

## Chapter 12

### **Illegal Immigration by Sea as a Challenge to the Maritime Border Security of the European Union with a Special Focus on Maritime Surveillance Systems**

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#### **12.1. Introduction**

This contribution introduces illegal immigration across maritime borders as one of the most topical challenges to the maritime border security of the Member States of the European Union (EU). The study pays special attention to maritime border surveillance, which plays a crucial role in ensuring efficient border security and control, and tackles the problem of unlawful acts, such as unauthorised border crossings, terrorism, trafficking in human beings, drug smuggling, and illicit arms trafficking.

Prevention of illegal immigration is a top priority issue in the EU's agenda. The majority of illegal immigrants entering the EU by sea originate from African countries. They come across the Mediterranean Sea or the Atlantic Ocean between Africa and the Canary Islands. The sea crossing threatens the lives of many immigrants as they often travel by boats that are unseaworthy and overcrowded. Accidents occur and many unfortunate immigrants lose their lives at sea.

The immigrant pressure from Africa with its unfortunate consequences is expanding, and therefore the issue has become a subject of increasing attention in the EU. While illegal immigration was put under EU jurisdiction in 1999, external border control and surveillance continues to be responsibility of the Member States. Current border controls provide insufficient coverage, and parallel competences have proven to be inadequate to prevent immigration flows. In order to enhance surveillance, the EU has undertaken a series of initiatives—including enhanced integration of surveillance systems and cooperation between various agencies responsible for migration control and border surveillance, and the creation of the Frontex agency—and continues to aim at more effective border management at both the national and European level.

This contribution describes the problem of illegal immigration by sea and its extent in the European Union. It outlines the most relevant EU policies and regulations related to it. Rights and obligations provided by international legal

instruments are examined separately. Special attention is paid to the current surveillance systems of the Member States and the EU. Finally, the main EU proposals to enhance the control of the marine borders of the southern Member States, in particular the proposal to establish the European Border Surveillance System (EUROSUR), are outlined.

## **12.2. The Problem of Illegal Immigration Across the Maritime Borders of the EU Member States**

Illegal immigration is defined here as an unauthorised entry of a third-country national to the territory of a Member State of the EU by land, sea or air. This definition also includes third-country nationals who arrive in EU with a valid visa but do not departure after their visa has expired and asylum seekers who refuse to leave after the rejection of their application for asylum. The focus here is merely on the aspects of illegal immigration by sea and does not cover immigrants who already are in a Member State seeking asylum, those who have overstayed their visa, or immigrants arriving in the EU through external borders other than maritime borders.

Illegal immigration is a major challenge for the EU; it is estimated that there are between 4.5 and 8 million illegal immigrants living in the Union at present and the figure increases by approximately 350,000–500,000 per year.<sup>1</sup> The majority of illegal immigrants trying to enter the EU by sea come across the western and central Mediterranean Sea and the Atlantic Ocean between Africa and the Canary Islands. The main immigrant flows depart from Libya, Morocco, Tunisia, and northern Mauritania aiming to reach either the mainland of Spain or Italy or their islands, such as the Canary Islands and Sicily, or the island state of Malta. Most immigrants originate from sub-Saharan and other parts of Africa and have first travelled long distances to reach the departure countries.<sup>2</sup> Another route, used mostly by Middle Eastern and Central Asian migrants, goes across the eastern Mediterranean Sea.<sup>3</sup>

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<sup>1</sup> Commission of the European Communities, “Towards a comprehensive European Migration Policy: Cracking down on employment of illegal immigrants and fostering circular migration and mobility partnerships,” *Press releases RAPID* (IP/07/678, 16 May 2007), available: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/678&format=HTML&aged=0&language=EN&guiLanguage=en>> (retrieved 20 January 2007).

<sup>2</sup> “Key facts: Africa to Europe migration,” *BBC News* (2 July 2007), available: <<http://news.bbc.co.uk/2/hi/europe/6228236.stm>> (retrieved 10 July 2008).

<sup>3</sup> Frontex, “Joint MTM Map on Irregular Mediterranean and African Migration Routes, Mediterranean Transit Migration,” *Press releases of FRONTEX* (22 January 2007), available:

The crossing is highly risky as the boats and vessels used are often unseaworthy and/or overcrowded. Accidents are common and many lives are lost at sea. During the past few years, thousands of Africans are believed to have died at sea in their attempts to reach Europe.<sup>4</sup> The use of cargo vessels, fishing boats and pleasure crafts as a way to transfer illegal immigrants is also widespread and problematic for the EU although not as life-threatening for the immigrants themselves.<sup>5</sup> In addition, illegal immigration may have other serious consequences to the security of the EU such as trafficking in human beings, smuggling of drugs and weapons, and terrorism.<sup>6</sup>

The southern Member States of the EU, in particular Spain, Italy and Malta, are under great pressure as they are at the frontline receiving illegal immigrants. The figure of over 22,000 immigrants arriving to Italy by boat in 2006 demonstrates the magnitude of the problem.<sup>7</sup> It is expected that the migration pressure from Africa will further increase due to, *inter alia*, the continent's rapidly growing population rate.<sup>8</sup>

### 12.2.1. Legal and Policy Framework

The legal and policy framework for illegal immigration by sea and maritime surveillance consists of policy making at the EU and national levels, as well as the provisions and principles of international law, Community law, and national legislation. The national policies and laws of the EU Member States are not

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<[http://www.frontex.europa.eu/newsroom/news\\_releases/art11.html](http://www.frontex.europa.eu/newsroom/news_releases/art11.html)> (retrieved 7 August 2008).

<sup>4</sup> For instance, in July 2008, fourteen African immigrants were reported to have died from heat exposure during the passage and fourteen were believed to have drowned in another accident. See "Fourteen Africans die on boat to Spain," *Reuters* (10 July 2008), available: <<http://uk.reuters.com/article/worldNews/idUKL1011279720080710>> (retrieved 10 July 2008).

<sup>5</sup> Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union adopted by the Council 27 November 2003, Council doc. 15445/03, available: <<http://register.consilium.europa.eu/pdf/en/03/st15/st15445.en03.pdf>> (retrieved 14 July 2008).

<sup>6</sup> Commission of the European Communities, "A Common Immigration Policy for Europe," *Press releases RAPID* (MEMO/08/402, 17 June 2008), available: <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/402&format=HTML&aged=0&language=EN&guiLanguage=en>> (retrieved 4 August 2008).

