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Erase them! Eurodac and Digital Deportability

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Lately, the number of refugee and transmigrant protest camps in various Western European cities has increased. In addition to demanding basic support, freedom of movement within Austria, work permits, access to education, a stop to all deportations, and more[1], the refugees of the Viennese Protest camp in the Votive Church had a surprising addition to their demands: “If you don’t want to meet our demands, then please delete our fingerprints from your data bases and let us move on. We are entitled to our future.” – The novelty of this demand lies in the fact that it connects the—thus far mainly physically conceived—right to freedom of movement with the right to data sovereignty, i.e. it expands the notion of freedom of movement to include an exoneration from *digital deportability*. By this term, we mean expanding the risks of migrant mobility—money, the amount of time on the road und sometimes life itself—to the entirety of the space surrounded by the Schengen borders and beyond. Digital deportability is the result of the permeability of Europe’s borders, making deportation at any given moment a constant threat within the slick space of the data flow. It is not the migrants themselves who circulate here, but rather the “embodied identity of migration,” as the sum of their “data doubles.”[2] In our case, these are represented by fingerprint algorithms and the “first point of contact” with the Schengen zone—that is, they contain information about the member state in which asylum was requested, the date the fingerprints were taken and the corresponding data. By demanding this be erased, the refugees in Vienna are thus addressing the difference between their person and the data set that the European Union issues on them in the Eurodac database. The Austrian public reacted to this by arguing that the demand was presumptuous and the state not able to fulfill it, since it relates to European law. This argument seems to be evident enough—however, we think it is incorrect. What the transmigrants are enacting with their if-then-formula is the demarcation of a boundary of lack of rights—and if we follow their protest, they are the ones who determine that it is the Austrian state in which this lack of rights is taking place. The point is to understand the demand to delete the fingerprints registered in Eurodac as a moratorium on the Dublin II Regulation. The point is also to have an effect on jurisprudence, to speak with Gilles Deleuze, though it must also be said that the suspension of Dublin-II deportations to countries that are unable to guarantee a humanitarian asylum procedure is partly already European practice... “To act for liberty, to become a revolutionary, this is to act on the plane of jurisprudence. To call out to justice – justice does not exist, and human rights do not exist. What counts is jurisprudence: *that* is the invention of rights [...]. Creation, in law, is jurisprudence, and that's the only thing there is. So: fighting for jurisprudence. That's what being on the left is about. It's creating the right.”[3]

Eurodac is a European database that collects and manages fingerprints from (a) asylum seekers (category 1), (b) persons who cross the European border in an irregular manner (category 2) and (c) who are found illegally staying on EU territory, they are compared with category 1 data, but may not be stored (category 3). In order to grasp the magnitude: in 2011, 412,303 successful data entries were recorded in Eurodac’s central processing unit. Technically speaking, Eurodac is an application that combines biometric identification technology with computerized data processing. In this sense, Eurodac can be understood as an example of a “smart border”: a diffuse border that cannot be geographically localized, but rather relies on numerous physical and virtual locations of control and surveillance, which are connected through a digital data network. The legal grounds for the implementation and configuration of Eurodac are thus far the Eurodac II Regulation (Council Regulation (EC) Nr. 407/2002), which was passed into law by the Council of the European Union in February 2002 and includes instructions for administrative operations and execution, as well as the Eurodac Regulation

(Council Regulation (EC) Nr. 2725/2000), which was also ratified by the Council on 11 December 2000. It included the actual legal act that enabled the IT-based European dactylographic system to technically be put into operation and also linked its work directly to the political framework of the Dublin II Regulation.[4] On the other hand, the 1990 Dublin Convention on asylum was politically justified by the claim that it primarily sought to prevent uncontrolled movements of asylum seekers within the EU. Bilateral negotiations on Eurodac, however, have been underway since 1996, and had precursors such as the *Automated Fingerprint System* (AFIS) for asylum seekers, which was created by the German Federal Criminal Police in the early 1990s, in the midst of the so-called asylum crisis. Originally conceived as an instrument of the European Community for the effective implementation of the Dublin II Regulation in regards to asylum, Eurodac was first geared towards *potential refugees*, but was then, upon Germany's initiative, expanded to include *illegal immigrants* and *illegal third-country nationals*. Since the groups of persons Eurodac can be applied to represent the interests of immigrants and asylum seekers, Eurodac is *de facto* an instrument for managing migration and regulating mobility, which not least aims to politically control and exclude an irregular population within Europe through re-identifying irregular migrants within the Schengen zone who are in danger of being deported. Within Eurodac's information architecture, the boundaries, which separate concerns regarding border controls and criminal law or counterterrorism measures, are also blurred, of which the new Eurodac revision is clear proof.

