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The EU External Edges: Borders as Walls or Ways?

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Abstract

The "Area of Freedom, Security and Justice" (AFSJ), that was established in Europe by the 1997 Treaty of Amsterdam, can be understood as an ambitious attempt to complete the freedom of movement of persons, one of the four liberties that were the core components of the 1957 Treaty of Rome, which gave birth to the European Economic Community. Most EU member States participate in the Schengen area and appear eager to abolish the internal borders between them and to define European common external borders. With the successive enlargements of the European Union, these borders have moved eastward and southward and have also become more complex. This paper argues that due to the exploitation of the technologies of digitalization, the borders and their control have turned out to be more fluid and mobile, more normative and reticular, toughening the development of processes of categorization between the desirable migrants and the undesirable ones. Thus the borders appear to be pathways (ways) for the former and barriers (walls) for the latter.

Keywords

Europe, external borders, immigration, fundamental rights, sovereignty

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Are the European Union (EU) external borders "ways," that is to say pathways that promote the movement of Third Country Nationals (TCNs) from the outside to the inside in order to stimulate economic trade, scientific projects, cultural development, family reunification and refugees' international protection? Or are the EU external borders "walls," in other words barriers that prevent TCNs from entering the territory of EU member States? Such a question can be asked because the surveillance of the EU borders has genuinely evolved during the last two decades, so much so that a real dichotomy has appeared between the desirable ones that are encouraged to come into the EU and the undesirable ones that are kept as far away as possible from EU territory. Different tensions are highlighted when dealing with this issue: the confrontation between the basic principles (the four liberties of free movement) and the substantial values (the protection of fundamental rights) that the EU polity is asserted to rely on, and the consequences (the violation of fundamental rights of the migrants) and the worrying effects (the dissolution of the rule of law) that EU policies engender. Also evident is the opposition between the integration process that characterises the EU project and the fragmentation effects that result from the member States' propensity to preserve their sovereignty.

The Treaty of Lisbon, which came into force on 1 December 2009, confirms and consolidates the evolving definition and the surveillance of the EU borders over the last two decades. The Treaty consolidates formerly dispersed policies on Justice and Home Affairs under one heading "Area of Freedom, Security and Justice" (AFSJ). Specifically this 'area' covers judicial cooperation both in civil and criminal matters and police cooperation, together with provisions concerning border control, asylum and immigration (Acosta Arcarazo & Murphy 2014). While the Lisbon Treaty established a new legal foundation for the European border control regime, the multi-annual Stockholm Programme adopted on 11 December 2009 by the Council of the European Union defines the political guidelines for legislative and operational planning within the AFSJ from 2010 to 2014,[1] as the Tampere 1999 Programme[2] and The Hague 2004 Programme[3] did for previous

1 EUROPEAN COUNCIL, Brussels, 10 & 11 December 2009, Presidency Conclusions; Stockholm Programme. An Open And Secure Europe Serving And Protecting Citizens, *Official Journal of the European Union*, C 115 of May, 4 2010.

2 EUROPEAN COUNCIL, Tampere, 15 & 16 October 1999, Presidency Conclusions, SN 200/99, Brussels, 1999.

3 EUROPEAN COUNCIL, Brussels, 4 & 5 November 2004, Presidency Conclusions; The Hague Programme. Strengthening Freedom, Security and Justice in the European Union, *Official Journal of the European Union*, C 53/1 of March, 3 2005.

periods (that is to say from 1999 to 2004 and from 2004 to 2009, respectively).

Such an "Area of Freedom, Security and Justice" (AFSJ) might be understood as an effort to complete the free movement of persons, one of the four liberties that were the core components of the 1957 Treaty of Rome, which gave birth to the European Economic Community (ECC). Yet amongst these four liberties of movement of goods, capitals, services and persons, the last one is particularly difficult to establish, with systematic identity checks remaining in place at the borders between most of the EU member States. While the Single European Act (SEA)[4] was negotiated in order to create an internal market between ECC member States, five of whom decided to conclude an agreement outside the ECC scope to overcome the lack of consensus regarding the gradual abolition of border checks within the European Community's internal borders. Belgium, France, Luxembourg, the Netherlands and Germany signed the Schengen Agreement on 14 February 1985, which was supplemented by the Schengen Convention signed on 19 June 1990 in order to organize the complete abolition of border controls between member States of the Schengen area, to issue common rules on visas and to promote police and judicial cooperation.[5] The rules governing the movement of persons across the Schengen area borders were clarified and consolidated in 2006, thanks to the adoption of the Schengen Borders Code[6] that constitutes the com-

4 The Single European Act was signed in Luxembourg on 17 February 1986 by the nine ECC Member States and on 28 February 1986 by Denmark, Italy and Greece; it entered into force on 1 July 1987.

