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Is Europe Turning into a 'Technological Fortress'? Innovation and Technology for the Management of EU's External Borders: Reflections on FRONTEX and EUROSUR

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7.1 Once upon a time ...

Once upon a time, in an era where the states defined themselves as 'sovereign', there was a border point. The border point was a place where a guard or a police-like officer used to ask to check a document called passport, which entitled a person to cross the border. States' ambitions to enhance controls over the flux of non-citizens entering their territories led them to raise the requirements and ask for an extra document, the visa, a form of permission required before arriving at a state's port or entry.¹

Nowadays the social physiognomy of the border has radically changed for a wide range of reasons. First, we name the context where the border performs its function.

Looking at the European region, the internal market project and its freedom of movement *rationale* have deprived member states' (hereinafter: MS) borders of most of their meanings. Lately, the Schengen process has removed controls at internal frontiers and required the strengthening of external borders for the benefit of European citizens.² The ambitious project of the Area of Freedom, Security and Justice (hereinafter: AFSJ), 'without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border control, asylum, immigration, and the prevention and combating of crime'³ has consolidated these milestones into something aimed at being a more coherent and comprehensive project.⁴

At another level, globalisation is challenging the purpose of controlling the flux of individuals moving across the globe, a single spatial and geo-political entity, a 'global village';⁵ at the same time, states are faced with the increased phenomena of mobility by people coming from disadvantaged areas of the world. Persistent poverty, recently made more acute by the economic crisis, is exasperating this situation, as recent North African political turmoil demonstrates.⁶ In this context, states are trying to strengthen their controls over migration flows, in an attempt to manage pressures and challenges for domestic economic and welfare systems.

A second factor to be highlighted while attempting to sketch how border controls have changed is technology.⁷ Nowadays the discourse is about e-borders, digital borders⁸ or technological borders. The myriad of technological applications available, from iris and bone scans, to satellites, 'drones' – Unmanned Aerial Vehicles (UAV) – and databases, has changed the nature of controls performed at borders.⁹ The term 'smart borders' suggests that controls at borders are becoming more and more ingenious, thanks to technology.¹⁰

European integration (with its Schengen spin-off) and globalisation, on the one hand, and the spread of technology in the management of border control, on the other hand, have determined the functional metamorphosis of the EU's external borders: these now resemble the gates of a 'cyber-fortress',¹¹ erected by Europe together with its MSs in an effort to control the endless migration flows approaching the shores of the EU.

External borders, even if naturally porous like sea borders, are framed in the political discourse as gateways to risks and threats that the EU and its MSs need to manage and control, such as cross-border crime, terrorism and 'illegal' migration. This is happening in parallel with the securitisation of migration control, which also affects the nature of border control, and which can be considered now as a fully fledged policing activity.¹² Recently commercial actors, such as aerial companies, have also been involved in the practices of controlling borders, as states' agencies delegate document control to them. The emergence of these phenomena is conceptualised as 'policing at distance', 'remote controls' and 'externalisation of migration':¹³ all these theories suggest that border control is getting an outreach dimension, purely instrumental to migration management,¹⁴ or, in the words of Elspeth Guild, that borders are 'moving'.¹⁵

The aim of this chapter is to examine critically the latest developments on technologies for the purpose of border control at EU and MS

levels. FRONTEX, the European Borders Agency, one of the last cases of agencification in the AFSJ, represents an institutional reform with the purpose of coordinating and thus 'putting together' brute force technologies (e.g. helicopters and vessels) usually 'belonging' to domestic military agencies. The second case examined under the heading of technology is EUROSUR, the European Border Surveillance System, which is developing within an ever-growing plethora of technological systems, infrastructures and databases serving the purpose of surveillance and management of external borders.¹⁶ The third case aims to present current researches and 'works in progress' in the field of technologies for the surveillance of external borders, such as 'drones' or UAV, which might be informative as to the direction in which cooperation in border control is developing.

These examples provide prisms through which we can look at how innovation and technology are translated in the context of policing external borders, and assess their implications in a political and legal perspective.

FRONTEX and EUROSUR must be placed into the EU's policy and legal context, that is, against the framework of the Stockholm programme and of the Lisbon Treaty. The Stockholm programme¹⁷ is the last multiannual programme of the EU for the AFSJ. Both texts provide new impetus to the AFSJ, defining new policy plans within a new legal architecture. In particular, the multiannual programme aims to offer an open and secure Europe serving and protecting the citizens, where openness and security represent two antithetic, even conflicting, paradigms inspiring European policies.¹⁸

In the Stockholm programme border and migration control are given high importance, both in their internal and external dimensions, inasmuch as it is possible to distinguish between them.¹⁹ Under the heading of 'access to Europe in a globalized world' the EU aims to strengthen the integrated borders management and visa policies. Illegal migration and cross-border crime are framed as phenomena which need to be contrasted, and FRONTEX is designated a central role in this respect, together with EUROSUR.²⁰

Furthermore, the programme confirms and builds upon the Global Approach to Migration, which was initiated in 2005 and centres on three axes: promoting legal migration, the relation between migration and development, and the fight against illegal migration. While recalling the advantages and chances represented by increased mobility and migration for the EU's MSs, and the need for MSs to adopt pro-active policies establishing links with the national labour market

requirements, the programme stresses that the fight against illegal migration needs to be developed through the integrated border management system, as well as cooperation with the country of origin and transit, completed also by return policies.²¹ The programme shows how the EU's migration policy has already acquired an outreach dimension and is expanding increasingly toward cooperation with third countries. If the programme is crowned by ambitious words and references to European values, it remains to be seen whether the AFSJ's practice matches its declarations of principles and promises of rights.²² For example, the programme reveals that border controls are purely instrumental to tackling migration; states' attempt to control migration implies also a criminalisation of the phenomenon, without considering its causes, and, even more importantly, it means that EU MSs are not refraining from cooperating with, for example, North African illiberal regimes, which could have the adverse effect of increasing migration toward the EU.