<sup>7</sup> See "Key facts," n. 2 above.

<sup>8</sup> "Visit to Ceuta and Melilla—Mission Report, Technical Mission to Morocco on Illegal Immigration 7<sup>th</sup> October – 11<sup>th</sup> October 2005," *Press Release* (MEMO/05/380, Brussels, 19 October 2005), available: <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/380&format=HTML&aged=1&language=EN&guiLanguage=en>> (retrieved 10 July 2008).

dealt with extensively here. The Member States are mainly examined in the context of surveillance systems as the control of the external borders of the EU continues to be their responsibility. However, there are also some surveillance measures taken by the EU that are mainly coordinative and supportive in nature. The legal basis of EU action regarding border control is provided in Article 62 (2a) of the Treaty Establishing the European Community.<sup>9</sup>

#### 12.2.1.1. Background: Towards Common Immigration Policy

In contrast to border surveillance, which continues to be in Member States' control, illegal immigration came under EU jurisdiction in 1999 by the Treaty of Amsterdam.<sup>10</sup> Since that time, the EU has sought to formulate a common migration policy, including all aspects of illegal immigration, and has taken a series of initiatives to reach the goal.<sup>11</sup> It is worth noting, however, that while

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<sup>9</sup> Article 62(2a) reads: "The Council [...] shall, within a period of five year after the entry into force of the Treaty of Amsterdam, adopt [...] measures on the crossing of the external borders of the Member States which shall establish: (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders." *Consolidated version of the Treaty Establishing the European Community* (consolidated text), published in *Official Journal* C 325 of 24 December 2002, available: <[http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf)> (retrieved 22 August 2008). Further regulation on external border control is provided in the Schengen Borders Code, of which Article 12 deals with border surveillance in general terms, Regulation (EC) No 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 [hereinafter Schengen Borders Code], available: <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=R egulation&an\\_doc=2006&nu\\_doc=562](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=R egulation&an_doc=2006&nu_doc=562)> (retrieved 22 August 2008).

<sup>10</sup> In particular, paragraph 3(b) of Article 63 put immigration under the competence of the EU; *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts*, adopted by the European Council on 16 and 17 June 1997, signed on 2 October 1997 by the Foreign Ministers of the fifteen Member States and entered into force on 1 May 1999, *Official Journal* C 340 (10 November 1997), available: <<http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>> (retrieved 9 July 2008).

<sup>11</sup> The first real call for common policy on immigration and asylum was made in the European Council Meeting in Tampere in 1999. For an overview of the early years' progress towards a common immigration policy, see Committee of the Regions, *Local and Regional Authorities and the Immigration Challenge* (Luxembourg: Office for Official Publications of the European Communities, 2005), pp. 15–24; see also, Commission of the European Communities, *Common policy on illegal immigration*, Communication from the Commission, COM(2001) 672 (Brussels, 15 November 2001) available: <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=COMfinal&an\\_doc=2001&nu\\_doc=672](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2001&nu_doc=672)> (retrieved 15 August 2008) [European Commission's Communications cited hereinafter by the main title]. Of special importance among the EU initiatives to promote a common migration policy are the three Council action plans on illegal immigration, external border control and

several legislative instruments have been adopted, e.g., in asylum, relatively few binding regulations and directives have been adopted on illegal immigration, aside from several binding decisions of the Council of the European Union.<sup>12</sup>

Despite the progress so far, the EU continues to strive for further integration on illegal immigration, asylum, and other migration issues.<sup>13</sup> The goal of the EU's migration policy is two tiered: preventing illegal immigration on one hand, and encouraging legal migration on the other, in order to ensure the sustainability of the labour market of the EU.<sup>14</sup> The main tools of the first goal are, *inter alia*, reinforcing external border security, strengthening cooperation with third countries, fighting against trafficking of human beings, preventing illegal employment, and improving return policies.<sup>15</sup>

Of special concern for the EU are immigrants in a genuine need of asylum whose access to the EU is given priority.<sup>16</sup> However, EU policy has

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return policy, namely Council doc. 6621/1/02: Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, available: <<http://register.consilium.europa.eu/pdf/en/02/st06/06621-r1en2.pdf>> (retrieved 14 July 2008); Plan for management of the external borders of the Member States of the European Union, Council doc. 10019/02, available: <<http://register.consilium.europa.eu/pdf/en/02/st10/10019en2.pdf>> (retrieved 1 August 2008); and Proposal for a Return Action Programme, Council doc. 14673/02, available: <<http://register.consilium.europa.eu/pdf/en/02/st14/14673en2.pdf>> (retrieved 15 July 2008).

<sup>12</sup> A list of EU legislation, Community acts, and main proposals regarding illegal immigration is available on the website for Justice, Freedom and Security of the European Commission at <[http://ec.europa.eu/justice\\_home/doc\\_centre/immigration/illegal/doc\\_immigration\\_illegal\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/immigration/illegal/doc_immigration_illegal_en.htm)> (retrieved 14 July 2008).

<sup>13</sup> E.g., Commission of the European Communities, *A Common Immigration Policy for Europe: Principles, actions and tools*, Communication from the Commission, COM(2008) 359, available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0359:FIN:EN:PDF>> (retrieved 4 August 2008); for an evaluation of the EU immigration policy, see, e.g., P. Bendel, "Immigration Policy in the European Union: Still bringing up the walls for fortress Europe?" *Migration Letters* 2 (April 2005), pp. 20–31.

<sup>14</sup> Unambiguous encouragement for legal migration was given, for example, in the COM(2006) 735, which states that "the EU will need migrants to ensure the sustainability of its labour markets given its demographic developments." The main aspect of the demographic change is the ageing European population resulting in the lack of workforce, see Committee of the Regions, *Local and regional authorities and the immigration challenge* (Luxembourg: Office for Official Publications of the European Communities, 2005), p. 13.

<sup>15</sup> Commission of the European Communities, *Policy priorities in the fight against illegal immigration of third-country nationals*, Communication from the Commission, COM(2006) 402 (Brussels, 19 July 2006), available: <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=COMfinal&an\\_doc=2006&nu\\_doc=402](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2006&nu_doc=402)> (retrieved 11 July 2008).