5 Since the Treaty of Amsterdam, the Schengen treaties (the Agreement and the Convention) are incorporated into the European Union law: they are part of what is known as the "*acquis communautaire*." Therefore, the new EU member States do not sign the Schengen Treaties as such, but are bound to implement the Schengen rules as part of the pre-existing body of EU law, which every new entrant is required to accept; and the legal acts setting out the conditions for entry into the Schengen Area are now enacted by majority vote in the legislative bodies of the European Union according to the ordinary legislative procedure. However, it must be emphasized that opt-outs have been provided for the only two EU member States which had remained outside the Area: Ireland and the United Kingdom and that Denmark, even though it signed the Schengen Agreement, can choose whether or not to apply any new measures that constitute a development of the Schengen "*acquis*."

6 Regulation (EC) n° 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (*Official journal of the European Union* (*OJUE*), J L 105 of 13 April 2006), as it has been amended by Regulation (EC) n° 296/2008 of the European Parliament and of the Council of 11 March 2008 determining the implementing powers conferred on the Commission (*OJUE*, L 97 of 9 April 2008), Regulation (EC) n° 81/2009 of the European Parliament and of the Council of 14 January 2009 concerning the use of the Visa Information System (VIS) under the Schengen Borders Code (*OJUE*, L 35 of 4 February 2009), Regulation (EC) n° 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (*OJUE*, L 243 of 15 September 2009) & Regulation (EU) n° 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) no. 562/2006 as regards movement of persons with a long-stay visa (*OJUE*, L 85 of 31 March 2010).

mon corpus of binding legislations for all the Schengen area member States.

Article 2 of the Schengen Agreement states that "internal borders may be crossed at any point without any checks on persons carried out." Yet the abolition of internal border controls and the renewal of freedom of movement within European space is based on the obligation of the country that is the first point of entry to verify an individual border crosser's compliance with a series of criteria. According to article 5.1 of the Schengen Borders Code, national authorities are required to examine the following entry conditions applying to TCNs "for stays not exceeding three months per six-month period": 1) possession of a valid travel document or documents authorizing the crossing of the border; 2) possession of a valid visa, in light of the conditions stipulated in the Code on Visas; 3) justification of the purpose and conditions of the intended stay and "sufficient means of subsistence for the duration of the intended stay and for the return to their country of origin"; 4) whether the individual is subject to an alert in the Schengen Information System (SIS) for the purpose of refusing entry into the Schengen territory; and 5) whether the person is considered a "threat to public policy, internal security, public health or the international relations of any of the member States." Afterwards, those TCNs who fulfill all the conditions detailed, in article 5.1 of the Schengen Border Code can move freely in the Schengen area.

The abolition of the EU's internal borders shouldn't come at the expense of security. Since no checks are carried out at the borders between member States of the Schengen area, two assumptions were never questioned; "the myth of the loss of control and the supposed security deficit that comes with it" (Moreno-Lax 2014, 154). Hence EU States have decided to join forces to attain the dual objective of improving security through more efficient external border controls, while facilitating access to those having a legitimate interest in entering EU territory. According to this logic, security appears as a necessary precondition for the establishment and the expansion of free movement in the EU. The quest for security, however, can never be completely fulfilled, since this is an inherently subjective and unstable condition. As a result, the security issue feeds more security disposals that generate more security problems, in a cumulative process that can potentially go on *ad infinitum*. One of the side effects of this securitization is that the policies it entails can be considered as essentially repressive, since they are aimed at sealing off Europe from potential threats, hence putting in jeopardy the principles of liberty and the protection of rights (Carrera & Balzacq 2013).

Indeed, although most European States seem to have the ambition of overcoming the traditional legal perspective, creating the European Union, abolishing its internal borders, and defining common European external borders, these States have revealed their wish to remain genuinely attached to their sovereignty.

Hitherto this has depended on a strong relationship between the territory (geography), the bureaucracy (government) and the *demos* (population); insofar that a necessary condition of statehood is for the State to possess a monopoly over both the legitimate use of violence within the territory and the legitimate means of movement into and out of such a territory. So the concepts of inclusion and exclusion from territory, bureaucracy and *demos* are inherent in the opposition between citizens or nationals on one side and immigrants or third country nationals (TCNs) on the other side, with the existence of physical borders making it possible to check passports to distinguish between nationals and TCNs. Therefore the distinction between the inside and the outside, between the insiders and the outsiders, seems to correspond to the geographical boundaries of the State's territory, to the physical limits of the polity's shape.

