coordinating surveillance capabilities, and we address the limits of these characteristics.

There is an idea that surveillance technologies are less fallible than humans: they are programmed to function in a set way, so will never fail in their mission. Another characteristic associated with the un-humaness of technologies is that they can be on "constant watch"; they do not need pauses, shifts or other environmental factors

to function properly. Indeed, a fixed-radar or camera can record hours and hours of footage. Surveillance technologies are often said to be value free, neutral and objective and they will not discriminate according to personal subjectivities. Thus, it can be argued that surveillance technologies are the most efficient security tools, as they will gather “perfect information” that enables perfectly targeted responses.

These elements constituted important ingredients in the “revolution in military affairs” (RMA) discourse, developed in the United States in the early 1990s. The RMA was based on the idea that future wars will be won by those who best manage information technologies and information flows to target their military actions. The current discourse about the need to master the Mediterranean space through surveillance technologies is indeed reminiscent of that of the RMA. And as the RMA was argued to enable the conduct of “clean wars”, the new discourse on surveillance technologies to manage the European borders has also developed a humanitarian rationale. This is concretized in the EUROSUR initiative’s third objective: reducing the death toll of migrants via better awareness of the situation at sea and a better system for sharing alerts. This can be seen as part of a greater discursive strategy put forward by the EU Border Agency Frontex, which focuses on the humanitarian aspect of its operations to gain legitimacy [Horsti, 2012].

However, regarding the supposed higher efficiency of surveillance technologies, it is not so much the technological set-up or programming of drones, radars or satellites that matters: Although an information gathering programme or alert mechanism may effectively carry out its programmed tasks,

there are still subjective aspects: on an input side, what information should be gathered and what kind of abnormal behavior constitutes a possible threat and reason to post an alert; on the output side, the interpretation of the situation that led to an alert message. In much the same way, satellites and cameras may cover wide areas of the maritime space, store hours of footage, and take high-resolution images when necessary, yet humans will always assess and interpret the content. Indeed, value-free technologies would be impossible to make, not to say that it would be impossible to have a value-free *use* of technologies.

The belief in the possibility of having a perfect observation and collecting perfect information may have unintended negative consequences on the subjects being observed. Again, the parallel with the RMA discourse is relevant. As Mikkel Vedby Rasmussen (2004, p. 7) put it, “The discourse on the RMA, however, is about the future rather than the past”. He explains that the RMA discourse and the ensuing ideas about clean warfare, zero casualties and no collateral damage are simply helping raise expectations towards military force and thus lower the threshold for staging armed interventions. In a similar vein, the discourse about using surveillance technologies to effectively control the border areas in the Mediterranean is also about raising expectations about previously unimagined radars, satellites and mobile cameras able to develop a virtually perfect look over the entire Mediterranean. A question worth raising here is if this simply helps lower the threshold for border patrols diverting vessels at sea, under the guise of detaining “perfect information”.

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## GEOGRAPHICAL OBSTACLES AND LEGAL GREY ZONES: HOW THEY MAY ENCOURAGE MORE SURVEILLANCE RATHER THAN IMPEDE THE PROCESS

As we have seen, the assessment of the “security problems” at sea – irregular migration and the more or less loosely connected threats of cross-border crime, smuggling and terrorism – not only contribute to a securitization of border management, but these problems are structured and characterized in a way that calls for surveillance technologies as the most appropriate “solution”. But what are the obstacles in this process of stepping up surveillance in the Mediterranean? And how do they affect this information race, this drive towards ever more surveillance to gather the most complete information about the threats “out there”?

There are two main obstacles to this process: one geographic, the other, legal. However, despite the difference in their nature, we will see that both, each in its own way, end up not impeding the process of surveillance, but driving forward the discourse about the need for more surveillance and more information collection.

### **Assessing the geography of the Mediterranean: a controllable space?**

The Mediterranean basin makes up 1% of the world’s oceans and covers an area of 2.5 million square kilometers. Even though it measures 3860 kilometers from its most western point to its most eastern point and the widest stretch between the northern coast and the southern coast is about 1600 kilometers, opposite states are never more than 720 km apart from each other. With 12 kilometers from the coast constituting the territorial waters of each state, the Mediterranean is indeed made up of large portions of international waters. The coast, if one counts the coastline of Malta and the islands that are part of the continental states, is of about 45 000 km<sup>9</sup>. Despite constituting a relatively small share of the seas and oceans on a global

scale, as a border area, the Mediterranean Sea is an extremely large area to watch over. Furthermore, as a high-traffic border area between two continents, it is also a complex environment to govern.