<sup>16</sup> E.g., Commission of the European Communities, *Policy plan on asylum – An integrated approach to protection across the EU*, Communication from the Commission, COM(2008) 360

been criticised as “sealing of the borders of European States” and not providing adequate refugee protection.<sup>17</sup>

#### 12.2.1.2. Increasing Attention on Illegal Immigration by Sea

In recent years, illegal immigration through maritime borders has attracted rapidly increasing attention in the EU. The expanding immigrant pressure from Africa and its consequences, in particular the high death toll of unsuccessful sea crossings, have been the focus of this attention.

In September 2003, the Commission presented a report of a study conducted by CIVIPOL regarding the control of the EU’s maritime borders.<sup>18</sup> The extensive report revealed loopholes of the maritime borders. It identified five priority areas to enhance control, namely, identification of illegal immigration routes, cooperation with third countries of origin and transit, introduction of effective operational structures for coordination between Member States, identification of the best technologies available, and the legal aspects of maritime border controls. Furthermore, the report laid the foundation for a programme of measures to combat illegal immigration across the maritime borders of the EU Member States, which was adopted in 2003.<sup>19</sup> The 16-paged programme proposed a number of measures, mostly operational, to enhance border control. It highlighted the importance of relations with the third countries from which illegal migration flows originate or through which they pass, as well as the importance of strengthened cooperation between the Member States. In 2004, the Council conducted an assessment of the implementation of the programme of measures. The assessment recognised the progress already made but also called for further operational and legislative measures to meet the requirements of the programme.<sup>20</sup> Additionally,

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(Brussels, 17 June 2008), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0360:EN:HTML>> (retrieved 4 August 2008).

<sup>17</sup> M-T. Gil-Bazo, “The practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs external dimension. The safe third country concept revisited,” *International Journal of Refugee Law* 18(3–4) (September/December, 2006), pp. 571–600.

<sup>18</sup> Council of the European Union, *Feasibility study on the control of the European Union’s maritime borders – Final report*, Council doc. 11490/1/03 (Brussels, 19 September 2003) available: <[http://ec.europa.eu/justice\\_home/news/information\\_dossiers/external\\_border/feasibility\\_study\\_en.pdf](http://ec.europa.eu/justice_home/news/information_dossiers/external_border/feasibility_study_en.pdf)> (retrieved 28 July 2008).

<sup>19</sup> *Programme of measures...*, n. 5 above.

<sup>20</sup> Council of the European Union, *Draft Council conclusions evaluating the progress made with regard to the implementation of the Programme of measures to combat illegal immigration across the maritime borders of the Member States of the European Union*, Council doc.

the Council invited the Commission to conduct an in-depth study on existing international instruments in regard to illegal immigration.

In 2005, the European Union Council adopted a Global Approach to Migration.<sup>21</sup> A more integrated and global approach was called for to balance diverse objectives, in particular preventing illegal immigration and benefiting from legal migration, in a way that would be beneficial to all the countries involved. Africa and the Mediterranean region were considered priority areas. The need for a global approach, especially in issues concerning both the Mediterranean and certain African countries, such as safety at sea, was highlighted. Special attention was paid to the need for further operational cooperation between Member States on maritime border control and enhanced dialogue and cooperation with all countries of the region.

The EU has also undertaken financial initiatives to prevent unwanted immigration flows. It has provided significant financial support to Member States to deal with illegal immigration through the Mediterranean Sea, e.g., by developing specific programmes such as Odysseus and ARGO.<sup>22</sup> The support and grants awarded have been considerable. For example, under the ARGO programme in 2006, the Commission co-financed six projects in Spain, Italy, and Malta totalling more than €3 million.<sup>23</sup> The EU financial support to third countries has likewise been notable; this will be discussed further below.

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15087/04 (Brussels, 22 November 2004), available: <<http://register.consilium.europa.eu/pdf/en/04/st15/st15087.en04.pdf>> (retrieved 14 July 2008).

<sup>21</sup> Council of the European Union, Annex I to the Presidency Conclusions on the European Council meeting in Brussels 15 and 16 December 2005, *Global approach to migration: priority actions focusing on Africa and the Mediterranean*, Council doc. 15914/1/05, REV 1, CONCL 3 (Brussels, 30 January 2006) available: <[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/87642.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/87642.pdf)> (retrieved 30 July 2008). The Global Approach to Migration built on *Priority actions for responding to the challenges of migration – First follow-up to Hampton Court, Communication from the Commission to the Council and the European Parliament*, COM(2005) 621 (Brussels, 30 November 2005), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0621:EN:HTML>> (retrieved 16 July 2008).

<sup>22</sup> For further information on the ARGO programme, see Commission of the European Communities, “Argo – external borders, asylum, visas and immigration,” available: <[http://ec.europa.eu/justice\\_home/funding/2004\\_2007/argo/funding\\_argo\\_en.htm](http://ec.europa.eu/justice_home/funding/2004_2007/argo/funding_argo_en.htm)> (retrieved 6 July 2008); for further information on the Odysseus programme, see “Odysseus – to help strengthen EU-wide cooperation in the field of asylum, immigration and external borders,” available: <[http://ec.europa.eu/justice\\_home/funding/expired/odysseus/funding\\_odysseus\\_en.htm](http://ec.europa.eu/justice_home/funding/expired/odysseus/funding_odysseus_en.htm)> (retrieved 6 July 2008).

<sup>23</sup> “Commission offers support to Spain, Italy and Malta for the reception of illegal immigrants,” *Press Releases RAPID*, IP/06/1208 (Brussels, 19 September 2006), available: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1208&format=HTML&aged=1&language=EN&guiLanguage=en>> (retrieved 5 August 2008).

### 12.2.1.3. International Law

Several international law instruments are relevant when considering illegal immigration across maritime borders and maritime surveillance, in particular of the United Nations Convention on the Law of the Sea (LOS Convention).<sup>24</sup> At all times, states are also obliged to respect human rights and the rights of refugees that are protected by international and regional agreements.<sup>25</sup>

Surveillance measures of maritime areas are limited by a diverse set of rules in different maritime zones. As a rule, coastal states have sovereignty over their territorial sea. Despite the universally applicable right of innocent passage, coastal states have the right to prevent the passage of ships transporting illegal immigrants through their territorial waters.<sup>26</sup> To a large extent, this also applies to contiguous waters.<sup>27</sup> On high seas, due to the basic principles of the freedom of navigation and the extensive jurisdiction of the flag state, other states cannot, in principle, intervene against ships carrying illegal immigrants.<sup>28</sup> Exceptions to the rule of flag state jurisdiction are made in cases of piracy, transport of slaves, and non-authorised radio emissions, but no exception is made for the transport of illegal immigrants.<sup>29</sup> Flagless ships, often used by illegal immigrants trying to enter the EU, do not invoke freedom of navigation on the high seas and can be intercepted by any state.<sup>30</sup>

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<sup>24</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, available: <[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/UNCLOS-TOC.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm)>, (retrieved 30 July 2008) [hereinafter LOS Convention].

