EU Borders and Their Controls
Preventing unwanted movement of people in Europe?

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No. 6 / 14 November 2013

1. Introduction: The EU's external border controls debate

In the first week of October 2013, a boat carrying people from the southern shores of the Mediterranean towards the Italian island of Lampedusa foundered and sank, resulting in the deaths of about 300 persons and the rescue of about 160. Responses from different actors within the EU have varied, although all have expressed sadness and condolences to those who lost loved ones in the disaster. UNHCR, the UN's refugee agency, immediately called for swift action from Italy to improve reception conditions for those arriving by sea. The focus was specifically on the conditions under which people, including asylum-seekers, are received in the country.[1]

Pope Francis said it was a "*day of tears*" and denounced the "*savage*" system that drives people to leave their homes for a better life, yet does not care when they die in the process.[2] Focusing on the ethics of the international system which results in deaths, the Pope perhaps highlighted one of the aspects of deaths in the Mediterranean which is least explored – **why do the captains of the fishing boats and other vessels in Mediterranean not rescue these people?** This sea is among the most heavily used for shipping and fishing, it is full of boats which could respond to distress signals, why do they not? This was a central issue in the Council of Europe's Parliamentary Assembly's Strik 2012 Report on the responsibility to rescue, which focused on the failure to rescue people in a distressed small boat in the Mediterranean just before military action in Libya.[3]

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[1] See news stories on the UNHCR websites (http://www.unhcr.org/52556a469.html and http://www.unhcr.org/5257d5599.html).

[2] "Lampedusa Disaster: Bad Weather Delays Rescue Operation as hopes face for victims of migrant boat tragedy off Italian island", *The Independent*, 4 October 2013 (http://www.independent.co.uk/).

[3] Strik, T. (2012), *Lives lost in the Mediterranean Sea: Who is responsible*, Report from the Committee on Migration, Refugees and Displaced Persons, Doc 12895 (2012). For an analysis refer to L. den Hertog (2012), *Two Boats in the*

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One of the factors in this discussion that receives less attention is **the role of current EU anti-smuggling and trafficking legislation**[4] and the way it has been transposed into national law by EU Member States, which often creates a presumption that a captain is committing the offence of smuggling or trafficking if he or she brings unauthorized people into harbours. The consequence is criminal prosecution and confiscation of the individual's boat. [5] While captains who prove that they were acting from humanitarian motives to rescue people may eventually be acquitted and their boats released, the process usually takes many years during which their families have no source of income and the main bread winner may be in pre-trial detention.[6]

The EU Commissioner for Home Affairs Cecilia Malmström said that "*In the aftermath of the Lampedusa tragedy we heard solidarity expressions from all EU countries, but these will remain only empty words if they are not followed by concrete actions. I also call on North African countries, in particular Libya, to fight more effectively the criminals who put these people in unseaworthy vessels and organise these journeys of death.*" [7] Malmström's statement could be interpreted as displacing the responsibility on North African governments to prevent people leaving their shores for the EU. **This would however create a certain tension with the human right** expressed in the Universal Declaration of Human Rights and the European Convention of Human Rights[8] **that everyone has the right to leave the country in which he or she may be**. In the same context, she claimed at an EU meeting in Luxembourg on 8 October 2013 that Frontex,[9] the EU's external border agency, needs greater funding. The annual Frontex budget has apparently decreased from €118 million in 2011 to €85 million this year. While Malmström stressed the need for rescue and assistance of boats, the deployment of border guards for this purpose follows a very specific agenda – ensuring that 'rescue and assistance' mean that people are returned to North African states from which they departed rather than be allowed to enter and seek refuge in the EU. **The central focus seems to be one on the management and surveillance of the EU's external borders, particularly in the Mediterranean.**

The sense of urgency about the state of affairs in the Mediterranean culminated in the adoption of the European Council Conclusions of 24 and 25 October 2013, which underlined the importance of addressing the "*root causes of migration flows by enhancing cooperation with the countries of origin and transit, including through appropriate EU development support and effective return policy*".[10] The Conclusions did however not adopt any concrete EU policy

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Mediterranean and their Unfortunate Encounters with Europe's Policies towards People on the Move, CEPS Liberty and Security Series, Brussels.

[4] See the relevant EU legal instruments here http://ec.europa.eu/anti-trafficking/Legislation+and+Case+Law/EU+Legislation/Criminal+Law/

[5] Further, according to the Guardian Weekly 11 – 17 October 2013, in August 2013 the Italian authorities ordered two commercial ships to rescue a migrant boat and then demanded that captains transport the migrants back to Libya (where none of them wanted to go and indeed from where they were in flight). One can well imagine the dilemma of the captains faced with a boat load of desperate people terrified of being returned to Libya. The result is that the Italian authorities have effectively made their own services and those of FONTEX the only ones willing to take on rescue at sea of people in small boats. And, of course their own services are too limited.

[6] Tugba Basaran is one of the few researchers seriously examining this deterrence effect on humanitarianism. See presentation REPI, ULB, 27 April 2013. Also see *The Saved and The Drowned: Governing Indifference Towards Rescue* research paper available from the author. Refer also to E. Guild and P. Minderhoud (2006), *Immigration And Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Rights*. Vol. 9., Martinus Nijhoff Publishers: Leiden.

[7] http://europa.eu/rapid/press-release_MEMO-13-883_en.htm

[8] Protocol 4 Article 2(2).

