PREVENTIVE EMPIRES: SECURITY DYNAMICS AT MULTIPLE LEVELS OF GOVERNANCE

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Introduction

Security is a dynamic and multi-layered concept. To many, security means ‘feeling secure’ (subjective security), to others it means ‘measured security’ (objective security), but it can also refer to security provision, security distribution or security instruments. In this article, I analyze some of the conceptual shifts in the security paradigm.¹ These evolve from deeper societal transformations, including globalisation, privatisation, pluralisation and hybridisation. The paradigmatic shifts have been addressed in new security strategies at the local, national and international levels of governance. Increasingly, the re-framing of local, national and international security strategies is founded on the notion of prevention. Thus, security discourses embrace notions such as anticipatory risk assessment by seeking to predict the outcome of multiple futures, applying pre-emption in internal as well as external security environments as well as the widespread use of surveillance instruments for the pro-active monitoring of movements, transactions, careers and intentions.² The growing popularity of this so-called precautionary principle at all levels of security governance raises several questions about the reliability of early indicators and the possible erosion of the classic presumption of innocence. The increased focus on radicalisation, terrorism and organised crime has gradually paved the path for the employment of proactive and preventive monitoring as regular means to monitor and control human behaviour. This article seeks to contribute to the discussion on how the contractual relationship between the state and its citizens may be affected and on the political and legal challenges that derive from it.

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I. Shifting Security Strategies

The notion of security has been the subject of reflection by several authors such as Buzan, Waever & De Wilde. The concept of security has been defined as ‘liquid’ as well as ‘utopian’. Complex societal issues are likely to become ‘securitised’, in the sense that by claiming that a referent object is under threat (e.g. the environment, collective health, public transport, public order), a security actor performs a series of (often extraordinary) measures which should contain the security threat or lead to its decrease. Security is thus seen as a social construction. Migration, for instance, has been subject to both politicisation and securitisation, particularly in the post 9/11 era, where immigration law has become an essential pillar of anti-terrorism legislation. The globalisation of security can be regarded as a main push factor for the shifting security paradigm. One of the core characteristics of the globalisation of security is the merging of global threats and local fears. At the same time, ‘glocal’ connections that exist on the basis of trade and commerce, internet, migration and travel, rest on a texture which is increasingly characterised by global solidarity and shared vulnerability.

Several authors engage in a modelling of the shifting governance of security. Security governance is often exercised by an intricate web of actors who operate across national borders and take recourse to intensive surveillance measures. Furthering the work of Castells, authors like Bayley, Shearing, Johnston, Wood and Gilleir et al. have written about the ‘nodal governance’ of security, which defines the provision of security as security bundles provided by

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9 Aas 2007, supra note 6, p. 3.

Despite the multi-layering, fragmentation, cross-border transcendence and localisation, state and security remain strongly interconnected.\footnote{A. Crawford, ‘Networked governance and the post-regulatory state? Steering, rowing and anchoring the provision of policing and security’. Theoretical Criminology, 2006-10(4), p. 458; L. Loader & N. Walker, ‘Policing as public good: Reconstituting the connections between policing and the state.’ Theoretical Criminology, 2001-5(1), p. 24.} Different layers of government continue to invest in public security, often in combination with private players. This lies in a “combination of the symbolic power, cultural authority and public legitimacy” of the public security service, “together with the access to sources of information and intelligence (notably crime-related data) that it facilitates.”\footnote{Crawford 2006, supra note 13, p. 463.}