<sup>25</sup> E.g., *International Covenant on Civil and Political Rights* of December 1966; *European Convention on Human Rights and Fundamental Freedoms* of 1950; *Convention relating to the Status of Refugees* of 28 July 1951; *Protocol relating to the Status of Refugees* of 31 January 1967.

<sup>26</sup> LOS Convention, n. 24 above, Article 25(1): “The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent”; Id., Article 19(1): “Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State ...”; Id., Article 19(2g): “Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in ... the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.”

<sup>27</sup> Id., Article 33(1a): “In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to ... prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.”

<sup>28</sup> Id., Article 87, freedom of the high seas; Id., Article 92(1): “Ships shall sail under the flag of one State only and ... shall be subject to its exclusive jurisdiction on the high seas.”

<sup>29</sup> Id., Articles 99–110.

<sup>30</sup> Id., Article 110(1d).



Ships are bound by the obligation to rescue and render assistance to any person or ship in distress at sea.<sup>31</sup> This applies in all cases, including the transport of illegal immigrants, and can be abused if immigrants are intentionally left in distress. Such transport usually takes place in worn-out large ships that fly under a flag of convenience and are run by criminal organisations.<sup>32</sup>

Illegal immigration by sea is often related to smuggling. The Protocol Against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime, addresses this issue.<sup>33</sup> The Protocol promotes cooperation among state parties and urges them to take legislative and other measures to prevent smuggling.<sup>34</sup> It proposes specific measures against smuggling of migrants by sea, which are mainly aimed at enhancing cooperation between the states “to the fullest extent possible.”<sup>35</sup> To support the Protocol, the Council of the European Union adopted a Decision to further promote cooperation and information sharing among the EU Member States that are parties to the Protocol.<sup>36</sup>

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<sup>31</sup> Id., Article 98(1b); *International Convention on Maritime Search and Rescue*, Hamburg, 27 April 1979, entered into force 22 June 1985 and amended in 1998 and 2004, available: <[http://www.imo.org/conventions/contents.asp?doc\\_id=653&topic\\_id=257](http://www.imo.org/conventions/contents.asp?doc_id=653&topic_id=257)> (retrieved 20 August 2008).

<sup>32</sup> Commission of the European Communities, *Examining the creation of a European border surveillance system (EUROSUR) – Impact assessment*, Accompanying document to the Communication from the Commission, Commission staff working document, SEC(2008) 151 (Brussels, 13 February 2008), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0151:EN:HTML>> (retrieved 20 August 2008).

<sup>33</sup> *Protocol against the smuggling of migrants by land, air and sea, supplementing the United Nations Convention against Transnational Organized Crime*, adopted by UN General Assembly Resolution 55/25 of 15 November 2000 and entered into force on 28 January 2004, available: <<http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>>. On 13 August 2008, 114 states were parties to the protocol, for a comprehensive list of signatories and parties see <<http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html>> (retrieved 20 August 2008).

<sup>34</sup> Article 3(a) of the Protocol defines “smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”

<sup>35</sup> *Inter alia*, Article 8(1) obligates state parties to give assistance on request in certain cases, e.g. when a state party suspects that a vessel flying its flag is used for smuggling of migrants. According to Article 8(2), if such a vessel flies a flag of another state party, the flag state may be notified and request authorisation to board, search or/and take measures against the vessel by other state parties. Article 8(4) obligates state parties to respond to such requests without delay. Finally, Article 8(5) gives the flag state the power to decide on which conditions and to what extent authorisation is given, and forbids states to exceed it.

<sup>36</sup> Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, supplementing the

In 2007, the Commission completed a study on international instruments in relation to illegal immigration by sea.<sup>37</sup> The study examined the role and the gaps of international treaties. The study proposed clarifications and adjustments to many of the treaties it reviewed. It suggested, *inter alia*, amending the exceptions in the LOS Convention regarding the flag state's extensive jurisdiction on the high seas to include transport of illegal immigrants.

### 12.2.2. Current Surveillance Systems

Presently, border surveillance has become the most emphasised element of the border management policy as described by Tampere JHA Council. The Schengen Border Code defines "border surveillance" as "the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks."<sup>38</sup>

#### 12.2.2.1. Maritime Surveillance on the National Level

A number of separate areas of maritime surveillance can be distinguished: fisheries, vessel traffic management, and border security surveillance.<sup>39</sup> Systems not designed for border protection may also prove to be an important

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United Nations *Convention Against Transnational Organised Crime* concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181(a) of the *Treaty establishing the European Community*, 2006/616/EC; the Decision is not binding on the United Kingdom, Ireland or Denmark; available: <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=Decision&an\\_doc=2006&nu\\_doc=616](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Decision&an_doc=2006&nu_doc=616)> (retrieved 20 August 2008).

<sup>37</sup> Commission of the European Communities, *Study on the international law instruments in relation to illegal immigration by sea*, Commission staff working document, SEC(2007) 691 (Brussels, 15 May 2007), available: <[http://ec.europa.eu/justice\\_home/doc\\_centre/immigration/illegal/doc/sec\\_2007\\_691\\_en.pdf](http://ec.europa.eu/justice_home/doc_centre/immigration/illegal/doc/sec_2007_691_en.pdf)> (retrieved 11 July 2008).

<sup>38</sup> Council Regulation EC/562/2006 establishing a Community Code on the rights governing the movement of persons across borders (Schengen Borders Code), 15 March 2006, *Official Journal* L 105/1, 13 April 2006, Art. 2.11.