[9] Refer to http://europa.eu/rapid/press-release_MEMO-13-864_en.htm

[10] European Council Conclusions, 24/25 October 2013, Brussels, EUCO 169/13, 25 October 2013.

action on these matters,[11] with the exception of the establishment of Task Force for the Mediterranean (TFM) led by the Directorate General for Home Affairs of the European Commission.[12] Both the Council Conclusions and some of the lines of action currently assessed by the TFM[13] demonstrate that t**he EU institutions are determinedly looking at the states in North Africa and asking why they do not act as 'substitute border guards' for the EU and prevent people leaving their shores**. The Council announced that it will return to asylum and migration issues "*in a broader and longer-term perspective*" in June 2014, at which time "*strategic guidelines for further legislative and operational planning in the area of freedom, security and justice*" are expected to be defined.[14]

The political chaos in Libya since the toppling the regime of Muammar Qaddafi by France and the UK has been reported to be one of the main reasons why boats are sailing. While Italy has a new arrangement with Tunisia to send its nationals back, it has none with Libya. The lack of a readmission agreement between the EU and Libya may not be so surprising bearing in mind the current state of affairs in Libya. The news outlet, the Daily Beast, reported on 11 September 2013 that on 19 August 2013, a group of gunmen attacked a convoy carrying the EU ambassador to Libya.[15] The assault outside the Corinthia Hotel in central Tripoli was not far from Prime Minister Ali Zidan's main office. The gunmen robbed the EU delegation at gunpoint before shooting at passing cars. Policemen outside the hotel did not dare intervene, according to EU diplomats. It is not clear who was part of the EU delegation or what they were doing in Libya. Accounts from people arriving in the EU via Libya indicate that between criminal gangs who carry out kidnapping and extortion and Libyan border officials there seems to be very little difference.[16] At the end of May 2013 the Council authorised the opening of negotiations with Libya for an agreement on the status of the EU integrated border management assistance mission in Libya (EUBAM Libya)[17] to be carried out in accordance with Libyan needs assessment on border management which the EU undertook in 2012 and allocated a budget of €30.3 million for the first 12 months.[18]

Similar to Malmström's position, the above-mentioned October European Council Conclusions called for the reinforcement of Frontex activities in the Mediterranean and the south-eastern borders of the EU, as well as the swift implementation by EU Member States of

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[11] As the European Voice rightly noted, calls alluding to the need to re-think "*the European Union's migration and asylum policy fell on deaf ears*". EU Leaders Postpone Migration Talks, 25.10.2013 (https://www.europeanvoice.com/article/2013/october/eu-leaders-postpone-migration-talks/78564.aspx).

[12] The TFM has a dual mission: one operational (identify short-term measures to be implemented) and another conceptual (on future policy developments in the medium-term). The European Council invited the TFM to "*identify -based on the principles of prevention, protection and solidarity - priority actions for a more efficient short term use of European policies and tools. The Commission will report to the Council at its meeting of 5-6 December 2013 on the work of the Task Force with a view of taking operational decisions. The Presidency will report to the European Council in December.*" See paragraph 48 of the Conclusions. It is to be noted the absence of any express reference to the role or participation of the European Parliament in this Task Force.

[13] The TFM lines of action include for instance strengthening border surveillance operations, building 'capacity' in third countries on migration management and border controls and specific initiatives in cooperation with third countries (such as Libya), such as the setting up of a Seahorse Mediterranean network between Libya and the Mediterranean Member States by 2015 or the installation of radar systems on North African states' coasts.

[14] For a critical assessment of the post-Stockholm Programme agenda refer to S. Carrera and E. Guild (2012), *Does the Stockholm Programme Matters? The Struggles over Ownership of AFSJ Multiannual Programming*, Liberty and Security in Europe Series, CEPS, Brussels.

[15] See http://www.thedailybeast.com/articles/2013/09/11/the-travesty-of-benghazi.html

[16] See for instance Amnesty International Report (http://www.amnesty.eu/content/assets/S_O_S_Europe_Report_Web_02.pdf).

[17] Press Release, Council meeting on Foreign Affairs 27-28 May 2013, Document number 9977/13.

[18] Press Release, Council, 22 May 2013 Document number 9478/13.

the new **European Border Surveillance System (EUROSUR),**[19] which according to the Conclusions "*will be crucial to help detecting vessels and illegal entries, contributing to protecting and saving lives at the EU's external borders.*" **EUROSUR envisages the use of a set of surveillance tools** (such as satellite tracking systems and sensors mounted on any vessel, vehicle or other craft, such as drones) in order to seek improving the 'situational awareness' and 'reaction capability' of Frontex and member states authorities in the prevention of irregular migration (unauthorized border crossings) and cross-border crime at the EU's common external land and maritime borders. According to the Guardian, 3 October 2013 "*European policymakers claim the (EUROSUR) technology will make a serious contribution to saving migrant lives on the sea, but sceptics say that the project is still primarily focused on preventing migrants reaching Europe at all, and legislation needs to be redrafted to put humanitarian concerns at the forefront of Eurosur's operations.*"[20] **It is indeed not clear the actual ways in which EUROSUR will effectively contribute in the protection of migrants and asylum seekers, and their human rights, at sea**.[21]

In the debates on the Mediterranean and human mobility, one of the issues which arise regularly is that of technologies. **Is there a** *technological fix* **to the movement of people across the Mediterranean from the South to the North (there is never any concern about the thousands of tourists, as they are called, who travel daily from the North shore of the Mediterranean to the southern shores in ferries)?**