Nevertheless, it has become necessary to rethink the relationship between control and borders. Major changes at the borders have taken place and the essential qualities of the borders have been transformed. The successive enlargements of the EU have led to substantial modifications in the size and shape of its borders, with the Schengen area gradually expanding to include nearly every EU member States.[7] Nowadays, it encompasses most EU States (except Bulgaria, Croatia, Cyprus, Ireland, Romania and the United Kingdom)[8] and even non-EU member States (Iceland, Norway, Switzerland and Liechtenstein). The 2004 and 2007 enlargements, which incorporated twelve new States with 130 million inhabitants, were particularly important because they caused EU territory and the Schengen area's external borders to shift in an eastward and southward direction. The external borders of the new member States, particularly those in the southern Mediterranean and in south-eastern Europe, became the external borders of Schengen territory. So these new member States were now responsible for determining the lawfulness of TCNs crossing into the entire Schengen area.

This situation created new and more complex EU external edges (8,000 km land borders, 43,000 km sea borders and 600 airports with extra-Schengen flights) which led EU member States to strengthen their surveillance of the people crossing them. In practice, efforts to promote cooperation in justice and police matters were intensified, as were efforts to uphold the harmonization of the right of asylum, to regulate labor migration, to manage family reunification, to fight against illegal immigration, to establish partnerships with third countries, to con-

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7 Italy signed the Schengen Agreement and the implementing Convention on 27 November 1990, Spain and Portugal joined on 25 June 1991, Greece followed on 6 November 1992, then Austria on 28 April 1995 and Denmark, Finland and Sweden on 19 December 1996.

8 Bulgaria and Romania are currently in the process of joining the Schengen Area.

clude return programs, and to toughen border controls (Faure Atger 2008; Guild, Carrera & Balzacq 2008). The EU external edges have been redefined and the ways they are controlled have been reshaped (Zapata-Barrero 2010). The development of processes of categorization (I) and channels of digitalization (II) have modified the nature of the borders, making them less geographic and territorial, more normative and reticular, so much so that the EU's external frontiers accordingly appear as open doors (ways) for desirable migrants and barriers (walls) for the undesirable ones.

THE REDEFINITION OF THE EU'S EXTERNAL BORDERS: THE PROCESSES OF CATEGORIZATION

According to the Schengen Borders Code, there is a major distinction between EU-citizens (nationals of the EU member States) and Third Country Nationals (TCNs), who are submitted to different levels of control when crossing an external border. EU-citizens undergo a minimum check, which is carried out to establish their identity on the basis of their travel documents; TCNs are subject to thorough controls. The EU external borders surveillance regime is based upon security and safety concerns, which not only create a division between citizens and non-citizens, but also a discrepancy between safe and potentially "risky" individuals (Hansen & Papademetriou 2014). Yet the EU simultaneously pursues the aims of eliminating terrorism, preventing illegal immigration, and fighting against international organized crime. Hence the distinction between the politically suitable and the potentially "risky" immigrants and between allegedly safe and possibly dangerous individuals appears to be both obviously unclear and normatively uncertain, generating an implicit association of immigrants with criminals. It must be emphasized that, in such a perspective, regulating the movements of TCNs across EU external borders are increasingly conceived and treated as security issues aimed at preventing criminal activities and not—as they ought to be—as humanity problems in order to guarantee the rights protection.

The expressions often used by EU documents, such as "organized terrorists," "lone wolves" and "illegal immigrants" reveal that EU's external border controls are genuinely based upon the surveillance of individuals and that these individuals' categorizations are essentially related to the political construction of threats (Ceyhan 2010; 2012). According to some authors, the TCNs are thus submitted to different levels of controls according to their supposed level of riskiness, and can therefore be considered via a complex typology that relates to different forms of exclusion (Bigo, Carrera, Guild & Walker 2010). The categories are multiple

and permit different types and levels of rights. First, there are the TCNs who are inside the Schengen area who are divided between the TCNs with short stay or long stay resident status, the TCNs benefiting from the international or subsidiary protection, the TCNs recognized as asylum seekers, or the TCNs considered as illegal immigrants. Second, there are the TCNs who are outside the Schengen area who are divided between those who require visas to enter the Schengen area for a three-month stay and those who do not. The EU's classification system not only defines certain groups and determines whether an immigrant does or does not have access to European territory and rights; it can also justify how the European States control migration flows across their external borders, above and beyond (Basilien-Gainche, forthcoming a). EU external borders controls are undergoing extra-territorialization (A) and an intra-territorialization (B).