<sup>39</sup> S. Ruzittu, "The new roles of European navies: the maritime and air surveillance. National experience and coordination among administrations" (Lisbon, 18 September 2007); Commission of the European Communities/Joint Research Centre Ispra, *Working Document III on Maritime Surveillance Systems* (Italy, 14 June 2008), available: <[http://ec.europa.eu/maritimeaffairs/pdf/maritime\\_policy\\_action/maritime-surveillance\\_en.pdf](http://ec.europa.eu/maritimeaffairs/pdf/maritime_policy_action/maritime-surveillance_en.pdf)> (retrieved 7 August 2008) [hereinafter Ispra], pp. 2, 6.

element of action against irregular migration. It is possible, owing to fisheries or maritime traffic surveillance, not only to supervise ship movements but also to easily distinguish (e.g., on the satellite or radar picture) vessels lawfully performing their business from those possibly carrying illegal immigrants or used for drug trafficking or smuggling. In the light of the loss of so many migrants' lives, distress and safety systems may also become useful. In general, the more systems that are being used at the same time reduce the possibility of overlooking a threat or unwanted vessel.<sup>40</sup>

It is worth mentioning several important national and International Maritime Organization (IMO) systems of non-border security surveillance operating in European waters:

- a) The vessel monitoring system (VMS) used for monitoring fisheries.<sup>41</sup>
- b) The automatic identification system (AIS) designed for maritime safety and collision avoidance. EU Member States are obliged to prepare on-shore installations for receiving and utilising the AIS information.<sup>42</sup>
- c) The vessel traffic services (VTS) designed for areas of dense shipping.<sup>43</sup>
- d) The long range identification and tracking (LITR) regulated system under SOLAS for monitoring vessels located farther from the shore. It is mandatory, e.g., for passenger vessels and larger cargo ships. In 2007, EU Member States agreed to create the EU LITR Data Centre managed by the European Maritime Safety Agency (EMSA).<sup>44</sup>

Additionally, there are other reporting regimes and maritime safety systems.<sup>45</sup>

Each Member State has its own border surveillance system, procedures and agencies responsible for border protection. According to the BORTEC study, there are about 50 authorities from 30 institutions involved in border surveillance in the Mediterranean and Central Atlantic states (Portugal, Spain,

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<sup>40</sup> Commission of the European Communities, "Background Paper No. 4B on improving European integration in maritime reporting, monitoring and surveillance" (to the Green Paper on European Integrated Maritime Policy, 2006), available: <[http://ec.europa.eu/maritimeaffairs/pdf/SEC\(2006\)\\_689%20\\_4b.pdf](http://ec.europa.eu/maritimeaffairs/pdf/SEC(2006)_689%20_4b.pdf)> (retrieved 5 August 2008), p. 6; Ispra, id., p. 18.

<sup>41</sup> Commission Regulation (EC) No 2244/2003, 18 December 2003; Ispra, id., p. 8; Commission of the European Communities, id., pp. 8–9.

<sup>42</sup> Ispra, id., pp. 8, 14; Commission of the European Communities, id., p. 8; see also, *International Convention for the Safety of Life at Sea (SOLAS)*, IMO, 1974; Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, *Official Journal L* 208, 05/08/2002.

<sup>43</sup> Ispra, id., pp. 8–9; Commission of the European Communities, id., pp. 6–7.

<sup>44</sup> Ispra, id., pp. 11, 16; Commission of the European Communities, id., pp. 9–10.

<sup>45</sup> Ispra, id., pp. 9–12.

France, Italy, Malta, Greece, Slovenia, Cyprus), sometimes with parallel competencies and systems. Moreover, integrated national border surveillance systems cover only a few selected parts of the EU external border owing to technical and financial limitations.<sup>46</sup>

In spite of this diversity, it is possible to observe some common trends. Militarisation of surveillance forces is visible. This is especially true in the changing modes of organisation as well as in equipping forces originally responsible for customs or patrolling territorial waters with military-style hardware and increasingly specialised surveillance equipment. Furthermore, the States' spending on border surveillance systems has increased significantly, together with rising employment in relevant supporting state agencies. The Spanish Guardia Civil and Italian Guardia di Finanza are fine examples.<sup>47</sup> The participation of the national navies in the prevention of the irregular immigration has been also increasing (e.g., in 2002, one-quarter of the Italian Navy's working hours were devoted to immigration control). Since 2002, several joint operations have been conducted by national naval forces, including *Amarante* (France), *Ulysses* (Strait of Gibraltar, several navies), and *Active Endeavour* (NATO).<sup>48</sup>

EU Mediterranean States are presently developing more advanced and integrated surveillance systems. The Spanish SIVE (*Sistema Integrado de Vigilancia del Estrecho*) system is one of the most costly, sophisticated, and successful. SIVE is composed of various military-style technologies, including fixed and mobile radars, infrared sensors, and patrolling equipment. This, together with satellite images and the data from maritime surveillance systems, allows SIVE to detect objects that "barely stick out from the water surface." SIVE was initially established in the area of the Strait of Gibraltar. It is being expanded to other crucial areas, such as the Canary Islands (where the migration routes have shifted mostly as an effect of SIVE). Other European states are considering following Spanish example (e.g., Portugal and Estonia).<sup>49</sup>

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<sup>46</sup> Commission of the European Communities, *Examining the creation of a European Border Surveillance System (EUROSUR)*, Communication from the Commission, COM(2008) 68 final (Brussels, 13 February 2008), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0068:FIN:EN:PDF>> (retrieved 8 August 2008).

<sup>47</sup> See in greater detail: D. Lutterbeck, "Policing Migration in the Mediterranean," *Mediterranean Politics* 11(1) (Routledge, March 2006), 59–82, especially pp. 68–69.

<sup>48</sup> Lutterbeck, id., pp. 67–68; Ruzittu, n. 39 above.

<sup>49</sup> Lutterbeck, id., p. 66; "Spain's Border Surveillance System Remains Controversial," *Deutsche Welle* (29 October 2007), available: <[www.dw-world.de/dw/article/0,2144,2835465,00.html](http://www.dw-world.de/dw/article/0,2144,2835465,00.html)> (retrieved 13 August 2008); Ispra, n. 39 above, pp. 18–19.

#### 12.2.2.2. EU Efforts Towards Integrated Maritime Surveillance

Major EU documents such as the Integrated Maritime Policy Blue Book characterise national and local maritime surveillance systems as “sub-optimal” and therefore ineffective.<sup>50</sup> Consequently, the need for integration of surveillance systems is seen as a necessity.