This Essay takes a step back from the immediacy of the October 2013 events. It examines **the issue of EU border controls from the perspectives of the technologies, new and old**. There has been a rich academic research on border controls and analysis of their meanings and effects.[22] Here we will build on this body of work which crosses a variety of scholarly disciplines to understand what is happening to border controls on the movement of persons in the EU and why the results are so deadly. **The technologies of control and surveillance available for external border controls in the EU are increasing in number and variety**. The claims made about them often that in some specific ways they are 'smarter' than other technologies, abound. What has been less examined is **what we can deduce about new and old border control technologies from the information and statistical data which are available on movements of people into and out of the EU**. Most of the information we have about this comes directly from Frontex, which publishes both quarterly reports on EU border

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[19] Regulation of the European Parliament and the Council establishing the European Border Surveillance System (EUROSUR), 22 October 2013 (http://register.consilium.europa.eu/pdf/en/13/pe00/pe00056-re02.en13.pdf).

[20] Mediterranean migrant deaths: a litany of largely avoidable loss, The Guardian, 3 October 2013, (http://www.theguardian.com/world/2013/oct/03/mediterranean-migrant-deaths-avoidable-loss).

[21] J. Jeandesboz (2008), *Reinforcing the Surveillance of EU Borders: The Future Development of FRONTEX and EUROSUR*, Challenge Paper, CEPS, Brussels.

[22] Bigo and colleagues have carried out a recent and extremely important study on the new technologies of border controls (Bigo, Didier, et al. "Justice and Home Affairs Databases and a Smart Borders System at EU External Borders." (2012)); We published a multidisciplinary analysis of EU border controls in 2013 (Bigo, Didier, Sergio Carrera, and Elspeth Guild, eds. *Foreigners, Refugees Or Minorities?: Rethinking People in the Context of Border Controls and Visas*. Ashgate Publishing, 2013). Baldaccini has examined from a legal perspective exactly the issue of FRONTEX operations in the Mediterranean. (Baldaccini, Anneliese. "Extraterritorial border controls in the EU: The role of FRONTEX in operations at sea." *Extraterritorial Immigration Control: Legal Challenges, Leiden: Martinus Nijhoff Publishers* (2010): 229-255); Zaiotti published a fascinating study on the cultures of EU border controls which looks at the sociology of these controls (Zaiotti, Ruben. *Cultures of border control: Schengen and the evolution of European frontiers*. University of Chicago Press, 2011); Vaughn-Williams takes the discussion into the field of international relations in his 2009 book on the theory of border controls (Vaughan-Williams, Nick, ed. *Border politics*. Edinburgh University Press, 2009).

controls with a wealth of information on the current situation and annual reports on border controls.[23]

The Essay opens with an overview of what actually happens at the EU's external borders (section 2). It then moves on to assess the old and new set of border control technologies that are deployed at the EU borders, and how new technologies such as those based on automated controls and biometrics, transform the classical principles of European border checks (section 3). Section 4 covers the main reasons why people are refused admission at the EU's external borders and the extent to which new border and surveillance technologies would assist in addressing the mobility challenges in the Mediterranean. Conclusions are finally offered on the articulation between the facts of EU border controls on persons and the claims and proposals for new technologies which are emerging from EU institutions. A fundamental question is here raised: *What kind of borders should the EU have?* (section 5).

2. What happens at the EU's external borders? The scale dilemma

There is much uncertainty about how many people enter the EU across its external borders each year. The EU's Fundamental Rights Agency (FRA) states that the number, including EU citizens and third country nationals comes to about 300 million per year.[24] The latest Frontex Risk Analysis (FRAN)[25] puts the figure at about 125 million people entering the EU each year, which figure includes third country nationals as well as EU citizens. These figures are somewhat surprising not only because they do not correspond very well but also in light of the single formal study on exit and entries at the external borders of the EU which was carried out by the Council in 2009.

The Council found that between 31 August and 6 September 2009 the total number of entries and exits registered during that one week at all the external borders of the European Union was: a total of 12,907,581 of which EU nationals constituted 9,312,665.[26] Third country nationals (non visa) accounted for 2,130,256 entries and exits while visa third country nationals represented 1,464,660 entries and exits. Making the general assumption that as many people entered as exited (which is flawed of course but at least permits the division of the overall figures by half) the total number of third country nationals who might have entered the EU during that one week in September 2009 was 1,797,458. If one multiplies this number (rounded up to 1.8 million) by the number of weeks in a year (52) the figure would be 93.6 million entries per year. This is a very rough estimate for many reasons,[27] but at least

[23] The information included in this article comes primarily from the FRONTEX Annual Risk Analysis 2013 (http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2013.pdf).

[24] http://fra.europa.eu/en/project/2011/treatment-third-country-nationals-eus-external-borders-surveying-border-checks-selected

[25] Frontex, FRAN Quarterly, Quarter 2, April-June 2013, Warsaw: Poland (http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q2_2013.pdf).

[26] Council Document 13267/09, 22 September 2009. The exercise took place on the initiative by the Czech Presidency of the EU (during the first half of 2009), which called for an exercise on data collection on entries and exists at the external borders of the Member States between the period of one week – i.e. 31 August and 6 September 2009. The aim was to gather comparable statistics on entries and exits of different categories of travellers (EU citizens and TCNs) at different types of external borders (air, sea and land) and at all border crossing points at the external borders.