II. Preventive Security Empires

Recent security strategies have been restyled and now focus on the fusion between internal and external security. The interconnection between different approaches is strongly promoted within the different security strategies that have been defined at the local, national and international level. Looking at the nation-state level within the European Union (EU), it is instructive to analyse
the argumentation in the British National Security Strategy.\textsuperscript{17} The Strategy
document argues that the international landscape has been transformed, in the
sense that the bipolar power construction has been replaced by a more
complex and unpredictable pattern of relationships. Furthermore, the Strategy
document presents a considerable shift in the security landscape and
establishes that former threats have been replaced by a series of
interconnected factors, such as globalisation, climate change, asymmetric
distribution of wealth and welfare, competition for energy, as well as
demographic shifts.\textsuperscript{18} As a consequence, this “single overarching strategy”\textsuperscript{19}
deals with threats emanating from transnational crime, pandemics and
flooding, threats that are potentially harmful to large groups of citizens. The
British document regards “early engagement”\textsuperscript{20} as a method to tackle the root
causes of terrorism and radicalisation. Across the national borders, this can be
done by supporting fragile states, to prevent them from further decline. In the
spirit of an integrated approach, a multi-lateral and multi-agency strategy is
advocated: the police, armed forces, border inspection, intelligence and
security services are ushered to build coalitions, together with the private and
‘third’ sector.

Hence, the shift toward the preventive (early) intervention, even beyond
national borders, is noticeable: “Wherever possible, we will tackle security
challenges early. We are committed to improving our ability to scan the horizon
for future security risks, and to developing our capabilities for preventive
action.”\textsuperscript{21} Thus, the document codifies \textit{pre-emptive action}.\textsuperscript{22} The term ‘pre-
emption’ became official part of the discourse when – under United States
President G.W. Bush – the National Security Strategy of the United States of
America marked the end of the deterrence strategy which characterised the
Cold War and heralded a new doctrine which codified action against ‘emerging
threats’. Carrying out a pre-emptive strike against a country before the other
side undertakes military action and before there is a formal declaration of war
raises several ethical questions.\textsuperscript{23} The war in Iraq, for instance, was driven by

\textsuperscript{17} Cabinet Office, \textit{The national security strategy of the United Kingdom. Security in an
interdependent world}, Presented to Parliament by the Prime Minister, by command of Her
\textsuperscript{18} Ibid, p.: 3; O. Kessler, ‘Risk’. In P. Burgess (ed.), \textit{The Routledge Handbook of New Security
\textsuperscript{19} Ibid Office 2008, supra note 17, p. 3.
\textsuperscript{20} Ibid, p. 7.
\textsuperscript{21} Ibid.
\textsuperscript{22} M. Houben, Better Safe than Sorry: Applying the Precautionary Principle to Issues of
\textsuperscript{23} M. Kaldor, ‘From just war to just peace’. In J. De Wilde, & M. Den Boer (eds.), \textit{The viability of
human security}, Amsterdam: Amsterdam University Press 2008, pp. 21-46; D. Verweij, ‘Military
Hague, Eleven International Publishing 2010 pp. 121-139.
precautionary motives and was based on an apocalyptic fear of Weapons of Mass Destruction.\textsuperscript{24}

In a similar vein, the National Security Strategy of the Netherlands\textsuperscript{25} acknowledges that the cause of several security problems may be beyond its national borders. Moreover, it observes the diffusion of security threats and seeks to establish an integrated risk assessment and multi-agency approach. Several vital interests are identified, notably territorial, economic, ecological and physical safety, and socio-economic stability. Further, it seeks to build in a forecasting perspective on the basis of horizon scanning, risk assessment and scenario-building, while making it coherent with international security strategies.

At an international level of security governance, the EU Security Strategy\textsuperscript{26} advocates an integrated strategy with a prominent position for preventive interventions. The key threats identified by the EU Security Strategy are: terrorism and violent religious extremism; the proliferation of weapons of mass destruction, including the spread of missile technology; regional conflicts; state failure; and organised crime.\textsuperscript{27} The EU concept of a comprehensive security strategy rests on a diffuse threat analysis. Compared with the American perception of security threats, which has lately focused on the threat emanating from global terrorism, the EU promotes a security strategy which emphasises the root causes of terrorism, radicalisation and organised crime.\textsuperscript{28}

This means that the EU seeks to deploy civilian instruments alongside military forces in its approach to conflicts or struggles with a fragmented authority.\textsuperscript{29} The strategy thus promotes a comprehensive approach, particularly by outlining the potential contribution of the EU to crisis management operations.\textsuperscript{30} The EU Security Strategy views globalisation as a mixed blessing:

\begin{itemize}
\item \textsuperscript{25} Strategie Nationale Veiligheid, www.minbzk.nl/aspx/download.aspx?file=/contents/pages/87407/...
\item \textsuperscript{27} Council of the European Union 2003, supra note 26.
\item \textsuperscript{30} Ibid, p. 6.
\end{itemize}
on the one hand, it encourages free trade and mobility\textsuperscript{31} while on the other it contributes to frustration and injustice. Pandemics, energy, water, food and economic challenges are all seen as issues closely interconnected with (in-) security.