The possible integration of maritime surveillance systems was an object of research in various studies, e.g., the BORTEC report (confidential apart from the public excerpt).<sup>51</sup> These systems, originally not designed for border surveillance, provide vital data for immigration officers. Within the framework of Directive 2002/59/EC, the Community vessel traffic monitoring and information system (VTMIS) is being built up under the auspices of EMSA.<sup>52</sup> The system is based on several components:

- a) SafeSeaNet (SSN) Version 1 is a constantly developed system of information exchange between Member States’ authorities to help prevent pollution and accidents at sea.
- b) The short range identification and tracking (SRIT) system is to eventually collect AIS data at the EU level (EMSA) and create an EU AIS-based real-time traffic image integrated into SSN (pilot project should be completed by the end of 2008).
- c) The Shore-based Traffic Monitoring and Information Database (STMID) gathers descriptive information on the Member States’ shore-based vessel monitoring and reporting infrastructure at a central level (the database is under constant development).<sup>53</sup>

To address exclusively border surveillance, in 2004 the European Agency for the Management of Operation Cooperation at the External Borders of the Member States of the European Union (hereinafter FRONTEX) was established.<sup>54</sup> FRONTEX, which became fully operation in October 2005,<sup>55</sup> is

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<sup>50</sup> Commission of the European Communities, *An Integrated Maritime Policy for the European Union*, Communication from the Commission, COM(2007)575 final (Brussels, 10 October 2007), p. 5.

<sup>51</sup> Ispra, n. 39 above.

<sup>52</sup> Ispra, n. 39 above, pp. 14–16; Commission of the European Communities, n. 40 above, pp. 7–8; EMSA website available: <<http://www.emsa.eu.int/end806d008.html>>, <<http://www.emsa.eu.int/end806.html>> (retrieved 13 August 2008).

<sup>53</sup> Ispra, n. 39 above, pp. 14–15.

<sup>54</sup> Council Regulation EC No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 26 October 2004, *Official Journal* L 349/1, 25 November 2004.

an intelligence-based and depoliticised body of the Community. Its main task is to coordinate cost-effective, systematically-managed joint operations based on thorough risk analysis. The resources at the agency's disposal also position it as a key institution in the consolidation, implementation, and expansion of the EU Integrated Border Management System.<sup>56</sup> FRONTEX tasks also include providing assistance to Member States in the training of national border guards, including the establishment of common training standards<sup>57</sup>; conducting risk analyses; undertaking research relevant for the control and surveillance of external borders; providing assistance to Member States in circumstances requiring increased technical and operational assistance at external borders; and providing Member States with the necessary support in organising joint return operations.<sup>58</sup>

Joint operations conducted by FRONTEX can take form of, for example, expert assistance (e.g., HERA I) or joint operations at sea (e.g., NAUTILUS, HERA II).<sup>59</sup> The results of the joint operations, apart from operational outcomes (e.g., a significant number of apprehended illegal immigrants and immigration facilitators) include exchanging best practices and information between Member States and enhancing cooperation between national border guard authorities.<sup>60</sup> Despite its success, there is also criticism of FRONTEX activities, e.g., refugee protection violations.<sup>61</sup>

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<sup>55</sup> Council Regulation (EC) 2007/2004 FRONTEX. The FRONTEX legal base also includes: Regulation (EC) No. 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers; 2005/358/EC: Council Decision of 26 April 2005 designating the seat of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and Treaty establishing the European Community.

<sup>56</sup> S. Carrera, *The EU Border Management Strategy: FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Document No. 261 (Brussels: Centre for European Policy Studies, March 2007), pp. 1, 8–9; “More about FRONTEX” (n.d.), FRONTEX Agency website at: <[http://www.frontex.europa.eu/more\\_about\\_frontex/](http://www.frontex.europa.eu/more_about_frontex/)> (retrieved 6 August 2008).

<sup>57</sup> The Common Core Curriculum for border guards was presented in March 2008, see “Common Training Standards for the EU Border Guard Services,” *Press Release* (4 March 2008), available: <[http://www.frontex.europa.eu/newsroom/news\\_releases/art33.html](http://www.frontex.europa.eu/newsroom/news_releases/art33.html)> (retrieved 18 August 2008).

<sup>58</sup> “More about FRONTEX,” n. 56 above.

<sup>59</sup> For more on particular joint operations, see Carrera, n. 56 above, pp. 20–22.

<sup>60</sup> Commission of the European Communities, *Report on the evaluation and future development of the FRONTEX Agency*, Communication from the Commission, SEC(2008) 149 (Brussels, 13 February 2008), para. II A.

<sup>61</sup> See, e.g., M. Vella, “FRONTEX: Out of control?” *Malta Today* (20 July 2008), available: <<http://www.maltatoday.com.mt/2008/07/20/n6.html>> (retrieved 19 August 2008).

Another FRONTEX instrument is the European Border Patrols Network (EBPN). The first phase (preceded by the MEDSEA study) began in 2007 with seven patrolling areas.<sup>62</sup> The main objective of EBPN is to “facilitate a closer and cost-effective operational cooperation between the national authorities responsible for patrolling the Member States’ Southern external maritime borders” as well as the synchronisation of national measures. This should not only prevent irregular immigration, but also help in detecting emergencies at sea and reducing loss of lives.<sup>63</sup>

There are a number of additional FRONTEX instruments used for border surveillance. The most important among these are the Rapid Border Intervention Teams (RABIT, a pool of experts deployed in exceptional situations), the Centralised Record of Available Technical Equipment (CRATE, a database of border surveillance equipment), BorderTechNet (development of capacities and technologies), and Information and Coordination Network for Member States’ Migration Management Services (ICONET, a web-based platform for information exchange).<sup>64</sup>

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<sup>62</sup> Council of the European Union, *FRONTEX Feasibility Study on Mediterranean Coastal Patrol Network – MEDSEA*, Council doc. 12049/06 (Brussels: Carrera, 2007), pp. 18–19.

<sup>63</sup> “Launching operations of the European Border Patrols Network: a new tool to tighten up control and management of the EU’s Southern maritime borders,” *Press Release*, IP/07/702 (Brussels, 24 May 2007), available: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/702&format=HTML&a>> (retrieved 27 June 2008). See also, R. Liubajevs, “Situation at the EU’s Southern maritime borders,” Frontex, presentation at the Seminar on Europe’s Maritime Frontiers (Lisbon, 18 September 2007), available: <<http://www.assembly-weu.org/documents/Lisbon%20Speeches/Maritime%20frontiers%20-%20Liubajevs.pdf>> (retrieved 10 August 2008); “European Border Patrols Network to combat illegal immigration along the southern maritime borders of the European Union,” MEMO/07/203 (Brussels, 24 May 2007), available: <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/203&format=HTML>> (retrieved 15 August 2008).