Eurodac reloaded

COM(2012)254 is a nearly 100-page document approved by the Commission on 30 May 2012, and since published. It refers to the establishment of Eurodac, which was laid out in a treaty that came into effect on 1 December 2009, and states that it is to operate in compliance with the European Union's directives. In other words, the proposal for a revision of the Eurodac Regulation that, in a single legal act, not only formulates guidelines for the comparison of fingerprint data for "establishing the criteria and mechanisms for determining that the Member State is responsible for reviewing an application for international protection lodged in one of the Member States by a third-country national or a stateless person," but also guidelines for "request[ing] comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes" and those relating to Regulation (EU) Nr. 1077/2011 concerning the establishment of "a European Agency for the operational management of large-scale IT systems in the area freedom, security and justice." Technically speaking, the European IT-agency manages the operations of the so-called Biometric Matching System (BMS) platform, a search engine systematizing biometric data that not only runs Eurodac data, but also that of the Schengen Information System (SIS II) and the Visa Information System (VIS). With the appearance of the platform approach, which provides an open and flexible architecture and ensures the compatibility (harmonized data formats), interoperability (European standards for data storage and transmission) and expansion—i.e. allows for exchange within and between sub systems, networks and organizations, as long as the legal grounds are given—the data bank systems VIS, SIS II and Eurodac seem to be in the process of being virtually merged. On 17 December 2012, merely a few days after the agency took up their operations, the European Parliament's Committee on Internal Affairs[5], an overwhelming majority voted in favor of the above-mentioned Eurodac revision proposal. It now seems that the final text version for the new regulation is currently being worked out in a trilogue between the European Parliament, Council and Commission. But how did these reformulations of the Eurodac architecture come about—practically unnoticed within critical circles? What events led to a renegotiation of the Eurodac Regulation with such a focus on *e-bordering*, which is also in danger of becoming a so-called *function creep*—meaning the delicate situation in which a procedure is set up for a certain purpose, but is then used for other purposes? How is it possible that, as a result of a now ratified amendment of the initial purpose (access rights for criminal prosecution officials and Europol), the new Eurodac Regulation risks creating a situation in which the presumption of innocence is no longer valid for asylum seekers?[6] Already on 3 December 2008, the Commission presented its first proposal to revise the Eurodac legislation, which included, in particular, the

implementation of a new management framework—the IT agency (COM(2008)825 final). A new version of the Eurodac Regulation was presented in September 2009 (COM(2009)342 final/COM(2009)344 final). It provided that criminal persecution officials receive access to Eurodac data. This version became obsolete, however, once the Lisbon Treaty came into effect. In October 2010, the Commission again presented another proposed revision withdrawing the motion that criminal persecution officials receive access to the system—this was especially due to the harsh criticism from the European Data Protection Supervisor, among others (COM(2010)555 final). The reason provided for the motion to revise and improve the system security and to reduce the storage period for data for category 2 entries was that its implementation must not be delayed and that the IT agency (Regulation Nr. 1077/2011) should begin their operations on schedule.[7] Furthermore, the negotiations concerning the asylum package had to urgently be advanced. In a memorandum from 21 October 2011, the Polish presidency communicated the following to the Council: "Work on the Eurodac Regulation is on hold." (Council document 15843/11.) The negotiations concerning the proposal of 2010 (which did not grant access to criminal persecution officials) therefore ceased, because, in the meantime, the majority of Member States was reportedly in favor of granting access to criminal persecution officials and Europol as part of the negotiations on the Common European Asylum System. This was adopted in October 2008 by the European Council as part of the framework of the European Pact on Immigration and Asylum and provides that both refugees and beneficiaries of subsidiary protection be granted equal status.