The Extra-Territorialization of the EU's External Borders

The border-free Schengen area cannot function efficiently without a common visa policy consisting of a general understanding of the conditions required for issuing a visa, as well as a list of countries whose nationals are exempt from this requirement.[9] When issued by one of the Schengen area member States, the Schengen short stay visa entitles its holder to travel throughout the 26 involved States for up to three months within a six-month period.[10] The member States participating in the Schengen project agreed in 2001 that it was necessary to harmonize the lists of countries whose citizens must have a visa when crossing external borders (mandatory visa requirement);[11] countries whose citizens are exempt from that requirement (visa exemption situations);[12] and countries whose citizens need to

9 Regulation (EC) n° 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

10 Visas for visits exceeding that period remain subject to national procedures.

11 The application of mandatory visa requirements involves prior scrutiny by the destination State of the personal situation and the trip purpose of the traveler. The scrutiny aims at ensuring that the planned trip is legitimate and does not jeopardize the security of the Schengen area member States. The visa requirement applied to nationals from a total of 125 countries and territories as well as to certain groups of persons from British overseas territories. See Council Regulation (EC) n° 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, and its successive amendments.

12 Decisions on visa free access to the Schengen Area result from bilateral negotiations. They are based on the progress made by the concerned countries in implementing major reforms in areas such as the strengthening of the rule of law, combating of organized crime, corruption and illegal migration and improving of administrative capacity in border control and security of documents. For the nationals of those countries targeted by visa exemption schemes, no prior check on purposes of travel and personal capacity of the traveler need to be carried out. In the EU, the prime requirement for benefiting from visa exemption is to fulfill the condition of reciprocity. Read in conjunc

obtain a visa when crossing external borders but can get this visa in the easier way (visa facilitation situations).[13]

Yet the EU is accustomed to negotiate and conclude visa facilitation agreements with third countries (Trauner & Imke 2008), as well as readmission agreements (Billet 2010; Cassarino 2010)[14] or mobility partnerships (Triandafyllidou & Maroukis 2013), in order to secure its external borders. These agreements create "a zone of prosperity and friendly neighborhood"[15] that is aimed at stabilizing the States adjacent to European territory and at strengthening their cooperation with EU member States. But they are also conceived, since 1995 and systematically since the 2002 Seville European Council, to prompt these neighboring States to contribute to the management of migration flows and to readmit migrants who unlawfully enter Europe. Development aid, trade, and visa facilitations are used as incentives or conditions on neighboring countries' effective participation with EU external borders controls (Ghazaryan 2014). The EU immigration policies and norms have thus developed an external dimension—the so-called "global approach"[16]—that is focused on preventing the arrival of migrants by outsourcing border controls to third States (Pascouau 2012a). The EU and its member States have thus transferred the responsibility for monitoring their external borders to third countries, hence extra territorializing these EU's external edges.

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tion with the principle of solidarity among EU member States, this approach implies that all of the Schengen participating countries need to benefit from visa exemption in a third country for the EU to consider relaxed rules for the entry of its nationals. The EU aims at achieving full visa reciprocity with the non-EU countries whose nationals are exempt from the visa requirement. Thus, EU citizens would not need a visa either for travelling to these non-EU countries. The nationals of a total of some 43 countries and territories are exempted from the visa requirement to entry to EU countries.

13 In the EU, visa facilitation consists of relaxing the visa requirements for certain categories of people. The content of each visa facilitation agreement concluded by the EU with a third country reflects the kind of relations it wishes to pursue with the benefiting third country. Nevertheless, they are characterized by similar elements, related to reduced procedural requirements: simplification of documentary evidence, lowering or waiving of the visa fee, quicker processing time, and wider issuance of multiple-entry visas. Depending on the visa facilitation agreement, different categories of citizens are identified as eligible for these relaxed rules. Such may be the case for members of official delegations, businesspersons, journalists, scientists, students and professors, and relatives of EU residents. For each category, documentary evidence justifying the purpose of the journey must be presented. So visas are still required even though the application procedure has been made easier and quicker. So far, the EU has concluded visa facilitation agreements with nine non-EU countries.

14 Report from the Commission to the European Parliament and the Council, *Evaluation of EU Readmission Agreements*, COM (2011) 76 final, 23 February 2011.

15 Communication from the Commission to the Council and the European Parliament, *Wilder Europe—Neighbourhood. A New Framework for Relations with our Eastern and Southern Neighbours*, COM (2003) 104 final, 11 March 2003, p.4.

16 Report from the Commission to the European Parliament and the Council, *Implementation of the Global Approach to Migration and Mobility*, COM (2014), 96 final, 21 February 2014.