<sup>64</sup> Liubajevs, id.; “Rapid Border Intervention Teams (RABITs) Exercise in Slovenia,” *Press Release* (10 April 2008), available: <[http://www.frontex.europa.eu/newsroom/news\\_releases/art35.html](http://www.frontex.europa.eu/newsroom/news_releases/art35.html)> (retrieved 18 August 2008); “European Border Patrols Network,” n. 63 above; “Launching operations,” n. 63 above; “BorderTechNet,” (n.d.), available: <[http://www.frontex.europa.eu/border\\_tech/](http://www.frontex.europa.eu/border_tech/)> (retrieved 18 August 2008). Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union of 28 February 2002, *Official Journal* C 142 (14 June 2002); Council Decision establishing a secure web-based Information and Coordination Network for Member States’ Migration Management Services of 16 March 2005, 2005/267/EC, *Official Journal* L 083 (1 April 2005). See also “Reinforcing the fight against illegal immigration – Secure web-based network for the coordination and exchange of information on irregular migration,” *Press Release*, IP/06/57 (Brussels, 20 January 2006), available: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/57&format=HTM>> (retrieved 13 August 2006) and D. Naujoks, “ICONET – EU Commission launches network on irregular migration” (Portal

### 12.2.3. Proposed Surveillance Systems

Efficient border control is a prerequisite for preventing illegal immigrants entering the EU. Current external border control and surveillance measures have proven to be inadequate in preventing illegal immigration through the Mediterranean Sea and the Atlantic Ocean between Africa and the Canary Islands. The measures lack in scope coverage and are often fragmented. Furthermore, different border agencies are burdened with parallel competences. The EU has identified integrated and secure border management as one of its policy priorities.<sup>65</sup> It has taken initiatives to enhance the control but, so far, no effort has succeeded in stopping illegal immigrant flows. Thus, the EU has taken further steps to create a new, effective and EU-wide border management system.

Designed to support Member States in preventing illegal immigration, a common European Surveillance System for Borders (EUROSUR) was proposed in a Communication from the Commission to the Council on reinforcing the management of the European Union's southern maritime borders in 2006.<sup>66</sup> It was proposed that the EUROSUR system would first improve surveillance by creating more efficient cooperation between the existing national surveillance systems of the Member States but in the long term "it should gradually replace national surveillance systems at land and maritime borders, providing cost-effective solution, including e.g. a combination of radar and satellite surveillance at European level." A few weeks after the Commission adopted its Communication the European Council stressed the need to examine the creation of EUROSUR but did not assess the proposed system.<sup>67</sup> In February 2008, the Commission responded to the request by adopting the Communication Examining the Creation of a European Border Surveillance System (EUROSUR).<sup>68</sup> It stated that, if created, the EUROSUR system would prevent illegal immigration and cross-border crime as well as

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Migrationsrecht.net, 13 January 2006), available: <[http://www.migrationsrecht.net/index2.php?option=com\\_content&task=view&id=>](http://www.migrationsrecht.net/index2.php?option=com_content&task=view&id=>) (retrieved 13 August 2008).

<sup>65</sup> Commission of the European Communities, n. 15 above.

<sup>66</sup> Commission of the European Communities, *Reinforcing the management of the European Union's Southern Maritime Borders*, Communication from the Commission, COM(2006) 733 (Brussels, 30 November 2006), available: <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!DocNumber&lg=en&type\\_doc=COMfinal&an\\_doc=2006&nu\\_doc=733](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2006&nu_doc=733)> (retrieved 11 July 2008).

<sup>67</sup> 16879/1/06 Brussels European Council 14/15 December 2006, *Press Release*, available: <[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/92202.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/92202.pdf)> (retrieved 8 August 2008).

<sup>68</sup> "Examining the creation," n. 46 above.



enhance search and rescue capability thereby decreasing the number of unfortunate immigrants who die at sea. Interestingly, and contrary to its earlier Communication, the Commission stated that "... such a framework would be set up without affecting the respective areas of jurisdiction of Member States nor replace any existing systems." It was now indicated that, instead of being aimed at replacing the national systems, the EUROSUR system would support the Member States by enhancing their capacity to detect crossing boats and vessels and increasing their capacity to react in such situations. First, the EUROSUR would interconnect and rationalise the national systems, and secondly, it would improve the existing surveillance tools. Its final goal would be to create a common monitoring and information sharing environment for the EU maritime domain. The Commission suggested implementing EUROSUR in three phases starting in 2010.<sup>69</sup>

In addition to the Communication on examining the creation of the EUROSUR system, the Commission presented other two Communications as a package of measures to enhance border security and to facilitate ease of travel for people who legally enter the EU.<sup>70</sup> The package included a Communication on preparing the next steps in border management in the European Union and a Communication on evaluation and future development of the FRONTEX Agency.<sup>71</sup> Further information and analysis of the topics were provided in the staff working documents accompanying the Communications.<sup>72</sup> The package of

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<sup>69</sup> Id.

<sup>70</sup> Commission of the European Communities, Directorate General Justice, Freedom and Security, *Border package: Facilitating travel and securing Europe's borders*, Citizen's Summary, available: <[http://ec.europa.eu/justice\\_home/news/summary/docs/border\\_package\\_en.pdf](http://ec.europa.eu/justice_home/news/summary/docs/border_package_en.pdf)> (retrieved 13 August 2008).

<sup>71</sup> Commission of the European Communities, *Preparing the next steps in border management in the European Union*, Communication from the Commission, COM(2008) 69 final (Brussels, 13 February 2008), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0069:FIN:EN:PDF>>; Commission of the European Communities, n. 60 above.