Having presented the context and function of border control and summarised the recent legal and political framework (1), this chapter will proceed as follows: the next section will be devoted to the main institutional innovation in the field, that is, the creation of the European agency FRONTEX, explaining its purpose, legal framework and some of its operations and issues associated with them (2). The next section will present the technological system for the management and surveillance of the external borders, EUROSUR (3). A fourth section will inform about current research and cooperation projects in the field of border surveillance (4), showing a trend towards militarisation of border surveillance. The paper will conclude (5) with some considerations on the political implications of these choices and developments, putting forward the argument that turning Europe into a technological fortress will not benefit Europe itself, nor its inhabitants.

7.2 FRONTEX: The agency and (some of) its operations at sea

The European Borders Agency FRONTEX (from *Frontières extérieures*) was set up in 2004²³ and reformed in 2007 (hereinafter: FRONTEX Regulation and RABIT Regulation, respectively).²⁴

The agency was created as a Community Agency,²⁵ in line with the consolidated case law on implied powers:²⁶ its legal basis is to be found in the old (pre-Lisbon) Treaty of the European Community (TEC), namely Article 62(2)(a) and Article 66 TEC, granting the EC powers to

adopt measures on the crossing of the external borders by establishing standards and procedures to be followed by MSs in carrying out checks on persons at such borders and measures to ensure cooperation between the relevant departments of the MSs' administrations and between Commission and MSs.²⁷

Article 1 of the FRONTEX Regulation states that FRONTEX was established with the mission of 'improving the integrated management of the external borders of the Member States'; the concept is defined in a Council document of late 2006,²⁸ endorsed by the European Council on 4–5 December 2006,²⁹ and comprises:

1. Border control (checks and surveillance);
2. Detection and investigation of cross-border crime;
3. The four-tier access control model, comprising measures in third countries (hereinafter TC), cooperation with neighbouring countries, border control, and control measures within the area of movements, including return;
4. Inter-agency cooperation;
5. Coordination and coherence on actions at EU level.

It appears that border checks and surveillance are only the first point of a much longer list, which also comprises investigation of cross-border crime and cooperation with TCs.³⁰

The legal text regulating the internal and external border management, the Schengen Border Code,³¹ was adopted later in 2006, more than one year after FRONTEX began operating.³² In this respect, FRONTEX offers an example of the dynamic and unstable relation between law and politics: in some circumstances political pressure pushes forward projects before the overall and necessary legal infrastructures are in place.

Among the main reasons for setting up a new agency we have 'provide the Commission and the MS with the necessary technical support and expertise in the management of external borders'.³³

According to the FRONTEX Regulation, the agency's main tasks are to:

1. coordinate operational cooperation between MSs in the management of the EU's external borders;³⁴
2. assist MSs in circumstances requiring increased technical and operational assistance at external borders;³⁵
3. provide MSs with the necessary support in organising joint return operations.³⁶

Besides this core operational dimension, the other main tasks include:

1. assisting MSs to train national border guards, including through the establishment of common training standards;
2. carrying out risk analyses;
3. following up on the development of relevant research for the control and surveillance of external borders.³⁷

The agency is required to assess, approve and coordinate joint operations and pilot projects proposed by MSs; FRONTEX itself may launch such operations, and is also empowered to put its technical equipment at the disposal of the MS joining such operations, as well as offer financial backing.³⁸

Other provisions show that FRONTEX plays an important role in 'putting together' technical resources among MSs, which witnesses the solidarity between MSs. The agency shall set up and keep a centralised record of MSs' technical means and equipment for the control and surveillance of external borders; MSs should contribute on a voluntary basis and according to the needs of the requesting MS.³⁹

The reform of 2007 was aimed at providing a rapid crisis-response capability available to all MSs, through so-called Rapid Border Intervention Teams (RABITs). This is the additional mission of FRONTEX, the tool to be used when risk analysis and intelligence activities (also by FRONTEX) fail to predict risks or events that MSs need to react to.⁴⁰ The RABITs should provide support for a limited time in exceptional and urgent situations, such as 'mass influx of third-country nationals attempting to enter a member state's territory illegally'.⁴¹

Another provision of the RABIT Regulation worth considering is that concerning the tasks and powers of members of teams: Article 6 specifies that team members shall have the powers to achieve border checks and border surveillance, and, more generally, the objectives of the Schengen Border Code, in accordance with the operational plan specified before the start of the RABIT intervention. This means that team members shall be authorised to carry service weapons, ammunition and equipment, and also to use them in accordance with the law of the MS hosting the RABIT intervention. The host MS shall also specify before the start of the mission which weapons shall be authorised and the conditions of their use. In any case, team members shall be authorised to use weapons for legitimate self-defence and legitimate defence of the members of the teams or other persons.⁴²

The FRONTEX Regulation provides for the organisation and realisation of the main tasks presented above. Other provisions of the FRONTEX Regulation are worth considering because of the scope of action they allow to the Agency.