Consequently, pressed as they are to meet such European requirements, neighboring countries modify their norms and their practices. They implement ethnic profiling at border crossings, confiscate travel documents, detain people in centres or even in prisons, submit them to inhuman and degrading treatments, and engage in pushbacks to countries where the migrants will be again exposed to inhuman and degrading treatments. Moreover they tend to prevent the departure of people suspected of wanting to apply for asylum in Europe, hence depriving them of their right to leave a country, as Niels Muižnieks, European Council Commissioner for Human Rights, put it in the Issue paper untitled *The Right to Leave a Country* (Muižnieks 2013). Therefore, violations of fundamental rights are occurring, even though the considered rights are recognized and protected by international conventions with binding effects. Particularly, most of the migrants who try to come to Europe in the hope of a better life are not able to benefit from the right of asylum, or even their right of life (Goodwin-Gill 2011; Di Filippo 2013). The Eritrean, Somali and Syrian migrants who venture out on the Mediterranean sea to escape persecutions stemming from the internal conflicts that plague their country of origin, are not ordinary migrants but genuine refugees. They come from countries that are either themselves subject to extreme political conditions or neighbors of such countries, and they consequently lack the opportunity to find protection in their own country or in neighboring countries (De Bruycker, Di Bartoloméo & Fargues 2013; Fundamental Rights Agency 2013). Notwithstanding, the EU and its member States avoid the international, European and national legal obligations relative to such human rights protection, they are supposed to be based upon (Basilien-Gainche 2010) and they have to respect when their external borders controls are intra-territorialized.

The Intra-Territorialization of the EU External Borders

The situation created by the abolition of the internal borders controls underscores the continuity between the external and the internal borders of the EU, and contribute to the evaporation of the opposition between the inside and the outside. Yet the strengthening of the external border checks of the Schengen area means that surveillance is exercised before an individual reaches the territorial borders. Nevertheless, it also signifies that control can be implemented within the territory of the member States. Actually, the Schengen Borders Code does not differentiate clearly between the external borders and the internal ones, as it defines the latter by the former.[17] Furthermore, insofar that the abolition of the internal borders controls is

17 According to the Schengen Borders Code, "internal borders" means: (a) the common land borders, including river and lake borders, of the member States; (b) the airports of the member States for internal flights; (c) sea,

not supposed to affect the exercise of member State's police powers under national law, surveillance is maintained in border zones in the same way as elsewhere in the territory, as long as it does not take the form of border checks (Carrera 2005; Guild 2005). Thus the Schengen area member States have been able to intensify their internal police activities, by hardening the identity checks of potentially undesirable individuals and by tracking them inside the Schengen area territory, in order to return them to their country of origin or transit. That is why this paper argues that the EU external borders are intra-territorialized.

Moreover, there is always the possibility of the temporary reintroduction of border controls in case of serious threat to public safety or internal security. The reinstatement of such temporary checks at the EU's internal borders have been used in order to protect political leaders during international sport events (for instance, the Football World Cups) or international summits (G20 summits). They have not been used to prevent serious crimes or to tackle illegal immigration flows. Indeed, identity controls at EU internal land borders are not considered by the EU member States as an effective instrument to deal with criminal activities and migration flows, but are exploited for their highly symbolic function: showing that they are sovereign States capable of protecting their citizens against undesired events and undesirable people (Groenendijk 2004). Such a reference to the essential sovereignty of the member States was in particular crucial during the aftermath of the Arab Spring. The position adopted by some member States was clearly aimed at putting pressure on the EU Commission, in order to push for a reform of the Schengen area (Basilien-Gainche 2011; Cornelisse 2014).

Italian authorities, for example, issued temporary residence permits for humanitarian reasons to undocumented North African immigrants coming from Tunisia, who arrived on their national territory before 5 April 2011. These residence permits granted them an automatic right to move freely within the Schengen area. Some EU member States, such as Austria, Belgium, and Germany, expressed concerns about the Italian measures; and France reintroduced checks at its border with Italy and returned hundreds of migrants trying to come from Italy. The diplomatic dispute that blew up between Rome and Paris, and the European wrangle that rose between the member States and the Commission, revealed the weakness of the principles upon which the Schengen area regime is supposed to be founded: the principles of solidarity, fair sharing of responsibility, sincere and loyal cooperation, and the respect of fundamental human rights (Carrera, Guild,

river and lake ports of the member States for regular ferry connections. Concerning the "external borders," they are defined in a negative manner as the member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders.

Merlino & Parkin 2011). If border controls are to be implemented in the interests of all the Schengen area member States, rather than only in the interest of the member State whose national authorities operate them, then participating member States must develop a high degree of mutual trust, a situation that now appears to be insufficient and deficient (Pascouau 2012b), especially in a time of xenophobic and nationalistic political discourse (Parkes & Schwarzer 2012).

Border surveillance is performed wherever the individuals are, creating a continuum between the external and the internal borders, between the outside and the inside. Migrants see their personal situation controlled and their administrative status defined. First, in their own country of origin where they submit a Schengen visa demand, at each stage of their trip from their country of origin to the Schengen area member State they aspire to go to, and in the territory of each member State of the Schengen area (Ugur 1995; Moreno-Lax 2013). Henceforth, the EU external edges seem to be, for the TCNs considered as undesirable, as ways bristling with walls, as routes studded with fences. Moreover they do not appear as geographic and territorial, but as normative and personal. The border is the migrant. Such a change in the cultures of border surveillance (Zaiotti 2011) and in the nature of European frontiers is based on the establishment of a common EU categorization of individuals, which in turn relies on the digitalization of EU border controls.