[27] Amongst others, the period of time during which the Czech Presidency exercise took place constituted only one week and coincided with the end of the summer season (end of August/beginning of September), something which might have determined that some of the results (e.g. those of Spain) are higher than in an annual average. Second, some of the data provided is based on the entries of TCNs who are required a 'visa'. The Council document did not specify the kind of visas that were taken into consideration by the national authorities (i.e. whether they only included short-term Schengen visas and/or national (long-term) visas, and the extent to which Schengen transit or multiple-entry visas were also included in the exercise). The kind of visas however has

it represents **a point of departure regarding the numbers of third country nationals who enter the EU each year** based on the only formal information collected on behalf of the Council from the relevant national institutions responsible for border controls.

During that one week period, according to the Council document entries and exits of all nationals at EU sea borders accounted for 1,101,677. Land borders comprised 5,035,709 of the total entries and exits and air borders constituted the remaining 6,770,195 entries and exits. If once again one simply chops the numbers in half to get some idea of the numbers of entries of all people, EU citizens and third country nationals, the entries at sea borders might account for about 500,000 per week. Assuming that within a range of a few thousand persons, these figures are probably fairly representative, **the arrival of a few hundred people across the Mediterranean seems rather small**.

Indeed, according to Frontex, the total number of people who were found crossing into the EU via sea borders (all of them not in the Mediterranean) irregularly in 2012 amounted to 23,254. The precision of the number indicates that Frontex must be fairly confident about the accuracy of the figure. According to UNHCR estimates, more than 1,500 people drowned or went missing while attempting to cross the Mediterranean to reach Europe in 2011.[28] The non-governmental organization, Fortress Europe, estimates that between 1988 and 2013 approximately 19,142 persons have died trying to entry the EU (though this figure includes all borders, land, sea and air).[29]

What one is encountering here is a problem of scale (*the scale dilemma*). The fact that the number of people entering and leaving the EU in authorized manners is so large and the number of people crossing into the EU via sea borders in the Mediterranean is comparative so small is hard to take in the distance. Further, the difference of scale is so large that it makes the panic presented in some parts of the press and political discourses regarding the numbers of people arriving on the little boats in the Mediterranean seem very strange indeed. Christoper Chope MP of the Council of Europe's Committee on Migration is reported in the Guardian Weekly 11 – 1 7 October 2013 in reaction to the problem of the failure to rescue people in the Mediterranean "*if traffickers think they can smuggle people in with impunity, that's the incentive for smuggling to increase.*" **If the EU has no trouble admitting around 500,000 people a week through its sea borders, how can less than +/- 25,000 a year constitute such a big policy challenge?**

The total population of the EU is slightly over 508 million people. Of this population 6.8% are third country nationals according to the EU's statistical agency, EUROSTAT.[30] In 2012, according to Frontex, 115,305 people were refused admission to the EU at its external borders. Only third country nationals can be refused admission at the EU's external borders, EU citizens have a right to enter the EU though entry can be limited to their Member State of underlying citizenship. Assuming that about 93.6 million third country nationals enter the EU each year this means that the percentage of people refused entry at the external border is 0.12% of those who present themselves to border guards. Again according to Frontex, in 2012, 73,437 persons were detected attempting to cross the EU's external borders other than at designated entry points. **This is about 0.08% of the probable total number of people who are admitted to the EU at its external borders per year** (once again bearing in mind the rough nature of the gross figure). Scale is also here an outstanding issue.

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implications concerning potential double-counting of entries and exists in the total numbers which were provided.

[28] See UNHCR website (http://www.unhcr.org/4f27e01f9.html).

[29] See Fortress Europe website (http://fortresseurope.blogspot.it/p/la-fortezza.html).

[30]   http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/EU_citizenship_-_statistics_on_cross-border_activities

3. Changing technologies at the EU external borders: Passports, visas and biometric databases

There are a variety of border control technologies which are deployed at the EU external borders. The most traditional of these technologies is a manual check of the passport presented by an individual to a border guard at a designated border crossing point and the manual stamping of that passport by a border guard with an entry stamp which includes the date of entry. All persons entering the EU at an external border crossing point are obliged by EU law to present themselves to a border guard for this examination.[31] If they are on the so-called Schengen visa black list,[32] then a condition of entry is that they have already received a Schengen visa or the equivalent before they arrive.

'Non-visa third country nationals' arriving at the EU's external border and seeking entry, according to the above-mentioned one week's count of third country nationals' entries and exits, account for 68.5% of all third country nationals entering the EU. This is interesting as more than 100 countries are on the EU's visa black list which account for about 80% of the non-EU world's population, according to Frontex. Non visa nationals do not go through any other identity control at the EU's external borders than this manual check of their documents unless the border guards have reason to carry out a more in depth investigation. **Thus non-visa nationals are those who are subject only to the oldest and most traditional border controls, which depend on the person's country of nationality having issued him or her a passport which is accepted at the EU border as sufficient for entry**.

However, these non-visa nationals may soon find themselves the objects of a new EU border technology system in the form of a **Registered Traveller Programme (RTP)**, which forms part of the so-called 'EU smart borders package'.[33] The RTP would aim at speeding up border-crossing for pre-vetted or 'bona fide' travellers based on automated identity checks and border-crossing gates. The Commission launched a proposal for the creation of such a system in 2013[34] the objective of which is to change the fundamental classical principle of European border checks from one in which all nationals of a state are treated equally to what the Commission delicately calls a 'person-centric' or driven approach which means that citizenship is no longer the organizing principle of the border control, rather it is the profile of the individual. The system would also feed on the suspicion that there is a potential 'illegal migrant' or 'overstayer' in every non-EU traveller coming to Europe. The European Commission has described the RTP as follows:

> In practice the RTP would work at the border the following way: A registered traveller would be issued a token in the form of a machine-readable card containing only a unique identifier (i.e. application number), which is swiped on arrival and departure at the border using an automated gate. The gate would read the token and the travel document (and visa sticker number, if applicable) and the fingerprints of the travellers, which would be compared to the ones stored in the Central Repository and other databases, including the Visa Information System (VIS) for visa holders. If all checks are successful, the traveller is able to pass through the automated gate. In case of any issue, the traveller would be assisted by a border guard.[35]

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[31] Article 7, Schengen Borders Code, Regulation 562/2006.