From a global perspective, everything seems to oppose the northern shore of the Mediterranean from its southern shore, in terms of wealth, economic and political stability and democratic rule (despite a move during the past year towards more economic instability in Europe and a process of democratization in North Africa following the Arab spring). This tension between the rich, prosperous and “peaceful” north of the Mediterranean and the poorer, more conflict-ridden and unstable south constitutes a strong driving force in the migratory flows from Sub-Saharan and North Africa towards the EU. A similar tension and push-pull effect can be seen along the US-Mexico border, with a similar move towards increased surveillance, policing and militarization of border control practices [Lutterbeck, 2006; Dunn, 1996, 2001]. Yet, managing the US-Mexico border is entirely different from managing the maritime border areas in the Mediterranean. Indeed, managing any land border is fundamentally different from controlling a maritime border: Jørgen Carling (2007) points out that the former demands surveillance of a fixed line, not an area as in maritime border surveillance, although current border management practices do tend to create similar “border zones” even beyond the land borders. In any case, assessing the geography of the Mediterranean, one would think that it constitutes an effective obstacle in the process of establishing a full-coverage surveillance system.

Yet, somehow, it seems that this geography of the Mediterranean and the maritime character of this border area put under watch do not so much hinder the actual execution of

<sup>9</sup> All numbers in this paragraph are taken from: “Jurisdictional waters in the Mediterranean and Black Seas”,

European Parliament, Directorate General for Internal Policies, Study, 2010, 136 p.

surveillance operations as encourage the discourse of the “need for more surveillance”. It is as if to tame the beast, there is no limit to the extent of surveillance that should be carried out. Also, the seemingly impersonal character of the sea, unlike land territory where surveillance more often implies watching over public and populated areas, seems to further underline the sense of lack of limits in the process of extending surveillance over the sea.

This approach does raise questions about the costs and benefits of such efforts: Is it possible, even beneficial, to have cameras covering every stretch of the coast? The immediate answer would be “no”, but again, the geography of the maritime borders is used to justify the establishment of a *coordinated* surveillance system in the Mediterranean that can be more flexible than national systems alone, relying on intelligence about migratory flows and the possibility of using mobile radars, shifting their location according to the shift in migratory flows, smuggling routes and weather conditions. The race towards continuously increasing surveillance also raises some more difficult questions about ethical implications. The main issue at stake here is that an extended surveillance system will impede the freedom of navigation at sea (enshrined in the UN Convention of the Law of the Sea [UNCLOS]) and constitute a risk to the right to privacy and protection of personal data (as laid down in various EU legislations).

### **Legal grey zones in maritime surveillance**

As we have seen, the geography of the Mediterranean implies a large border *area* to keep under watch. Yet, the different maritime zones, from the territorial to the international waters, are associated with different legal obligations. Principally, in territorial waters, states are sovereign and can therefore apply and execute national legislation as they wish. The international waters are governed by international law, specifically UNCLOS of 1982. Assessing the legal regulations over maritime border surveillance operations in

the Mediterranean not only implies *where* this surveillance is carried out but also *how* it is carried out: What do we understand by surveillance? What actions are gathered under the umbrella of surveillance operations? Is it just the act of watching or something more? Surveillance in the maritime context and as it is presented in the EUROSUR context should be understood as a three-part process: the acts of watching, analyzing the information collected, and reacting to the abnormal or unwanted behavior observed. To each part, different national, European and international regulations apply.

First, the act of watching is governed by national laws when it occurs in territorial waters. No international treaties deal with surveillance in the sense of keeping something under watch, yet one must assume that surveillance can only be carried out with respect for other international obligations as well as for third states’ sovereignty in their territorial waters. Second, collecting information is governed by rules on the processing, storage and exchange of data, depending on whether the information is of sensitive and/or personal character. National governments have their own regulations, and the EU has developed a consistent body of regulations (the European Data Protection Directive, Directive 95/46/EC, is a central reference). Third, reacting to an observed abnormal situation will probably mean sending a patrol vessel to search and rescue and/or divert a vessel back to its port of origin or accompany it to a European safe harbor. This is probably the most complex part of the surveillance operation; it is governed by a range of international (and national) regulations (as will be seen below) and according to how a situation is interpreted and defined, different – sometimes contradictory – laws could apply.