For example, Article 13 enables FRONTEX to cooperate with EUROPOL and other international organisations competent in areas covered by the FRONTEX Regulation, through 'working arrangements', whereas Article 14 establishes some 'external capacities' with TCs and their authorities: indeed the agency 'shall facilitate the operational cooperation between Member States and third countries, in the framework of the European Union external relations policy', through facilitation agreements. Besides this, the agency can conclude 'working arrangements' with competent TC's authorities. Summing up, FRONTEX can conclude two different types of external agreements: (a) 'facilitation agreements' with TCs, and (b) 'working arrangements' with TC's relevant authorities, which also apply to inter-agency cooperation.⁴³

Analysing FRONTEX functioning, a first assessment to be made is that the core focus of the agency is on operational aspects: coordinating MSs' operational cooperation and providing assistance to their authorities.⁴⁴ The reform of 2007 confirmed this trend, strengthening the tasks and powers of officers participating in FRONTEX operations:⁴⁵ there seems to be a stable evolution stressing the operational dimension.⁴⁶ This is also the way the agency profiles itself. Its reports are written in a very technocratic jargon, stressing cooperation aspects, coordination functions and management logics applied to external borders. All this is meant to evocate knowledge and expertise-based legitimacy, and output legitimacy. This in turn is intended to strengthen the credibility of its operations, which constitute the main expenditure of the FRONTEX annual budgets.⁴⁷

An overall analysis of FRONTEX Joint Operations (hereinafter: JO) at sea borders would be beyond the remit of this chapter: therefore we will present here some of those JOs carried out at the Western and central Southern maritime border in order to gain a better understanding of the way that technology and technical cooperation affect border controls and surveillance.

In JO HERA (in particular HERA II and III), MSs were cooperating with Spain under the coordination of FRONTEX in joint sea surveillance operations, that is, joint aerial and naval patrols with the purpose of intercepting and diverting boats, in cooperation with the authorities of Senegal and Mauritania, the states of departure for these 'boat peoples'. In a FRONTEX News Release on JO HERA, one can read that the agency

detected vessels setting off toward Canary Islands, and diverted them back to Senegal and Mauritania⁴⁸ on the basis of bilateral agreements between Spain and Senegal and Spain and Mauritania.

JO NAUTILUS, based on the central Mediterranean Sea, began in 2006.⁴⁹ JO NAUTILUS IV (2009) is especially problematic, for several reasons. First, there is little official information by FRONTEX as to what has happened at sea during operations NAUTILUS I, II and III and no information at all on NAUTILUS IV.⁵⁰ Secondly, the information by other sources, such as NGOs and academic reports about NAUTILUS II offer conflicting statements by Maltese officials as to whether push-backs of 700 migrants to Libya occurred.⁵¹ Besides this, one can learn that the Schengen Border Code was not applied because Malta was not yet a member of the Schengen Agreement. The legal basis of those operations was unclear, and how to intercept migrants and where and how to take them were discussed on an ad hoc basis by military and security officials, thus 'reinforcing [...] [their] discretion'.⁵²

The NGO Human Rights Watch⁵³ denounced NAUTILUS IV, stating that it 'resulted in the interdiction and push back of migrants in the central Mediterranean Sea to Libya', with the cooperation of a German *Puma* helicopter, under the coordination of the Italian coastguard. The boat was carrying 75 migrants and has been 'handed over' to a Libyan patrol boat, which 'took them' to Tripoli, where they were assigned to a military unit. The Human Rights Watch report also quotes a declaration by FRONTEX Vice-Director Gil Arias-Fernandez, who commented favourably on this operation: 'Based on our statistics, we are able to say that the agreements [between Libya and Italy] have had a positive impact. On the humanitarian level, fewer lives have been put at risk, due to fewer departures. But our agency does not have the ability to confirm if the right to request asylum as well as other human rights are being respected in Libya'. The FRONTEX director denied the involvement of the agency in push-backs, and clarified that Italian operations took place outside FRONTEX operational area.⁵⁴ Lacking any official information by FRONTEX as to the operational area, it is, as first, hard to get a clear picture of what has happened, and, secondly, difficult to believe that there was no contiguity at all between a FRONTEX JO and a single MS's initiative.

As to FRONTEX, one should observe that the coordination façade of this agency and the technocratic jargon of its reports are an attempt to hide a reality of technical militarisation of border control and surveillance: also thanks to FRONTEX, these activities are now performed with a rich deployment of several types of military equipment, ranging from aerial and naval crafts to weapons. The domestic agencies involved,

such as the Italian *Guardia di Finanza*, have a quasi-military status in their domestic administrative systems. One might legitimately wonder if all this deployment of military force against undocumented migrants, implying a significant expenditure of public money, is desirable. In spite of the increasing political pressure to tackle migration flows coming from African shores, academic analysis show that irregular migration at maritime borders does not represent a significant *ratio* of the whole phenomenon, and that the successful effects of operations at sea is not clear.⁵⁵ This requires attention because it undermines the political desirability of these type of initiatives, and raises questions as to the proportionality between resources involved and final results achieved.

The little official information offered by FRONTEX does not meet the standards of accountability and transparency with which the agency should comply. Secondly, the migration dimension of these operations, and thus, the impact on human lives, is completely neglected in the agency's assessment. These operations might expose migrants to longer and more dangerous sea travels, if they disrupt shorter routes.⁵⁶ Reading FRONTEX reports it appears that the agency's only objective is erecting borders against a 'criminal phenomenon', illegal migration, and it does not matter that this concerns desperate people, often women and children, seeking a new place to live at risk of their own lives.