[32] Regulation No 539/2001.

[33] See http://europa.eu/rapid/press-release_IP-11-1234_en.htm For an assessment of the original 2008 Commission Communication see Guild, E., S. Carrera and F. Geyer 2008. *The Commission's New Border Package: Does it take us one step closer to cyber-fortress Europe?*. Brussels: Centre for European Policy Studies, CEPS.

[34] European Commission. 2013. Proposal for a Regulation establishing a Registered Traveller Programme, COM(2013) 97 final, Brussels.

[35] COM(2013)97, p. 3.

So any non-visa third country national who would wish to enjoy a facilitated entry at the EU's external borders would have to provide a variety of personal data, including fingerprints which will be held either in the VIS (see below regarding visa nationals) or a new database entitled the Central Repository and these fingerprints together with the passport would constitute essential elements of entry at the external border.

Databases of biometric information about individuals are one of the hallmarks of new border technologies. There is a substantial appetite for these databases in EU policies and laws regarding third country nationals which we explain further below. What is central, however, to the use of **biometric databases** in external border controls of the EU is that **they partially replace the passport as the document which determines the identity of the individual**. Instead of the individual's legal identity being a matter of negotiation between that person and his or her state of citizenship through the issue of a passport to him or her, the EU database makes an alternative claim to identifying the individual. No matter what the passport of the individual may say, the EU database which contains the fingerprints of the individual enjoys an advantage – the capacity to tie the physical person with an inalienable part of his or her body – e.g. fingerprints.

For instance, a person with dual nationality (US and Canadian) would register in the RTP with their fingerprints and their US passport. He or she would then travel to the EU on his or her valid Canadian passport. The EU database would check the person's fingerprints in the automated entry and recognizes the person as a US citizen (not a Canadian one). The automated entry system would likely to be uncomfortable with the outcome, but the problem would likely be resolved so long as the person has both of his or her passports with him or her to show to a border guard sent to resolve the machine's confusion. But what has happened in this practical example is that **the knowledge of the database as to who the person is takes priority over the valid documentation** which his or her country of citizenship has issued to him or her.

For third county nationals on the mandatory visa list, the passport which their state issues to its citizens is not sufficient for travel to the EU. Those people must obtain a visa from an EU (Schengen member)[36] consulate through which process the person must provide substantial personal information (including about income and resources) as well as biometric data including fingerprints (unless the person is under 12 years of age[37] or physically unable to provide them)[38] this data, including information from sponsors in the EU who may be EU citizens is stored in a new EU database, the Visa Information System (VIS)[39] and is available to border guards and law enforcement authorities across the EU. **Thus these third country nationals have a new identity created for them by the EU visa system**. The place of the creation of that identity is **while they are still in their country of origin**. The value of that new EU controlled identity (which is valid for 59 months – after that the fingerprints need to

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[36] The Schengen countries which can issue Schengen visas valid for short stays of 3 months out of every six month period I the Schengen area are all EU Member States except: Bulgaria, Croatia, Ireland, Romania and the UK. But it includes the non-EU states of Iceland, Liechtenstein, Norway and Switzerland: Billet, Carole. "Les relations extérieures des agences ELSJ après le traité de Lisbonne." *Colloque sur la dimension institutionnelle du volet externe de l'ELSJ*. 2011.

[37] Though according to the European Commission, it is having a study carried out to determine whether fingerprints from children younger than 12 can be reliable for database purposes. COM(2013)442, pp 7-8.

[38] EU Visa Code, Regulation 810/2009 Article 13(7)(a) and (b).

[39] The VIS started operations in October 2011 in Schengen States' consulates in North Africa and was progressively deployed in the Near East and the Gulf Region in 2012. Regulation (EC) No 767/2008 of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) as amended by Regulation (EC) No 810/2009 of 13 July 2009.

be taken again)[40] is that it creates a presumption either that the person is admissible to the EU (through any external border post) as a visitor for three months if a visa is issued, or a presumption against future issue of a visa if the application is refused. If a dual Turkish/Lebanese national applies again for a visa using the Lebanese passport after refusal of such a request using his or her Turkish passport, the fingerprint record in the VIS is supposed to reveal the unique identity of the person.

Visas are not new even in the EU.[41] But their traditional role has been as a tool of foreign policy, a sanction against states between whom there is antagonism. Its development as an immigration control tool in the EU is a story which dates from about the mid 1980s.[42] The importance of visas as a foreign affairs tool re-emerges with the creation of no-visa lists in the EU (and elsewhere) in particular following the Bosnian wars of the 1990s.[43] **The effects of visas on the phenomenon of death in the Mediterranean** has been examined by de Haas.[44] According to his research the phenomenon of irregular boat migration "*has existed ever since Spain and Italy introduced visa requirements for Moroccans, Algerians, Tunisians and other African nationals around 1991. This forced many people, who previously could migrate and circulate to Europe freely, to cross borders irregularly. Over the past decades, an increasing number of sub-Saharan African migrants and refugees have joined North Africans in their efforts to cross the Mediterranean.*"[45] Before 1991 there was no such phenomenon and there were alternatives to irregular boat migration, most importantly, regular mobility.