### **Legal dilemmas revolving around two obligations: the principle of non-refoulement and the search and rescue regime**

The interaction between a border guard unit patrolling at sea and a vessel defined by a

surveillance system as abnormal or suspect is thus where the main dilemma lies. Widespread disagreements on interpretations persist within the EU about the extent of obligations of Member States, despite efforts to solve this lack of clarity through in-depth studies of the law of the sea<sup>10</sup> and a Council decision aimed at providing a common interpretation of the rules applicable to Member States engaging in joint patrols under the coordination of Frontex<sup>11</sup>. Border guards have to consider the obligation of non-refoulement and the obligation to bring rescue to a vessel in distress in their interaction with vessels carrying migrants at sea. These obligations are distinct, but the way irregular migration across the Mediterranean has developed has created a situation where they more frequently intersect.

### The principle of non-refoulement

The principle of non-refoulement, enshrined in article 33 of the 1951 Geneva Convention, says that “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion<sup>12</sup>.” This is probably the single most important aspect of refugee law, as it is the only principle that lays down a formal obligation on states. Indeed, anyone has a positive right to *seek* asylum, but no state has the positive obligation to *provide* the status of refugee or international protection, even though these are the natural responses to anyone who seeks protection. Furthermore, a migrant must have left his or her own country of origin to be able to request asylum and must be within the juris-

dition of the state with which it claims protection. This is where an important point of contention lies: Some interpret this to mean that the asylum claimant has to be within the sovereign territory of the state with which he or she claims asylum; others, such as Thomas Gammelthoft-Hansen (2011), argue that migrants on a border guard vessel fall under the jurisdiction of the flag state of this vessel. Assessing whether someone is in need of protection (that is, if some of the passengers onboard a ship carrying irregular migrants could potentially raise the obligation of non-refoulement for the state intercepting the vessel) is extremely hard, if not impossible, out on the high seas. Some responses to this difficulty include categorizing the migrants as coming from pre-defined safe countries (often with readmission agreements with the EU or individual Member States) or needing further examination. Yet, even the definition of certain safe countries cannot be said to safeguard states against breaching the non-refoulement principle, because it is difficult to assess “at sea” if the migrants are themselves nationals of the country from which they departed, if it was defined as safe.

### The search and rescue regime

The obligation to bring assistance to save life at sea is laid down in article 98 of UNCLOS and further detailed in two conventions 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). UNCLOS states that

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers ... to render assistance to

<sup>10</sup> European Commission, Commission Staff Working Document, Study on the international law instruments in relation to illegal immigration by sea, Brussels, 15.5.2007, SEC(2007) 691 final.

<sup>11</sup> Council Decision 2010/252/EU, supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational

cooperation coordinated by Frontex, *OJ* 2010, L111/20. This decision has been fiercely opposed by some Member States and is currently being contested before the Court of Justice of the European Union by the European Parliament.

<sup>12</sup> Article 33 (1), 1951 Convention Relating to the Status of Refugees.

any person found at sea in danger of being lost ... and to proceed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may be reasonably be expected of him<sup>13</sup>.

“Rescue” was defined in an amended version of the SOLAS Convention as “ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety<sup>14</sup>”. The state responsible for the search and rescue area is thus responsible for finding a place of safety, whether on its own territory or in another harbor close by. What is relevant in the context of maritime border control and surveillance activities is that, first of all, this obligation applies everywhere at sea, independently of the legal maritime zone where the vessel in distress is found; second, it applies irrespective of the nationality of those in distress and the conditions in which the vessel is found; and it applies to anyone, no matter how they “find” or become aware of a ship in distress, meaning that becoming aware of a distress situation at a distance (with the help of surveillance technology, for example) triggers a responsibility to ensure that search and rescue is being carried out. The central difficulty here is defining what constitutes a situation of distress. It is not defined in UNCLOS; the amended version of the SAR Convention defines it as a “situation wherein there is reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance<sup>15</sup>”. This still leaves room for interpretation, and there are various views on the most appropriate moment for intervening with search and rescue capacities. While some border guards wait until a situation is clearly one of imminent and life-threatening danger, others step in earlier to rescue ships

that are deemed to be so poorly equipped and so unseaworthy that they will not be able to cross the Mediterranean without ending up in distress. The latter interpretation is supported by the motivation of European border guards to stop vessels earlier, in order to justify a return to the harbor they left from, being the “nearest” safe harbor. “Proximity” has become an established reference in the execution of rescue operations, although the formal definition of “rescue” does not state proximity as a necessity for completing a rescue operation, only as one logical destination among others (another one being the rescue ship’s next port of call).