THE CONTROL OF THE EU EXTERNAL BORDERS: THE CHANNELS OF DIGITALIZATION

The current feature of the European border surveillance regime relates to use of new technologies of information and communication: the controls are numerous and remote; the borders are digital and smart.[18] Henceforth, the social sorting of individuals is maintained by the computer-assisted scrutiny of the people who want to cross European borders, as the differentiation between the desirable and the undesirable travelers is easier to achieve, as is the determination of administrative status and thus the possibility of accessing their diverse rights. Yet there are cars, boats, helicopters, and airplanes that assure the control of the EU external borders. There are also heat sensors and carbon dioxide detectors that aim to verify the presence of human beings, and DNA, X-rays and biometric tests that involve

18 Communication from the Commission to the European Parliament and the Council, *Smart Borders—Options and the Way Ahead*, COM (2011) 680 final, 25 October 2011.

the very body of the monitored migrants (saliva, hair, bone, fingerprints and iris). Finally, there are databases that give the authorities the ability to process and conserve personal information concerning the migrants, and satellites that ensure all the data is shared among national authorities and European agencies. Such use of new technologies is assumed worthwhile: they are thought to guarantee that borders are monitored more powerfully, that applications are dealt with more rapidly and that procedures are followed more efficiently.

Yet the belief that internal and external security issues are best answered by technical solutions is not confirmed by analyses, it is even expose as erroneous by examples of the unreliability of these high tech mechanisms—for instance the deficiencies of the age determination through bone scan, and the shortcomings of recorded personal data—(Preuss-Laussinotte 2006). Nevertheless the goal that the EU and its member States are pursuing consists of creating a digital grid over the space they wish to control (Besters & Brom 2010; Dijstelbloem & Meijer 2011). This is accomplished by using databases by streaming cooperation between the different regional and national authorities involved in police and security matters, and through the interoperability established between these common databases. Numerous are the databases that the EU Agency for large-scale IT systems (EU-Lisa) has to manage. They are composed of the following: Visa Information System;[19] Schengen Information System;[20] European Electronic System of Travel Authorisation;[21] *Entry/Exit System*;[22] Register Traveller

19 The Visa Information System (VIS), operational since December 2010, covers the biometric data of persons who have applied for a visa to any member State-Council Decision (JHA) n° 2004/52 of 8 June 2004 establishing the Visa Information System (VIS).

20 The Schengen Information System (SIS) became operational in 1995. It contains data on persons wanted for arrest or extradition, missing persons, people who have been refused entry, stolen vehicles and firearms, and stolen or misappropriated identity cards. This information can be used to refuse to process visa applications at embassies, or entry at the European external borders. The second generation of Schengen Information System SIS II, which became operational in the first part of 2013, contains biometric data (photographs and fingerprints). It is designed to be not only a reporting system but also an investigation system with open access for EU authorities within the field of Justice and Home Affairs, such as Europol and Eurojust. Yet, the Supplementary Information Request on National Entry (SIRENE) system allows member States to exchange additional data.

21 The European Electronic System of Travel Authorization (ESTA) is based on the model implemented in the USA. It will be used to collect personal and passport information before the departure of TCNs who are not subject to a visa requirement.

22 The Entry/Exit System (EES) would allow Member States' border agencies to take fingerprints and other data from third-country nationals entering the EU in order to calculate the authorized stay of those entering the EU with short-term visas; to assist in the identification of any person who may not, or may no longer, fulfil the conditions for entry to, or stay on the territory of the Member States; to support the analysis of the entries and exists of third-country nationals; and to issue an alert to national authorities

Programme;[23] and the Eurodac system.[24] Thanks to such technologies, the borders and their controls are not constrained by geography anymore: as the relevant authorities are able to access all the collected data wherever they want. The surveillance of the movements of people crossing the external frontiers does not need to take place at the physical borders, but can also occur before the person arrives and after she/he arrives in European territory. So, one more time, we can observe that the differentiation is blurred between the inside and the outside. Notwithstanding, the development of digitized borders creates problematic issues. These include the protection of the individuals' dignity (A) and the preservation of the States sovereignty (B).

The Protection of the Individuals' Dignity?