Apart from the extremely prominent criticism from the EDPS[8] concerning the possibility of criminal persecution officials being granted Eurodac access, the German Green Party member Ska Keller, for example, criticized the current Eurodac proposal for being "the result of a cheap horse trade with the council": "The police of the Member States are granted access to Eurodac so that they in turn agree to at least a few improvements of the mutual EU standards for asylum procedures and the accommodation of asylum seekers."[9] The reconstruction of the Eurodac Regulation demonstrates the way in which the European Commission works on migration and asylum politics: three steps ahead, one back, two to the side. However, all too often political projects that appear to be new intensifications have great staying power and represent a contested compromise, in which negotiating restrictive migration legislature is usually accompanied by the creation of measures to improve the situation in terms of human. This is especially true for the current Eurodac Regulation (COM(2012)254 final), which—compared with the previous situation—clearly seeks to heighten data protection for persons whose data is processed; for instance, it now includes the obligation to inform the so-called data subject (Article 29). Furthermore, in order to guarantee the *data protection principle of proportionality* and the *coherence of the responsibility for the asylum seekers*, a proposal has been made to align the storage period for data from third-country nationals or stateless persons (previously "foreigners"), whose data was compiled as the result of an irregular crossing of the border of a member state by land, sea or air (Category 2), with the period in the Dublin Regulation that allots jurisdiction on the basis of this information (Article 10, Paragraph 1)—i.e. for the duration of one year instead of two.[10]

Further reforms of the Regulation (Articles 9 and 14) limit the duration for transferring the fingerprint data to the server, henceforth referred to as the central system, which is located in Strasbourg and St. Johann im Pongau (Austria), in the "government bunker" that lies 300 meters underground. The data is to be uploaded "as soon as possible, but at the latest" after 72 hours. Cases in which "the condition of the fingertips does not allow to take the fingerprints in a quality ensuring appropriate comparison" are seen as grounds for non-compliance with the 72-hour time limit. They continue to oblige the member states of origin to record and transmit the fingerprint data—at the latest 48 hours after the fingerprints have successfully been taken. Instead of asylum seekers, there is talk of "persons seeking international protection," whose data sets should be stored for ten years (Article 12 and 13). The only grounds on which the data may be erased earlier is that said persons have acquired citizenship.

The mode of governance responsible for realizing the new Eurodac Regulation can certainly not be understood as a purposeful conspiracy of the Commission, but instead as a transnational network of new and old actors

who serve to further stabilize the migration and border regime. The actuality of the Schengen crisis of 2011, in regards to the Dublin II Regulation, the legitimacy of which in the meantime has constantly been in a state of crisis, is certain to continue for much longer. But, unlike we expected, this did not lead to Eurodac being reconsidered altogether. Instead, the revision of the Regulation demonstrates that an intensification and continuation based on the subsidiary principle[11] is being pursued, while at the same time emphasizing transnational cooperation by stating, for example, that the Eurodac database was sufficient for its intended purpose but that certain improvements and adjustments must still be made to make the database more applicable for implementing the Dublin System.[12] One intended new measure proposed that relates to this is that the Member States are to report cases to Eurodac where the sovereignty or humanitarian clauses of the regulation have been applied[13]; that is, special reports need to be submitted for the cases where a member state takes responsibility for reviewing the asylum request of a person for whom they would not normally be responsible as per the Dublin Regulation criteria.

This is not Europe!