Besides this, there are also other legal questions that undermine the legality of FRONTEX operations: for example JOs HERA II and III were carried out on the basis of bilateral agreements between Spain and TCs that have not been made public: the EU (or FRONTEX) and participating MSs were not part of those agreements.⁵⁷ Italian push-backs that occurred alongside NAUTILUS IV were made possible on the basis of bilateral agreements between Italy and Libya.⁵⁸ Secondly, the operations presented in this section should be framed as diversion or interception operations against migrants, some of whom are potential asylum seekers: after concerned reactions by many NGOs and international agencies, such as the UN High Commissioner for Refugees,⁵⁹ the academic literature analysed the legality of those operations with reference to the law of the seas, international human rights and refugee law, with a special emphasis on the principle of *non refoulement*, as well as European asylum law, putting forward many criticisms.⁶⁰

The relevance of these questions became more serious after the entry into force of the Lisbon Treaty: the legally binding nature of the Charter of Fundamental Rights of the EU, with its many references to international law instruments, such as the Geneva Convention on the Status of Refugees, is going to make the problem more acute. A fragmentary

interpretation of MSS' and FRONTEX' duties while monitoring the EU's external borders is no longer sustainable. Thanks to the broader scrutiny of the EU Court of Justice,⁶¹ the legal accountability mechanisms will make it more likely that current operations will be assessed.

7.3 EUROSUR: The EU's technological system for the control and surveillance of external borders

Since the Hague Programme the EU political agenda has been developing in the direction of exploiting all the possibilities offered by technologies within the realm of the policies falling within the AFSJ: WE refer, for example, to the principle of availability, meaning that 'a law enforcement officer in one Member State who needs information [in the pre-trial phase] in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose'.⁶²

Technology is already a tangible reality thanks to a number of databases. Among the systems in place for the AFSJ's policies are the SIS (the Schengen Information System), which is designed to map persons who should be refused entry or be searched by law enforcement authorities, and the EURODAC systems, which lists asylum seekers. More systems are currently (and still) being developed: the SIS II, the VIS, for travellers requiring visas, and the E/ES, the Entry/Exit System, for so-called overstayers, the most significant group among irregular migrants. These have been explained as 'technological' or 'digital fixes' for the EU.⁶³

In the field of management and surveillance of the EU's external borders EUROSUR is currently being created: the target for 2011 is the EUROSUR Pilot Project, which is 'developing and demonstrating the exchange of relevant information between the Members States as well as between the Member States and Frontex'. It will first be operational between six countries at the Southern and Eastern Borders. Its aim is to 'support MSs by developing systems with modern technologies, by promoting interoperability and uniform border surveillance standards and by extending cooperation and improving data sharing between Member States and Frontex'.⁶⁴ Other relevant contributions of FRONTEX to EUROSUR in 2011 are the development of a Common Pre-frontier Intelligence Picture, to be realised by the Risk Analysis Unit; and the exploration of satellite-based imagery for border security.⁶⁵

The EUROSUR project originates from two feasibility studies the Council commissioned FRONTEX to undertake: MEDSEA and BORTEC.

The studies are not public although there is some information on them in other official documents. The MEDSEA study was designed to explore reinforcing the monitoring and surveillance of the Mediterranean, through a Coastal Patrols Network, involving Southern European countries and North African states. The BORTEC report has mapped the situation in place with regard to border surveillance, in order to explore the feasibility of a comprehensive borders surveillance system: the results showed that about 50 authorities from 30 institutions are involved in border surveillance, sometimes with overlapping competences and systems.⁶⁶

As a follow-up to those studies, the Commission Communication of 2008⁶⁷ presented the challenges and objectives for the future development of border surveillance. In that text the EUROSUR project was meant to focus initially on the EU's Southern and Eastern borders. Its declared objectives were to reduce the number of illegal migrants entering the EU; to increase the security of the EU as a whole by contributing to the prevention of cross-border crime; thirdly, to enhance the EU's search and rescue capacity, an objective which in later texts has been framed as a humanitarian reason for reducing the death toll of migrants losing their lives while attempting to cross the Mediterranean.⁶⁸

The EU's goal with EUROSUR is to achieve 'border surveillance', which means to set up a system for the surveillance of borders between crossing points. This should be completed by 'border checks', that is, border control through checks carried out at border crossing points, which is fulfilled by technological tools currently being developed (the abovementioned SIS II, VIS, E/ES, and the RTP, the Registered Traveller Programme). Border surveillance through EUROSUR is indicated to represent an important step in the process of gradual establishment of a common European integrated border management system.

In practical terms, EUROSUR is a common technical framework to support MSs authorities and enhance their capacity to coordinate at a European level and to cooperate with TCs. Thus, the main goal of EUROSUR is to provide a technical framework for the use of existing systems and common tools, like satellites, and for the exchange of information and intelligence. The EUROSUR system should be set up without affecting MSs' respective areas of jurisdiction (EUROSUR's principle of 'neutrality' with respect to internal MSs' division of competences), nor by replacing any existing systems.

Its development should take place through three phases: the first phase is about interlinking and streamlining existing national surveillance systems at MS level; the second, about the development and

implementation of common tools at the EU level; the third phase should lead to a common information-sharing environment for the EU maritime domain.

In the first phase MSs will have to set up National Coordination Centres (NCCs) and National Surveillance Systems (NSSs). This shows EUROSUR envisages the creation of new actors tasked with intelligence functions at the domestic level. At the same time, other steps of the first phase require some cooperation with third countries. This last aspect is having deep political implications, and therefore, should be dealt with at the appropriate level, with guarantees of transparency.

More recently, in the 2010 Communication on 'The EU Internal Security Strategy in Action: Five steps towards a more secure Europe'⁶⁹ the Commission addressed the EU strategy on security through five policy objectives, confirming that one of the key objectives for addressing security concerns was to strengthen border management, a target to be reached mainly thanks to technology.

If the legitimacy of EUROSUR is defended also for its humanitarian dimension, one might wonder whether all these developments are not driven simply by a logic of surveillance and control of migration phenomena, to be carried out by exploiting all the possibilities offered by the high-tech industry.