The linking of visas with biometric databases is a much newer development. In the EU it only begins with the creation of the VIS made possible by the adoption of a measure in 2004 though the system only became operational on 11 October 2011.[46] According to the European Commission the VIS consists of a central IT system and of a communication infrastructure that links this central system to national systems. VIS connects EU (Schengen) consulates in non-EU countries and all external border crossing points of Schengen States. It processes data and decisions relating to applications for short-stay visas to visit, or to transit through, the Schengen Area. The system can perform biometric matching, primarily of fingerprints, for identification and verification purposes. The Schengen visa itself carries the fingerprints of the individual to whom it is issued which fingerprints have been collected in the country of origin then stored in the VIS (now managed by the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA) based in Tallinn).[47]

When the person arrives at the EU external border those fingerprints in the visa are checked against the VIS database to ensure that the person carrying the passport is the same person whose fingerprints were taken during the visa procedure. This checking process requires

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[40] EU Visa Code, Regulation 810/2009 Article 13(3).

[41] Wolff, Sarah, Nicole Wichmann, and Gregory Mounier (eds.) *The External Dimension of Justice and Home Affairs*, Routledge, 2013.

[42] Infantino, Federica, and Andrea Rea. "La mobilisation d'un savoir pratique local: attribution des visas Schengen au Consulat général de Belgique à Casablanca." *Sociologies pratiques* 1 (2012): 67-78; Hobolth, Mogens. "European visa cooperation: interest politics and regional imagined communities." *LEQS Paper* 34 (2011).

[43] See the EU External Action Service general comment (http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf#2.3).

[44] Co-Director of the International Migration Institute (IMI) of the Department of International Development and the University of Oxford.

[45] Hein de Haas, 5 October 2013, Blogspot http://heindehaas.blogspot.fr/ .

[46] European Commission (http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/2011/20111011_en.htm).

[47] See EU-Lisa Activity Report (http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/agency/docs/activity-report-2012/eu-lisa_2012_activity_report_en.pdf).

fingerprint machines to be available at EU external border posts (which was not universally the case in 2013). The system was still being rolled in 2013 out by area of the world. **The choice of where to start rolling out the system is perhaps an indication of where in the world the EU has not most concerns**. The first region to which it was applied was North Africa. The second region where the collection and transmission of visa data to the VIS started for all visa applications was the Near East, with the exception of the occupied Palestinian territory due to the serious technical difficulties (it has now been designated the 11th region). The third is the Gulf region.[48] The next region rolled out was West Africa, Central Africa, East Africa, Southern Africa, South America, Central Asia, South East Asia.[49] The fourth and fifth regions, the rest of Africa, were rolled out in 2013.[50] The Commission estimates that roughly 2.4 million visa applications were introduced in VIS In 2012. That is some 16% of total visa applications in that year. The objective of the VIS again according to the Commission is to tackle identity theft more effectively.[51]

The effect of **the VIS is the bringing into existence of a large database with extensive personal information and biometric data in the form of fingerprints which is available to consular officials, border guards and law enforcement agencies across the EU**. But the biometric information is only about **third country nationals who are on the mandatory visa list**. The need for the VIS rests on the threat of identity threat. The need for the biometric information in the form of the fingerprints in order to combat identity theft in the crossing of the EU's external borders needs to be examined in light of Frontex's information on the incidence of identity theft. According to Frontex in 2013, 7,888 incidents of people using false or fraudulent documents were detected in the whole of the EU. Over half of these documents were detected at the air borders and just under a third were in respect of Albanian documents (2,110).[52] Albanians are not required to have visa to enter the EU (so long as they have a new style biometric passport). Thus their fingerprints will not be included in the VIS.

The next most important nationalities where false or fraudulent travel documents were used, in numbers, were Syrians (486 – most likely people seeking to escape the civil war using someone else's passport), Moroccans (397) and Ukrainians (284). The three countries are all on the mandatory visa list. The numbers, however, are very low indeed. Considering the financial expenses of setting up the VIS and its operation, the intrusion into the private lives of third country nationals not least with the collection of biometric data in the form of fingerprints, this is a very dubious project. 2.4 million sets of fingerprints were entered into the VIS in 2012 and made available to all EU border and law enforcement agencies yet EU border guards only detected 7,888 cases of document fraud in that year and a third of those were in respect of people who do not need visas and so whose details are not in the VIS. In light of this information, **it is difficult to claim that the VIS is a border control technology**. Yet for the moment, the EU agencies make no other claim regarding the reason for the VIS's existence. The country which accounts for the largest number of Schengen visa applications is Russia. The total number of Schengen visa applications in 2011 was over 13.5 million and Russians accounted for about 30% of those applications.[53] Russian nationals also account for 8.5% of refusal of entry at the EU's external borders, coming third after Ukrainians (16%) and Albanians (10%) of the total number of refusals of entry.

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[48] Commission Decision 30 November 2009, C(2009)8542.

[49] Commission Decision 24 April 2012 C(2012)2505.

[50] Commission Implementing Decision 2013/122/EU of 7 March 2013.

[51] COM(2013)42 final.