The complaints among border guard authorities that migrants seeking to cross the Mediterranean on purpose use unseaworthy ships and/or throw themselves into the water when in sight of a European vessel, in order to trigger a responsibility to search and rescue, should be seen as a direct consequence of the closing of the legal window of entry into Europe, both in terms of possibilities of authorized immigration *tout court* and the narrowing down of possibilities to have asylum requests properly processed.

### **Questions raised by these obligations: solvable through surveillance?**

The two main questions for border guards are: Are they returnable or not? Are they in need of rescue or not? The latter has precedence, as it applies to anyone, no matter where, yet the former question can add complications to a rescue operation that aims to return migrants to their port of departure when there is uncertainty about their origin and thus the possible application of the principle of non-refoulement. Our concluding argument here is more forward looking than the ones developed above, because it considers the possible further evolution of surveillance

<sup>13</sup> Efthymios Papastavridis, “Rescuing ‘Boat People’ in the Mediterranean Sea: The Responsibility of States under the Law of the Sea”, EJIL Analysis, 31 May 2011, <http://www.ejiltalk.org/rescuing-boat-people-in-the-mediterranean-sea-the-responsibility-of-states-under-the-law-of-the-sea/> (Accessed 29 February 2012).

<sup>14</sup> MSC Resolutions 153(78) and 155(78), MSC 78/26/Add. 1, Annex 3 and 5 respectively.

<sup>15</sup> International Convention on Maritime Search and Rescue, 1979, 2006 Edition, International Maritime Organization, Annex 1.3.11.

systems. We argue that with the way security issues at sea are framed (securitization of migration, need to curb “unpredictable” and “asymmetric” threats such as crime and terrorism) and the way the policy discourses about technological solutions of surveillance are built, it is highly likely that the legal challenges raised by the obligation of non-refoulement and the obligation to bring search and rescue will simply be used as yet another reason to push towards even more surveillance. The information race implies a belief in ever more information and ever more intelligence as the best response to legal and ethical dilemmas like these. Yet, more information gathering and processing to provide answers also raise other legal and ethical concerns. Would ever more detailed images of the persons onboard a vessel enable border guards to have an early idea about the origin of the migrants? This raises concerns about both the migrants’ right to privacy and issues of facial discrimination related to sorting

according to physical appearances. Early warning about ships carrying potential irregular migrants is also problematic, because it puts at risk the right of anyone to leave their country according to the Universal Declaration of Human Rights. Then, would more detailed images and early warning mechanisms enable patrolling units to bring rescue before a situation of imminent danger appears? There is a great chance that surveillance may have a positive impact here, yet with the risk of “using” the humanitarian approach of search and rescue operations to conceal what are really operations of diversion of irregular migrants heading towards the EU (Tondini, 2010). A more overarching challenge is the risk that information gathered through surveillance that is stored in databases and/or shared with cooperating partners or with other EU databases will lead to increased automation of decision-making processes that directly affect individuals, as ruled by the EU Directive on Data Protection.

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## CONCLUSION

In the case of maritime surveillance in the Mediterranean, not only the belief in surveillance technologies as all-encompassing solutions to cross-border challenges (with irregular migration as a centerpiece) but also what one would think would be the main obstacles for the establishment of a surveillance system of systems (as the EURO-SUR initiative foresees) help drive forward the discourse about the need for more surveillance. Some of the responses to the central obstacles for building such a system are

already heard in the discourse surrounding the establishment of EUROSUR, particularly those relating to the geography of the Mediterranean and the assumed flexibility of a system of systems. Other aspects of these obstacles, especially those relating to the challenges presented by the legal grey zones at sea, remain unanswered; arguing for more surveillance to solve these issues raises other legal and ethical dilemmas. Yet, the overarching discourse about the need to know more about the threats “out there” persists.

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