In Spring 2011, we were in Igoumenitsa for the first time, as part of our field research[14]. It is the last Greek harbor city before the border to Albania and ferries going to Italy depart from here. During our stay, we visited an informal settlement of almost exclusively male transmigrants that has since been evicted by the police.[15] It was on the outskirts of the city, on a slope directly above the harbor access road, which the people living there call "the mountain." In 2011, the migrants, who had arrived from Algeria, Tunisia and Morocco via Istanbul and Greece, sprayed the word "Morocco" with red paint in Arabic on the wall along the harbor road. To us, this confidant marking of the boarded-up prospect of Italy seemed to echo the confrontational clash of freedom and the Arab Spring movements rebounding off a European border here: these migrants walked up and down the harbor, back and forth along the wall, waiting for the perfect moment to jump on a truck, etc. Many of the travelers from Maghreb who were stuck here told us: "This is not Europe!" "C'est la poubelle de l'Europe."[16] And then, the climax: "C'est la poubelle de la poubelle de l'Europe." The main theme of all our conversations with North Africans was: I'm here now, but I'm still on my way to Europe. They apparently had a very precise idea of what Europe would be like. Their protest against the border between Europe and Africa was to cross it. But because many of these migrants carried the border even on their bodies (many of them already had registered fingerprints), they weren't able to completely cross the border that was literally embodied in the shape of their own fingers—not even if they were able to reach the next station, Milan, Rome or Geneva. For they carried the border further themselves and, at the same time, transgressed it. By this means—by disregard or as a misstep—these transmigrants reterritorialized the border. They began to operate in Europe proper and to push the border deeper into the territory—Vienna, Amsterdam, Berlin, Lyon, Paris...—in 2013, we definitely began understanding that transmigrants who are on their way to Europe—similar to the *Gastarbeiter* of previous generations—are challenging nothing less than the borders of Europe. Taking a stance against the "fortress" Europe, they are creating their own Europe, a Europe of those coming, those coming to Europe, a coming Europe. We see it as an analytical and political error to view migrants as disconnected from the functioning of the information and control systems that are linked to their mobility. We are challenging the image of a Manichean relationship between agents and knowledge forms of control and agents and knowledge forms of mobility, which risks further "escalating dialectic of control" by participating in the formation of the systems it essentially seeks to dismantle—e.g. when the focus on technical solutions for the surveillance and control of borders is too quickly championed and goes unquestioned. It is not only historically relevant that Eurodac was developed as a reaction to the turbulences caused by migration in Europe and the movements of migrants within the Schengen zone. It's still the case today, 2011 in Igoumenitsa and 2013 in Vienna: migration comes first. Movement comes from its control. Due to new control technologies, the European border is increasingly becoming more externalized and deterritorialized, yet at the same time it is under pressure and being called into question through the migrants' movements. The migrant knowledge that circulates in narratives and stories is clear proof that

migration is a self-reflexive part of what we call “the information and control continuum.” It always entails—to use Dennis Broeders’s words—two modes of exclusion: the exclusion *from* the registration and documentation and the exclusion *through* the registration and documentation.[17] The modulation of both these processes of exclusion, or more specifically, the flexible and mobile interplay of the two, lay the ground for “digital deportability” to advance. However, it also lays the ground for the emergence of new political rights, the invention of jurisdictions and ecologies of justice that transcend the boundaries of the politics of citizenship. These represent a form of governmentality of community that can only partially, flexibly include the “immanent modes of existence of people provided with rights“[18] in migration, their various ways of life in mobility, as “flexible citizenship,” for example, or differentially as “acts of citizenship,” and simultaneously view them as detached from comprehensive equality. Inclusion is individual. A person becomes someone. In the connectivity of transnational migration, however, a concrete challenge to our understanding of citizenship and its potential for inclusion is also migrating. After all, the person on the journey is never the same in the end. The space occupied by the accommodations is not what was hoped for, the documents don’t point to who a person is or was, but who this person will become along the way. A person will become many. Walking will become the law, and collectivity the code!

[1] http://refugeecampvienna.noblogs.org/demands/demands-made-concrete/

[2] For more detailed information cf.: Tsianos, Vassilis S., Kuster, Brigitta (2012), „mig@net- Transnational Digital Networks, Migration and Gender. Thematic Report „Border Crossings“, http://www.mignetproject.eu/?cat=5.