Crossing borders, individuals are confronted with digitized controls and intrusive technologies (Foucault 1966; 1975; Bert 2007; Potte-Bonneville 2012). Thus the migrants are internalizing—embodying— the borders in the proper meaning of the term; meanwhile they are interiorizing the controls, leading them to develop some proactive contributions to their own surveillance. Such a situation reveals that the migrants appreciate their (un)desirability, so much that they are auto-evaluating the representation the EU and its member States have of their potential (un)riskiness for European societies (Broeders 2007). Thus the technological characteristics of the border controls challenge and reshape the position of individuals, particularly concerning their rights (Boehm 2009). From a legal perspective, it must be considered whether controlled migrants are aware that they have rights (for instance, the ones attached to data protection guarantees), and to know how to make such rights effectively respected (for instance, asking about available remedies). There are issues both politically and legally problematic about this, as the digitalization of the borders and of their controls tend to be deployed in an allegedly "state of exception," according to which the relevant national authorities

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when there is no exit record by the expiry time. In this way, the system will also be of assistance in addressing the issue of people overstaying their short term visa.

23 The Registered Traveler Programme (RTP), revealed in a communication 2010 and in a proposition in 2013, is supposed to facilitate the fluid access to the EU of pre-screened travelers, without undermining security. It would offer simplified, automated border checks to non-EU nationals complying with certain criteria and an Entry/Exit System that would make it possible to identify over-stayers (people who entered the EU lawfully, but have stayed longer than they were entitled to).

24 The Eurodac system, operational since 2003, collects the fingerprints of all individuals aged over 14, who apply for asylum in an EU country, or who are found illegally present in EU territory. The system aims to prevent the so-called asylum shopping by harmonizing responses to asylum claims within the EU. - Council Regulation (EC) n° 2725/2000 of 11 December 2009 establishing Eurodac.

assert they can restrain the fundamental rights of the supposedly dangerous migrants (Huysmans 2006; Basilien-Gainche 2013).

It must also be highlighted that the use of technology for collecting, processing and sharing information in order to reinforce external border controls has contributed to blurring the boundaries between the management of asylum and migration on one hand, and the fight against crime and terrorism on the other, as well as erasing the differentiation between the internal and the external dimensions of national security (Bigo 2010). There seems to be a pattern whereby databases, which were originally introduced to handle movements across borders, are increasingly being exploited in criminal investigations and committed to security issues. Meanwhile, as the Schengen Information System identifies most of the TCNs reported as "unwanted aliens," an implicit but worrying link is established between migrants and criminals even terrorists. Indeed, some databases are even conceived in order to both identify immigrants and investigate criminality. In particular, the recast of the Eurodac Regulation[25] in article 1.2 states that the national and European police authorities can access this database of asylum-seekers fingerprints when invoking the fight against organized crime and terrorism. This association of the migrants who apply for international protection, consecrated by the 1951 Geneva Convention relating to the Status of Refugees, with criminals and terrorists, paves the way for violations of the principle of non-discrimination and infringements of the fundamental rights of these individuals.

The digitalization of border controls raises obvious problems regarding the respect of the migrants' rights (Parkin 2011; Bigo 2014). First, collection, registration, exploitation and conservation of personal data are all problematic (Jones 2014; European Data Protection Supervisor 2014). Concerning the data collection, two remarks can be made: member States dispose of a wide margin of appreciation relatively to the grounds for registration, so much so that discrepancies between them are observed that highlight the weak reliability of the databases. Moreover, registered individuals are scarcely informed or aware of their registration and henceforth of their right to challenge such a registration in case of unlawfully or incorrectly collected data. Data access and use are also tricky, insofar

25 Regulation (EU) n° 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) n° 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) n° 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast).

that EU institutions do not have real control over the authorities who can acess the databases and exploit the registered information, because these authorities are determined at the national level. Moreover, the data is often stored beyond the legal retention period and the lack of data destruction procedures compounds the question of the effective proportionality of data conservation. The right to the protection of personal data, as it is consecrated by article 8 of the Charter of Fundamental Rights of the EU, seems to be in jeopardy. Also, other fundamental rights are at stake, such as the rights to an effective remedy, to claim international protection, and to leave any country. Obviously the preoccupation of EU member States is not in ensuring that migrants can access their rights and protections, but is focused on decreasing TCNs arrivals, allegedly in order to preserve their sovereignty. Paradoxically, this sovereignty is also negatively affected by such a border control policy.

The Preservation of the States Sovereignty?

Since the borders are traditionally considered as the limits of State power, the surveillance of their crossing is assumed to be one of the main attributes of a sovereign State (Pickering & Weber 2006). This is why EU member States have been focusing so much on European external border controls. By opting to digitalize their external borders, EU member States appear to consider technology as the means for achieving their securitization aims. Yet, in doing so, they have forgotten that technology requires mediations and henceforth implies limitations (Latour 1999), so much so the method that has been chosen to assert their sovereignty appears to be simultaneously the one weakening it. The borders of the sovereign States are blurred indeed, as sensitive databases concerning justice and home affairs are widely interconnected, as genuine cooperation between numerous public actors is obviously needed, and the coordination of diverse private actors is clearly required. In such a context, the sovereignty of a State seems to be rather deteriorated. It depends on the intervention of independent agents in a wide and long chain of decisions, making any control difficult to achieve and any accountability challenging to assess (Bigo, Carrera, Hayes, Hernanz & Jeandesboz 2012).