The EU is investing significant amounts of money in technologies for policing borders:⁷⁰ EUROSUR is part of this process. While the rationalising effort of this project is laudable, its long-term implications are more obscure, especially with regard to control over the amount of data to be generated by all the databases indicated and the flow of information to be exchanged through the system, the magic word being interoperability. Secondly, any expansion of controls over migration must be confronted with the so-called waterbed effect: though it is often reported that recent increased practices of controls and surveillance at sea have contributed to diminished numbers of illegal migrants, these arguments do not consider that increased controls impact on migration routes more than on migration itself. Moreover, if the number of people drowning at sea falls,⁷¹ the numbers of missing people thanks to sea surveillance and interception practices is rising.⁷²

7.4 Other investments in brute-force technology

The panorama of European developments and investments in brute-force technology does not stop here. Among other plans for research on hi-tech border surveillance are satellite surveillance systems, UAVs

or 'drones', and maritime vehicles, and other systems to be studied in the context of border management. The flow of technological tools and systems to be exploited to defend Europe from the 'threat' of undocumented migrants seems never-ending.

Also in this context, FRONTEX is cooperating with defence and surveillance industry, in the context of the PF7 programme, working to adapt military surveillance techniques for Europe's borders. The 'giants' of war and military industry, such as Sagem, Finmeccanica, Israel Aircraft Industries and others are working together within EU-sponsored research and industry projects to develop what we would label 'total surveillance tools', that is, tools and technical infrastructure to achieve the '24/7 blue and green border situation awareness'.⁷³

The EU is thus funding research aiming to develop autonomous and adaptive systems for protecting borders, taking measures to stop illegal action at those borders with the supervision of border guards. FRONTEX is investing in research on fixed surveillance and border-drone technology, alongside similar projects studied by the European Defence Agency (EDA) and some MSs. Besides this, it is also coordinating a working group of the European Security Research and Innovation Forum (ESRIF), dealing with integrated border management and maritime surveillance.⁷⁴ The US has been also investing in such technologies for controlling its Mexican borders through 'predator drones', which have been heavily criticised by UN Special Rapporteur on Extra-judicial Killings Philip Alston, who accused the US of 'giving the CIA a license to kill and encouraging a PlayStation mentality that devalues human life'.⁷⁵ Even accepting the Commission's argument that the EU is developing such technological tools with the aim of reducing the death toll of migrants, a question remains: will such a plethora of technological tools tell us more than mere facts, that is, the presence of humans in the midst of the sea? Will this technology help FRONTEX and the MSs to identify those people trying to reach the shores of Europe, in fulfilment of international and European human rights obligations? Or are these systems meant to reinforce 'cyber-fortress Europe'?

Another aspect emerging in reports of FRONTEX's high-ranking officials⁷⁶ concerns involvement and cooperation with armed forces in the control of migration flows. The ongoing cooperation with NATO and EDA as well as with national armed forces in the area of border security issues⁷⁷ reveals a process of militarisation of border controls. Even if this is confined to the area of research and technology, training and exchange of information and risk analysis, there are reasons to believe that technology is becoming the 'Trojan horse' for pushing forward

more militarisation of border surveillance within a logic of securitisation of borders management and migration policy.⁷⁸ The enemy that our democratic and liberal societies are facing is the un-wealthy and un-documented migrant, trying to reach his or her ought-to-be 'promised land' in precarious boats: we are tackling this threat by deploying satellites, airplanes, vessels, sensors and more, as if we are dealing with enemy states – or 'rogue states' such as Libya –, jeopardising the very existence of our democracies and liberal values. Most worrying of all, the EU and its MSs are actively involving non-liberal states in this fight against migrants, by making cooperation and aid subject to 'migration conditionality'.

The rationale underlying the creation of EUROSUR, as emerging from the Commission Communication of 2008, reveals a similar logic, while framing a close link between the need to fight illegal migration and prevent cross-border crime (terrorism, trafficking in human beings, drug smuggling and illicit arms trafficking).⁷⁹ These developments need to be monitored simply because they confirm the criminalisation of undocumented migration. They thus suggest that undocumented migrants should simply be stopped before the borders, without consideration for any other elements which might come into play, like people fleeing persecution and the like.

7.5 Concluding remarks

After an introduction putting the EU's external borders control in the context of the fight against undocumented migration, the chapter has presented the legal framework and some of the activities of the EU's border agency FRONTEX, focusing in particular on maritime border control in the Mediterranean Sea. The information available on some JOs (described above) indicates serious policy and legal issues on the respect of international and European asylum provisions, besides problems of transparency and accountability on such activities led by FRONTEX. In particular, the interception of boats of undocumented migrants at sea, carried out within or alongside FRONTEX-coordinated operations, constitute a deplorable practice. The institutional innovation represented by FRONTEX will be completed by the EUROSUR system, currently under discussion. The latter instrument has the purpose of realising a 24/7 control of the EU's land/sea borders, in order to achieve 'full situational awareness'. Borders control is – or could be in the near future – performed with the deployment of all technological means available, from biometrics to war technologies (drones). Considering

the type of activities (interception of boats at sea) and the instruments employed or being investigated/developed, that is, in the direction of military technologies, the first consideration to be made is about the ongoing militarisation and securitisation of external borders control and surveillance. The question here is whether pursuing such a policy is socially desirable, having regard to the high costs involved and the unclear benefits.