[52] Frontex, FRAN Quarterly, Quarter 2, April-June 2013, Warsaw: Poland (http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q2_2013.pdf).

[53] FRONTEX Annual Risk Analysis 2013.

4. Why are people refused admission at the EU's external border?

The arguments in respect of the technologies, both new and old, for EU border controls on persons are based on the officially purported objective that unwanted people who do not fulfil the requirements for entry into the EU should not be allowed to enter. **The Schengen Borders Code (SBC)[54] spells out at Article 5 the requirements which people must fulfil in order to enter the EU Schengen area**. People must show that:

> a) they are in possession of a valid travel document or documents authorising them to cross the border;
>
> (b) they are in possession of a valid visa, if required except where they hold a valid residence permit;
>
> (c) they can justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;
>
> (d) they are not persons for whom an alert has been issued in the Schengen Information System (SIS) for the purposes of refusing entry;
>
> (e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.

The Commission has proposed a new initiative: the creation of an electronic **Entry-Exit System (EES)** in order to have EU-wide record of entries and exits of travellers to and from the Schengen area and thus a reliable means for Member States to determine if a third-country national has exceeded his/her right to stay.[55] This will allow Member States to know whether the people who have actually been admitted to the EU in fact fulfilled the criteria of Article 5(1)(c) SBC (or not). But the EES will only be able to provide that information when the person leaves, so the record will be primarily historical. The Commission makes three main claims regarding the value of the proposed system. It will:

- Calculate the authorised stay of each traveller; this includes at entry, in case of a traveller having visited the Schengen area frequently, to quickly and precisely calculate how many days there are left of the maximum of 90 days within 180 days; at exit, to verify that the traveller has respected the authorised stay; and within the territory, in relation to carrying out checks on third-country nationals to verify the legality of their stay;
- 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; this concerns notably persons who are found during checks within the territory not in possession of their travel documents or any other means of identification;

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[54] Regulation establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), EC/562/2006, 15 March 2006, OJ L 105/1, 13.4.2006. The Code substituted the provisions regarding external borders as included in the Schengen Convention, the Common Border Manual, the Executive Committee Decision on external border control in airports, Council Regulation 790/2001, the Council Decision on border crossing sings as well as the Council Regulation on stamping of documents.

[55] European Commission, Proposal for a Regulation establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM(2013) 95 final, Brussels.

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- To support the analysis of the entries and exits of third-country nationals; this includes notably getting a precise picture of travel flows at the external borders and the number of overstayers, .e.g. by nationality of travellers.[56]

The Commission has proposed the allocation of €1.1 billion to develop the EES and the RTP Scheme outlined in the previous section of this Essay. **The estimated costs have risen however to €1.3 billion**.[57] As pertinently argued by a recent study published by the European Parliament assessing the impact of these Commission proposals,[58] these estimations are still not financially sound and the actual "*financial and administrative impact may be far greater than the Commission envisages*", as these not include "*the administrative costs incurred by Member States in the running of the EES, and the costs of processing RTP applications in consular posts abroad, particular those that are unused to dealing with a large volume of requests.*"

According to Frontex, 344,928 third country nationals were treated as not fulfilling or no longer fulfilling their conditions of entry into the EU in 2012.[59] The top five nationalities of those treated as 'overstayers' were Afghans, Moroccans, Pakistanis, Algerians and Tunisians. They accounted for over ¼ of all persons so treated. 115,305 people were refused entry at the EU's external borders. The five top nationalities, accounting for almost 50% of all refusals were (in order of numerical importance) Ukrainians, Albanians, Russians, Georgians and Serbians. All of them are nationals of countries neighbouring the EU and two – Albanian and Serbian nationals - are not required to obtain visas to enter the EU (provided they have new style biometric passports). In light of Frontex's information, **it is not clear how either an EES or a RTP would substantially change the situation**.

Turning to the reasons why third country nationals are refused entry to the EU, the five main reasons (leaving aside the category 'other'), according to FRONTEX are:

- No valid visa (or residence permit – accounting for 35,451 refusals;
- No justification for the visit – accounting for 25,306 refusals;
- Entry on the Schengen Information System[60] as a person to be refused admission to the EU – accounting for 15,691 refusals;
- No or inadequate means of subsistence – accounting for 11,015 refusals; and
- No valid travel document – accounting for 7,538 refusals.

All of the main grounds for refusal except the SIS entry, depend on traditional border control techniques- checking passports, visas and the reason for admission. Interestingly, also according to the same data provided by Frontex, only 3,270 persons were refused admission to the EU on the basis that they were or were likely to be a security threat. The grounds for this refusal are public policy (which is usually related to criminality), internal security, public health or the international relations of a Member State. Most surprising of all is how banal the process is – the numbers are low given the size of the EU and the probable volumes of people entering and leaving the EU; the reasons for the most part are mechanical, not the right documents, not enough money or speculative on the part of the border guard: not the right reason to want to enter to the EU. **The statistical evidence does not lead to an**

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[56] COM(2013)95.

[57] Unisys (2010) *Final Report Cost Analysis of Entry-Exit & Registered Traveller Systems*. Brussels, CB-E-SO30-REP-003 (http://tinyurl.com/n9l5uck).

[58] J. Jeandesboz, D. Bigo, B. Hayes and S. Simon (2013), *The Commission's Legislative Proposals on Smart Borders: Their Feasibility and Costs*, European Parliament, DG IPOL, Brussels, pages 42-50.

[59] FRONTEX Annual Risk Analysis 2013.