[3] Agir pour la liberté, devenir révolutionaire, c'est opérer dans la jurisprudence. Quand on s'adresse à la justice... – La justice ça n'existe pas, les droits de l'homme ça n'existe pas. Ce qui compte, c'est la jurisprudence. C'est ça, l'invention du droit. (...) La création des droits, c'est la jurisprudence. Il n'y que ça qui existe. Donc, lutter pour la jurisprudence. C'est ça, être de gauche, moi je crois que c'est créer le droit.“ Gilles Deleuze in Pierre-André Boutang’s 1988-89 film *L'Abécédaire de Gilles Deleuze*, under the letter G for „Gauche / The Left“.

[4] Eurodac has been online since 15 January 2003, and is currently used by 27 EU member states as well as Iceland and Norway (both since 2001), Switzerland (since 2008) and Liechtenstein (since 2011).

[5] Committee on civil liberties, justice and home affairs (LIBE).

[6] The phrasing in the Regulation that refers to the requirements for granting access to criminal persecution officials is that the existence of a “substantiated suspicion that the perpetrator of a terrorist or other serious criminal offence has applied for asylum,” and in compliance with proportionality only “once there is an overriding public security concern, that is, if the act committed by the criminal or terrorist to be identified is so reprehensible that it justifies querying a database that registers persons with a clean criminal record” (Recital 5, Paragraph 9, COM (2012) 254 final). In addition, as of now the member states and Europol must present to the Commission annual reports on the effectiveness of finger print data comparisons for criminal persecution. These reports should include information about the exact purposes of the comparison as well as the number of cases (Article 40, Paragraph 8, COM (2012) 254 final).

[7] Beginning in December 2012, Eurodac was to be administrated by the IT agency in charge of the operation of large-scale IT systems in the area of freedom, security and justice.

[8] Cf. for instance, the press release by EDPS (EDPS/12/12) on 5 September 2012, under the title: „ EURODAC: erosion of fundamental rights creeps along." On the criticism of the stigmatization of asylum seekers, they write: "For instance, if a fingerprint is found at a crime scene, asylum seekers can potentially be identified through EURODAC data while other individuals cannot because similar data is not available for all other groups of society."

[9] http://www.ska-keller.de/neues-aus-dem-libe-ausschuss/item/598-libe-spezial-zu-eurodac. (Translation SO)

[10] Another additional, new aspect is the deletion of the compiled data in this category. This is to be done instantaneously once the person in question has received a residence permit, left the territory of the member states or acquired citizenship. In addition, this data division, which had thus far been imprecisely paraphrased as "in connection with an irregular crossing of an external border" and assessed as Category 2, is specified and also expanded on: it now relates to any "third country national or stateless person of at least 14 years of age who is apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State having come from a third country and who is not turned back or who remains physically on the territory of the Member States and who is not kept in custody, confinement or detention during the entirety of the period between apprehension and removal on the basis of the decision to turn them back."

[11] The origin of this principle, which came into effect with the Maastricht Treaty in 1993, is found in Christian social doctrine . It says that "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."
http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/subsidiarity.htm

[12] COM(2012)254 final, p. 79

[13] ibid.

[14] The field research took place within the context of the project Mig@net -Transnational Digital Networks, Migration and Gender, which is part of the EU Seventh Framework Programm. Cf. http://www.mignetproject.eu/

[15] Cf. the report on the situation in Igoumenitsa from May 2011
http://infomobile.w2eu.net/2011/05/24/igoumenitsa-mountain-jungles-threatened-by-eviction/

[16] "This is Europe's trash can!"

[17] Dennis Broeders, 2011, "A European 'Border' Surveillance System under Construction", in: Huub Dijstelbloem and Albert Meijer, Migration and the New Technological Borders of Europe, S. 40-67, hier S. 59.

[18] "Human rights say nothing about the immanent modes of existence of people provided with rights." Gilles Deleuze and Félix Guattari. (1994) What is Philosophy? (trans. Hugh Tomlinson and Graham Burchell). New York: Columbia University Press, 107.