A second reflection considers that pursuing the path of technology without clearly defined parameters of what is socially desirable and what is not, undermines the whole high-tech project on issues of legitimacy and proportionality. Technology runs the risk of being exploited to achieve 'total surveillance' situations, which would threaten our liberal and democratic societies much more than some thousands third country nationals in search of peace and prosperity. In this scenario technology, a mean, becomes an end.

Another concern is devoted to persons, as stakeholders affected by border control and surveillance. The interests and aspirations of persons seeking to reach Europe force us to reconsider the way we frame the relation between person and territory first, but also between we Europeans and the others, that is, persons coming from the rest of the world. Making access to Europe more difficult will not stop people in distress from searching for more humane conditions in which to live; quite the opposite, it might imply that more persons will fall in smugglers' hands and more generally fall victim to organised crime. Therefore, one should be aware that the way in which access to a country is framed has implications for the freedom of other persons, for the notion of a person as a holder of rights, and eventually for the very basic idea of what constitutes a human being.⁸⁰

Turning Europe into a technological fortress and disregarding human life in its bare life – *nuda vita* – dimension will not make Europe and its privileged inhabitants safer. The developments presented in this chapter should indicate the need for a reflection on the social desirability of the massive deployment of technologies in the domain of border control and surveillance. We should not forget that borders should define the place where they *all* lived happily ever after.

Notes

1. Ryan, B., 'Extraterritorial immigration control: what role for legal guarantees?' in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* (Leiden and Boston: Martinus Nijhoff 2010), p. 4.

2. See Guild, E., *Moving the Borders of Europe*, inaugural lecture, available at: www.jur.ru.nl/cmr/docs/oratie.eg.pdf; see also K. Groenendijk, E. Guild and P. Minderhoud (eds), *In Search of Europe's Borders* (The Hague: Kluwer, 2003).
3. Article 3(2) TEU.
4. The status quo however is often perceived as problematic, unbalancing (internal) security and freedoms, focusing on cooperation among state authorities and undermining individuals' rights.
5. The reference is to the fortunate theorisation of the communication theorist M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto: University of Toronto Press, 1962), and *Understanding Media* (New York: McGraw-Hill, 1964).
6. Sapelli, G., 'Disoccupazione, rivolte e immigrazione', *Corriere della Sera*, 19 February 2011.
7. Dijstelbloem, H. and A. Meijer, *Migration and the New Technological Borders of Europe* (Basingstoke: Palgrave Macmillan, 2011).
8. Brouwer, E., *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System* (Leiden and Boston: Martinus Nijhoff, 2008).
9. In April 2011 the Swiss authorities were patrolling parts of their Southern border with drones, for the purpose of controlling and preventing possible migrants trying to reach the Confederation from Italy. Available at http://www.ilgiorno.it/varese/cronaca/2011/04/07/486460-caccia_migranti.shtml.
10. Dijstelbloem, H., A. Meijer and M. Besters, 'The migration machine, in H. Dijstelbloem and A. Meijer, *Migration and the New Technological Borders*, cit., p. 11.
11. Guild, E., S. Carrera and F. Geyer, *The Commission's New Border Package. Does It Take Us One Step Closer to a 'Cyber-Fortress Europe'?*, CEPS Policy Brief, No. 154/2008.
12. The online version of the Oxford Advanced Learner's Dictionary, for the entry 'policing', reports the following:
 - 1: the activity of keeping order in a place with police, *community policing*
 - 2: the activity of controlling an industry, an activity, etc. to make sure that people obey the rules, *the policing of legislation*'.
13. These practices emerged in the context of policing external borders in connection with the fight against undocumented migration. See E. Guild and D. Bigo, 'The transformation of European border controls, in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Leiden and Boston: Martinus Nijhoff, 2010), pp. 258–9.
14. Guiraudon, V., 'Before the EU Border: Remote Control of the 'Huddled Masses'', in K. Groenendijk, E. Guild and P. Minderhoud (eds), *In Search of Europe's Borders* (The Hague: Kluwer, 2003).
15. Guild, E., *Moving the Borders of Europe*, op. cit.
16. On surveillance see M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995). Playing on the concept of Bentham's panopticon, see B. Hayes, *NeoConOpticon: The EU Security-Industrial Complex*. Available at <http://www.statewatch.org/analyses/neoconopticon-report.pdf>, date of retrieval: 4 April 2011. Transnational Institute and Statewatch, 2009.

17. OJ 2010/C 115/01.
18. For a comment on the draft programme, see E. Guild, S. Carrera and A. Faure Atger, 'Challenges and Prospects for the EU's Area of Freedom, Security and Justice', CEPS Working Document No. 313/2009. See also R. A. Wessel, L. Marin and C. Matera, 'The external dimension of the EU's area of freedom, security and justice', in C. Eckes and Th. Konstadinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge: Cambridge University Press, 2011), pp. 272–300.
19. It is indeed since 2005 that the European Council has put the milestones for a so-called Global Approach to Migration, witnessing a policy choice of dealing with migration also in the external relations of the EU. See Presidency Conclusions on the Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean, European Council, Brussels, 15–16 December 2005.
20. Stockholm Programme, section 5: Access to Europe in a globalised world.
21. Stockholm Programme, section 6: A Europe of responsibility, solidarity and partnership in migration and asylum matters.
22. The Stockholm Programme features numerous references to fundamental rights and European values through the whole text.
23. Council Regulation (EC) No. 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1; hereinafter: FRONTEX Regulation.
24. Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers; OJ L199/30; hereinafter: RABIT Regulation.
25. Curtin, D., *Executive Power of the European Union Law, Practices, and the Living Constitution* (Oxford: Oxford University Press, 2009), pp. 146, 147, describes agencies as the 'satellite executive power'.
26. The reference is of course to the seminal ECJ's case *AETR*: case 22/70, *Commission v. Council* (*AETR*) (1971) ECR 263. See also J.J. Rijpma and M. Cremona, 'The extra-territorialisation of EU migration policies and the rule of law', EUI Working Papers LAW 2007/01, quoting readmission agreements adopted on the legal basis of Article 63(3)(b) TEC as an example of act adopted by the EC without an express treaty reference to such instruments, pp. 10–11.
27. In (old) TEC, one reads:
Article 62
 'The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:
 1. measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;
 2. measures on the crossing of the external borders of the Member States which shall establish:
 (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders; (...)'.