[60] Brouwer, Evelien. *Digital borders and real rights: effective remedies for third-country nationals in the Schengen information system*. Vol. 15. BRILL, 2008.

obvious and overwhelming need for overhaul, technological development or massive budgetary expenditure.

The last new technology which the EU is rolling out as part of its external border controls agenda is the above-mentioned **EUROSUR**. As previously anticipated, this technology consists of a **mix of satellite imaging and drones** watching the EU's external borders with the objective of reducing the loss of lives at sea and the number of irregular immigrants entering the EU undetected, and to increase internal security by preventing cross-border crimes, such as trafficking in human beings and the smuggling of drugs.[61] For the system to work, **cooperation with neighbouring third countries is essential** according to the Commission's Communication. According to the European Commission's Press Release, the exchange of information in the framework of EUROSUR will take the form of 'situational pictures', which can be described as graphical interfaces presenting data, information and intelligence. Moreover, "*These situational pictures will be established at national and European level and will be structured in a similar way to facilitate the flow of information among them. In order to improve the capability of detecting small vessels, Frontex will also set up a service for the common application of surveillance tools, combining, among other things, satellite imagery with information derived from ship reporting systems.*"[62]

According to Frontex, EUROSUR has three phases, the first is the rationalization of surveillance systems among the Schengen states, the second is "*to improve surveillance at the EU level by introducing more advanced technologies and combining all the resultant data to form a coherent whole, available to its users 24 hours a day, seven days a week;*" and the third involves creating a common information sharing 'environment' for all Member State agencies affected. The cost estimates for EUROSUR amount to €338 million for 2011-2020, according to the Commission.[63] **This is indeed an expensive system and one which uses technologies which are more commonly associated with military equipment than civilian ones**. There is always the argument and a very valid one too, that even one unnecessary death in the Mediterranean is beyond cost. But the question which arises is **whether this enormously ambitious system will actually assist if the problem is a more mundane one**. According to the *Guardian Weekly* 11-17 October 2013, in August 2013 the Italian authorities ordered two commercial ships to rescue a migrant boat and then demanded that captains transport the migrants back to Libya (where none of them wanted to go and indeed from where they were in flight). One can well imagine the dilemma of the captains faced with a boat load of desperate people terrified of being returned to Libya. **Better satellite surveillance or drones will not resolve this ethical issue**.

5. Conclusions

The debates about EU border controls in the second half of 2013 have been fierce. The continuing loss of life in the Mediterranean because of the failure to rescue people seeking to reach the EU's southern borders has fuelled much anguish on the subject. While there is a general consensus that something needs to be done to diminish the loss of life, there are very different approaches to what that something must be. UNHCR has called for better reception facilities within the EU; the Pope has called for humanity for those seeking a better life; the Commission has called for more responsible policing of North African borders which would prevent people leaving in small boats. **The backdrop to the debates is 'what kind' of border controls should the EU have.**

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[61] COM(2011)873.

[62] http://europa.eu/rapid/press-release_IP-11-1528_en.htm?locale=FR.

[63] http://europa.eu/rapid/press-release_MEMO-11-896_en.htm?locale=FR.

There are two main frameworks around the border control issue in the EU. The first is the *traditional approach* – passports, visas and checks carried out by border guards at the external frontiers. The second is the greater *use of technology* in the form of databases with biometric identifiers and electronic automated checks at external frontiers and satellite images for border guards so that they can see who is approaching the borders, land or sea.

This Essay has examined the claims regarding border controls from the perspective of available knowledge and statistical information about what happens at EU borders on the basis of the statistical information which the EU's border agency, Frontex makes available. What is particularly noticeable from the statistical information is **the unclear articulation between the facts of EU border controls on persons and the claims and proposals for new technologies which emerge from EU institutions**.

The dilemma is one of scale – the numbers of third country nationals entering the EU per year (probably in the region of about 90 million), the population of the EU (about 508 million) are in one order of things. The numbers of persons drowning in the Mediterranean (about 1,500 in 2011), the numbers of persons refused admission to the EU (just over 115,000 in 2012) and even the numbers of persons treated as not fulfilling or no longer fulfilling their entry conditions to the EU (under 350,000 in 2012) let alone those using false or fraudulent documents (under 8,000 in 2012) are of a completely different order.

In view of the tremendous disjunction between the two scales, the measures adopted that have a massive impact on the totality of people moving (such as large new databases with biometric information and entry-exit schemes for tracking everyone's movements, satellite images and drones) simply in order to deal with issues involving 0.08% of that total **are quite simply disproportionate**. People need to be rescued in the Mediterranean – **but the best way to do this is to encourage rather than discourage all those fishing boats, pleasure boats and other vessels travelling the Mediterranean to rescue people**. Massive collection storage, use and transmission of sensitive personal data, including fingerprints, of people travelling, or displacing this responsibility to third North African countries, is a very unsatisfactory and odd response to the dilemmas raised by human mobility in EU's external borders.

Where are the solutions to the current problems? The first is to be found in reducing the obstacles to mobility of people in the Mediterranean. Unnecessary visa requirements are clearly an important part of the problem. Secondly, the EU institutions need to ensure that in the transposition of EU anti-smuggling and trafficking legislation, Member States do not create obstacles to search and rescue at sea in the private sector. The private sector is central, through the wide network of commercial sea activities in the Mediterranean, to saving people quickly and effectively, so long as they are not intentionally or unintentionally discouraged from doing so. Indeed, it is an obligation of the international law of the sea to rescue people at risk of drowning at sea.

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