The European Border Surveillance System, Eurosur, offers a particularly interesting illustration of this issue.[26] Established to prevent unauthorized border crossings, to counter cross-border criminality and to support measures against persons who illegally crossed EU external borders, Eurosur tends to provide to

26 Regulation (EU) n° 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

relevant national and European authorities a common information sharing environment. It relies on the interoperability of the national and European databases and on a rationalized cooperation between all the actors that collect, exploit, conserve, and manage the considered data (Jeandesboz 2011). These involved public operators are numerous, including the national justice and police authorities, the relevant European authority responsible for the management of Eurosur, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex),[27] and all the actors with whom Frontex cooperates, such as European organs,[28] and even the customs authorities of third countries that Frontex has concluded working agreements with.[29] Private operators are also associated with this surveillance hub. They include groups or individuals that lead the research and development programs, the ones that develop the basic technological systems and tools, the ones that process visa applications on behalf of consulates, and so forth.

The sovereignty of States is challenged in another way too. How can they be considered sovereign if they deny their own responsibilities? Yet, EU member States refuse to be accountable for the violations of human rights that were and are committed during the border surveillance operations performed by Frontex (FIDH 2014). The purpose of these operations are to localize and to apprehend migrants before they arrive in European territory. In order to redirect them to their country of departure or transit, the interceptions can take place in international waters or in the territorial waters of third countries, thanks to the cooperation with the police authorities of these partner States—under working agreements that are concluded and implemented by Frontex regrettably without any monitoring.[30] Thus the issue of the violations of human rights during such interceptions is very complex (Carrera 2007; Perkowski 2012). These gaps in EU norms have not yet been filled by

27 Council Regulation (EC) n° 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, as modified by Regulation (EC) n° 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Team, by Regulation (EU) n° 1168/2011 of the European Parliament and of the Council of 25 October 2011, and by Regulation (EU) n° 1052/2013 of the European Parliament and of the Council of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

28 In particular, Europol, Eurojust, the European Police College (CEPOL), the European Asylum Support Office (EASO), the Fundamental Rights Agency (FRA).

29 Those States are mainly those that have been identified as a source of irregular migration or part of the transit route for such an irregular migration, such as Russia, Ukraine, Belarus, Libya, and Morocco.

30 European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations, OI/5/2012/BEH-MHZ.

the case law of the Luxembourg Court (CJEU, Grand Chamber, 5 September 2012, *Parliament v. Council*, C-355/10). However, the Council of Europe has asserted its positions. The Strasbourg Court found Italy in violation of its extra-territorial human rights obligations under the European Convention of Human Rights, reminding the country of its responsibility to exercise its jurisdiction over a vessel flying its flag and receiving shipwreck victims on the high seas (ECtHR, Grand Chamber, 23 February 2012, *Hirsi Jamaa v. Italie*, Req. n°27765/09). The Parliamentary Assembly has dealt with the problem of *Lives Lost in the Mediterranean*, asserting that European member States are to be considered responsible for such tragedies (PACE 2012).

CONCLUSION

Europe's borders, as they have been digitalized, have turned out to be more fluid and mobile, more normative and personal, strengthening the development of processes of categorization. As William Walters asserted, "borders are becoming more and more important not as practices but as spaces and instruments for the policing of a variety of actors, objects and processes whose common denominator is their 'mobility' or more specifically, the forms of social and political insecurity that have come to be discursively attached to these mobilities" (Walters 2006, 197). Indeed, the use of personal data has contributed to dematerialize the borders, their control, and the people atttempting to cross them. Thus, when the migrants are put at a distance, they are put far away from the obligations to take care of them according to national, regional, and international legal instruments, which European States have a responsibility to implement these controls. As they are far away from our eyes, they remain far away from their rights. According to this perspective, the Regional Protection Programmes RPPs, that are supposed to increase the number of potential asylum countries in the world, raises the problem of European temptation of shifting the burden of taking care of the most vulnerable asylum seekers. Meanwhile the differentiations between internal and external security policies are erased, and the boundaries between foreign policy, migration management and development aid are removed, and the borders between the "we" and the "others" are fortified (Crépeau 1995), so much so that the paradigm of the *banopticon* has emerged. Its purpose is not to *discipline and punish* as the *panopticon* does (to quote the title of the famous Michel Foucault's book), but to discipline and return (Bigo 2008; Basilien-Gainche forthcoming b).

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