Article 66 TEC:

'The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this title, as well as between those departments and the Commission'.

28. Council document No. 14202/06, draft Council conclusions on integrated border management. The concept has been previously referred at in Commission's communication – toward integrated management of the external borders of the Member States of the European Union, COM (2002)233 final, cit.
29. Council Conclusions on Justice and Home Affairs Council, Brussels, 4–5 December 2006.
30. See Baldaccini, A., 'Extraterritorial border controls in the EU: the role of FRONTEX in operations at sea', in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* (Leiden and Boston: Martinus Nijhoff, 2010), p. 233.
31. Regulation (EC) No. 562/2006 of the European Parliament and of the Council, OJ L 105/01.
32. Guild, E. and D. Bigo, *The Transformation of European Border Controls*, cit., 268.
33. Article 1(3) of the FRONTEX Regulation.
34. Article 2(1) letter (a).
35. *Ibid.*, letter (e).
36. *Ibid.*, letter (f).
37. Article 2(1) letters (b), (c), (d) respectively.
38. Article 3(1) and (4).
39. Article 7.
40. Regulation No. 863/2007/EC.
41. *Ibid.*, recital 7 of the preamble.
42. Article 6 (1), 6(5), 6(6), 6(7).
43. Cf Wessel, R. A., L. Marin and C. Matera, 'The external dimension of the EU's area of freedom, security and justice', in C. Eckes and Th. Konstantinides (eds), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge: Cambridge University Press, 2010), p. 294.
44. This is what one can read in FRONTEX Press release: 'FRONTEX – facts and myths', by Ilkka Laitinen: 'Summing up I would like to remind that FRONTEX activities are supplementary to those undertaken by the Member States. FRONTEX doesn't have any monopole on border protection and is not omnipotent. It is a coordinator of the operational cooperation in which the Member States show their volition. If some of our critics think it is not enough they should fix their eyes on decision takers, as FRONTEX only executes its duties described in the Regulation 2007/2004'. In J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union*, EUI PhD thesis. See also the Commission Communication on European Agencies – The Way Forward COM (2008)135, p. 7, where FRONTEX is classified as an agency in charge of operational activities: 'Agencies can be classified in different ways. One useful way is to try to look at the key functions they perform'.
45. See Article 6 and 7, Regulation (EC) No. 863/2007, cited above.

46. See JHA Council of 5–6 June 2008; Commission COM (2009) 262 p. 18; earlier: COM (2008) 67, p. 5.
47. The number of sea border joint operations is increasing every year, together with the number of participating states. See FRONTEX Press Pack, available at: www.frontex.europa.eu. This finds confirmation also in the annual budgets: in 2008, the 62 per cent of the total budget (31,1 MEUR out of 50,635,) has been devoted to sea border operations, whereas the second largest portion of the budget (13% of the budget) is represented by training (of border guards). See COWI Evaluation Report, 15 January 2009, available at the Frontex webpage, p. 25.
48. 'Based on their bilateral agreements with Spain, Senegal and Mauritania were also involved with their assets and staff. The main aim of this joint effort was to detect vessels setting off towards the Canary Islands and to divert them back to their point of departure thus reducing the number of lives lost at sea. During the course of the operation more than 3500 migrants were stopped from this dangerous endeavour close to African coast'. News Release 'Longest FRONTEX coordinated operation – HERA, the Canary Islands' of 19 December 2006, available at: http://www.frontex.europa.eu/newsroom/news_releases/art8.html. For figures, see the statistic published on Frontex's webpage. Accessed on 4 April 2011.
49. Tondini, M., 'Fishers of men? The interception of migrants in the Mediterranean Sea and their forced return to Libya', *INEX Paper*, October 2010, available at: www.inexproject.eu, 16. Accessed on 4 April 2011.
50. In 2006 and 2007 operations, FRONTEX statements declare that about 3000 migrants were intercepted, one third within the operational area, two thirds outside it. In 2008 operations, FRONTEX declared that no migrant was diverted back or deterred; instead some 15 facilitators were arrested. FRONTEX statistics for NAUTILUS 2008 tell that 16,098 migrants arrived to Italy, and 2321 to Malta.
51. Klepp, S., 'A contested asylum system: The European Union between refugee protection and border control in the Mediterranean Sea', 12 *European Journal of Migration and Law* (2010), pp. 1, 16.
52. Klepp, S., 'A contested asylum system', op. cit., p. 17.
53. See Human Rights Watch Report 'Pushed Back, Pushed Around', available at: <http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0>, p. 37. Accessed on 4 April 2011.
54. Tondini, M., 'Fishers of men?' op. cit., 16.
55. COWI report and Baldaccini, A., op. cit., 239.
56. See for example the reports of Statewatch, website Migrants At Sea, available at: <http://migrantsatsea.wordpress.com>, Human Rights Watch, the RefWorld tool of UNHCR, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain>. Accessed on 4 April 2011.
57. Trevisanut, S., 'The Principle of *Non-Refoulement* at Sea and the Effectiveness of Asylum Protection', in A. Von Bogdandy and R. Wolfrum (eds), *Max Planck Yearbook of United Nations Law*, vol. 12. (<http://www.brill.nl/max-planck-yearbook-united-nations-law-volume-12-2008> Leiden-Boston-Tokio: Brill, 2008), pp. 205, 245; S. Trevisanut, 'Maritime border control and the protection of asylum seekers in the European Union', *Touro International Law Review*, vol. 12 (2009), pp. 157, 159.