<sup>72</sup> E.g., Commission of the European Communities, *Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Report on the evaluation and future development of the FRONTEX Agency – Impact assessment*, Commission staff working document, SEC(2008) 148 (Brussels, 13 February 2008), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0148:EN:HTML>>; "Accompanying document," n. 32 above; Commission of the European Communities, *Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Preparing the next steps in border management in the European Union – Impact assessment*, Commission staff working document, SEC(2008) 153 (Brussels, 13 February 2008), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008SC0153:EN:HTML>> (retrieved 14 August 2008).

measures was aimed at enhancing all aspects of border control and surveillance, and at the same time it was aimed at improving smooth passenger flows of bona fide travellers. Measures proposed were wide-ranging and included, *inter alia*, the use of new technology, creating the EUROSUR system, reinforcing the capacity of FRONTEX, establishing a system for simplified and automated border checks for low-risk travellers from third countries, as well as a system to register third country nationals on entry and exit.

Once again, in June 2008, the EU reconfirmed integrated external border management as its goal in a Commission communication on a common immigration policy for Europe.<sup>73</sup> The existing border control tools, including FRONTEX, the use of latest technologies and well-coordinated cooperation with third countries are considered important but there continues to be a need of EU-wide surveillance system. The Commission requires Member States to continue building the EUROSUR concept. The EU's efforts towards further integration of surveillance systems, and border management in general, are in line with the overall Integrated Maritime Policy of the EU, which aims to create common sea-related policies for the EU Member States.<sup>74</sup>

The last but not least aspect of the future development of maritime surveillance is cooperation with third countries. The EU has emphasised that cooperation with countries of origin and transit is a prerequisite for effective external border control and thus, for the prevention of illegal immigrant flows.<sup>75</sup> Cooperation has been named as one of the policy priorities of the EU in the

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<sup>73</sup> Commission of the European Communities, *A Common Immigration Policy for Europe: Principles, actions and tools*, Communication from the Commission, COM(2008) 359 (Brussels, 17 June 2008), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0359:FIN:EN:PDF>> (retrieved 4 August 2008).

<sup>74</sup> In fact the Commission put emphasis on the importance of developing a European network for maritime surveillance and, in particular, has emphasised the need for better coordination within and among the Member States' surveillance agencies and the need for interlinking the existing monitoring and tracking systems of the Member States, see European Commission, *Integrated Maritime Policy for the European Union, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM(2007) 575 final (Brussels, 10 October 2007), available: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0575:FIN:EN:PDF>> (retrieved 8 August 2008); and in an accompanying document, the Action Plan, which proposed practical measures to reach these goals, see Commission of the European Communities, *Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Integrated Maritime Policy for the European Union*, Commission Staff Working Document, SEC(2007) 1278 (Brussels, 10 October 2007), available: <[http://ec.europa.eu/maritimeaffairs/pdf/ActionPaper/action\\_plan\\_en.pdf](http://ec.europa.eu/maritimeaffairs/pdf/ActionPaper/action_plan_en.pdf)> (retrieved 8 August 2008).

<sup>75</sup> "Reinforcing the management," n. 66 above.

fight against illegal immigration.<sup>76</sup> The EU has taken concrete actions to establish or strengthen relations with several countries: agreements have been made and cooperative measures undertaken between the EU and third countries such as Morocco and Algeria.<sup>77</sup> Among other measures, the EU has provided a substantial amount of funding to third countries to improve their management of migrant flows.<sup>78</sup> The arrangements are not only targeted at enhancing relations between the EU and North African countries, but also to support the capacity of the North African countries, which are often used as countries of transit, to prevent illegal immigration and to provide necessary protection on their own as well as to support relationship-building between the countries of origin and transit. It seems clear, however, that all arrangements share the same ultimate goal: they all aim at preventing illegal immigration to the EU.<sup>79</sup>

### 12.3. Conclusion

Illegal immigration by sea is a problem of great magnitude and has attracted a great deal of attention in the EU. Immigration pressure from Africa is expanding, and many immigrants continue to die at sea on their unfortunate journey across the Mediterranean or the Atlantic Ocean between Africa and the Canary Islands trying to reach Europe. The efforts taken at national and EU levels have been unable to stop the immigration flows so far. One reason behind this is inadequate and fragmented external maritime border control,

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<sup>76</sup> “Communication from the Commission on Policy priorities,” n. 65 above.

<sup>77</sup> The *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part*, signed on 26 February 1996 and entered into force on 1 March 2000, available: <[http://europa.eu/eur-lex/pri/en/oj/dat/2000/l\\_070/l\\_07020000318en00020190.pdf](http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_070/l_07020000318en00020190.pdf)>; *Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People’s Democratic Republic of Algeria, of other part*, signed on 22 April 2002 and entered into force 1 September 2005, available: <<http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=821>>. For further information on the Euro-Mediterranean Partnership, see the European Commission’s External Relations website: <[http://ec.europa.eu/external\\_relations/euromed/index\\_en.htm](http://ec.europa.eu/external_relations/euromed/index_en.htm)> (retrieved 27 August 2008).

<sup>78</sup> E.g., a budget line B7-667, established in 2001, provided grants totalling €57 million between 2001 and 2003, “Executive Summary of the final report on Evaluation of Preparatory Actions B7-667 – Cooperation with Third Countries in the Area of Migration,” available: <[http://ec.europa.eu/justice\\_home/funding/2004\\_2007/cooperation/funding\\_cooperation\\_en.htm](http://ec.europa.eu/justice_home/funding/2004_2007/cooperation/funding_cooperation_en.htm)> (retrieved 6 August 2008).

<sup>79</sup> For a review of EU relations with Morocco and Libya, see, e.g., Gil-Bazo, n. 17 above, at p. 584.

which remains under the national jurisdiction of the Member States and results in a great diversity of surveillance systems and agencies. In order to enhance surveillance, numerous cooperation measures have been set up between the Member States and initiatives, mostly cooperative or coordinative, have been taken by the EU. A particularly significant proposal of the EU is the proposed European Surveillance System for Borders (EUROSUR), which is designed to interconnect and rationalise the national systems, and in the long term, to create a common monitoring and information sharing network.

In contrast to external maritime border control being under Member States control, illegal immigration has been part of the EU competence since 1999. From the beginning, the EU has attempted to integrate immigration and asylum policy and further integration continues to be its goal. The EU has undertaken a series of initiatives, e.g., established specific programs, built relations with third countries of origin and transit, and provided funding both to Member States and third countries. It is worth noting, however, that the EU has adopted few legally-binding regulations and directives.

There are also several international law instruments that are relevant to immigration policies and maritime surveillance. Of special importance is the LOS Convention that lays out the basic rules and limitations on surveillance measures in various maritime zones. Furthermore, the states are obliged to respect the human rights and the rights of refugees protected by many international and regional agreements.