58. Treaty of Friendship, Partnership and Cooperation with Libya, signed in Bengasi on 30 August 2008. For a comment see 'Il trattato Italia-Libia di amicizia, partenariato e cooperazione', dossier no. 108/2009, under the direction of N. Ronzitti, available at: http://www.iai.it/pdf/Oss_Transatlantico/108.pdf. Additional Technical-Operational Protocol of 4 February 2009, not publicly available. Accessed on 10 May 2011.
59. UNHCR Press Release: 'UNHRC deeply concerned over returns from Italy to Libya', 7 May 2009.
60. See *ex multis*, see the complete and accurate reconstruction by V. Moreno Lax, 'Seeking asylum in the Mediterranean: Against a fragmentary reading of EU Member States' Obligations Accruing at Sea, *International Journal of Refugee Law*, vol. 23 (2011), pp. 174–220.
61. See Article 263 of the TFEU: this provision states that the EUCJ will also review 'the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis à vis third parties'. This will make possible for the EUCJ to review the legality of acts of FRONTEX.
62. The multiannual Hague Programme, adopted at the European Council of 4 and 5 November 2004.
63. M. Besters, F. W. A. Brom, 'Greedy' Information Technology: The Digitalization of the European Migration Policy, *European Journal of Migration and Law*, vol. 12 (2010), pp. 455–70, at 457 ff.
64. See FRONTEX Programme of Work 2011; Council Document 5691/11, 25.1.2011, p. 29.
65. *Ibid.*, p. 48.
66. COM (2008)68, p. 3.
67. COM (2008)68.
68. COM (2008)68 and MEMO/08/86 from the Council.
69. COM (2010)673 final.
70. 'More than €50 million in EU funds from the European Security Research Programme of the Commission's FP7 has already been allocated to the adaptation of military surveillance techniques to Europe's borders'. From B. Hayes (NGO Statewatch), 'The robot armies at our borders', for the Economist's European Voice, 2.10.2010, available at <http://www.europeanvoice.com/article/imported/the-robot-armies-at-our-borders/69598.aspx>. Accessed on 4 April 2011. A more specific example is the consortium SEABILLA, coordinated by Selex (a Finmeccanica company), which was awarded a €10 million 'research' contract to develop an EU sea border surveillance system (the total project cost is €15.5 million, the EC contribution is €9.8 million). This has been launched in the framework of the FP7 programme, aiming at making the EU 'most dynamic competitive knowledge-based economy in the world'. The consortium 'SEABILLA', which was awarded the tender, includes a host of arms companies and defence contractors (BAE Systems, EADS, Thales, Sagem, Eurocopter, Telespazio, Alenia, TNO and others) and promises to: (1) define the architecture for cost-effective European sea border surveillance systems, integrating space, land, sea and air assets, including legacy systems; (2) apply advanced technological solutions to increase performances of surveillance functions; (3) develop and demonstrate significant improvements in detection, tracking, identification and automated behaviour analysis of all vessels, including hard to detect vessels, in open waters as well as close

to coast. According to the project synopsis, these surveillance systems will be used for: (a) fighting drug trafficking in the English Channel; (b) addressing illegal immigration in the South Mediterranean; (c) thwarting illicit activities in open-sea in the Atlantic waters from Canary Islands to the Azores; in coherence with the EU Integrated Maritime Policy, EUROSUR and Integrated Border Management, and in compliance with member states' sovereign prerogatives. Source: 'Research or procurement? Finmeccanica-Selex awarded €10 million EU sea border surveillance contract'. The information was retrieved at <http://neoconopticon.wordpress.com/2010/09/22/research-or-procurement-finmeccanica-selex-awarded-e10-million-eu-sea-border-surveillance-contract/>. Accessed on 4 April 2011.

71. The dominant view is actually the opposite. On this point we can find many different and divergent figures, which are difficult to assess. What is uncontested is that we talk about ranges of thousands. As it about human lives drowned at sea, we prefer not to provide any figure. The phenomenon is serious and it is worth all our attention, in spite of the nitty-gritty numbers involved.
72. NeoConOpticon, op. cit., p. 41.
73. Hayes, B., (NGO Statewatch), 'The robot armies at our borders', for the Economist's European Voice, 2 December 2010, available at: <http://www.europeanvoice.com/article/imported/the-robot-armies-at-our-borders/69598.aspx>. Accessed on 4 April 2011.
74. NeoConOpticon, op. cit., p. 37.
75. Hayes, B., 'The robot armies at our borders', op. cit. As to the position taken by the Obama administration in it, see the recent interview of UN Special Rapporteur P. Alston, available at <http://www.democracynow.org/2010/4/1/drones>.
76. Arias Fernandez, G., CIDOB report.
77. Ibid., 131.
78. Léonard, S., 'FRONTEX and the Securitization of Migrants through Practices', paper presented at the Migration Working Group Seminar, European University Institute, Florence, 9 February 2011.
79. See the Commission's communication COM (2008)68 final, p. 3, where the Commission discusses the objectives of EUROSUR.
80. See Agamben, G., 'Al di là dei diritti dell'uomo', *Mezzi senza fine*, Turin 1996, pp. 20–30.