In line with the EU, the North Atlantic Treaty Organization (NATO) opines that security at home means security abroad.\textsuperscript{32} In the meantime, NATO has been involved in developing a new Strategic Concept\textsuperscript{33} to tackle ‘new threats’, such as cyber attacks, piracy, large-scale energy disturbance and fragile states.\textsuperscript{34} NATO acknowledges the emergence of a number of “diverse non-traditional security threats”, which challenge the organisation to step beyond its original role. A key characteristic of newly emerging threats is that they no longer have to occur within NATO territory: “they could affect NATO’s security even if they originated from beyond NATO’s borders.”\textsuperscript{35} Similarly, NATO works with a\textit{predictive method} and as such it has initiated a ‘multiple futures project’, inspired by a growing range of challenges that it may currently not be equipped to deal with.\textsuperscript{36} Opting for a ‘spiral approach’, the NATO discussion is meant to lead to a common understanding of key strategic trends, their drivers and a series of possible futures from which the potential challenges facing NATO and their implications\textsuperscript{37} could be discussed.

Hence, at the level of international security governance, the common denominator between the European and the American approach is the notion of\textit{early defence}. As argued above, the National Security Strategy of the USA outlined the need for\textit{anticipatory action} “to defend ourselves”.\textsuperscript{38} The EU Security Strategy says that “We need to be able to act before countries around us deteriorate, when signs of proliferation are detected, and before humanitarian emergencies arise. Preventive engagement can avoid more serious problems in the future.”\textsuperscript{39} The EU employs the discourse of enhancing the security in neighbouring regions and third states, e.g. by using the strategy


\textsuperscript{32} Adviesraad Internationale Vraagstukken \textit{Crisisbeheersingsoperaties in fragiele staten. De noodzaak van een samenhangende aanpak}. The Hague 2009, No. 64 \texttt{www.aiv advies.nl}, p. 12

\textsuperscript{33} NATO’s 1999 Strategic Concept outlines NATO’s fundamental security tasks as security, consultation, deterrence and defence, crisis management and partnership, in Medcalf, supra note 8, p. 19.

\textsuperscript{34} Adviesraad Internationale Vraagstukken \textit{Het nieuwe strategisch concept van de NAVO}. The Hague 2010, No. 67, \texttt{www.aiv-advies.nl}, pp. 34-35

\textsuperscript{35} Medcalf, supra note 8, p. 17.

\textsuperscript{36} NATO Allied Command Transformation, \textit{Multiple Futures Project. Project Initiation Document (PID)}. Version 1.5, April 2008.

\textsuperscript{37} Ibid.


\textsuperscript{39} Council of the European Union 2003, \textit{supra}, note 26, p. 11; emphasis is the author’s.
of Security Sector Reform.\textsuperscript{40} The EU Security Strategy also proposes that ‘common actions’ are best based on common appreciations of risk: the sharing of intelligence between Member States and partners of the EU is therefore strongly promoted.\textsuperscript{41}

The fusion between internal and external security seems to establish the pretext for an increased focus on extraterritorial engagement in combination with an early intervention doctrine. Within the external security sphere, the Responsibility to Protect principle (R2P)\textsuperscript{42} has gradually gained ground, albeit with controversial discussions concerning the legal legitimacy of military interventions in foreign jurisdictions and the recourse to “vocabularies of imperialism”.\textsuperscript{43} The R2P principle relates both to intervention as well as prevention and reconstruction.\textsuperscript{44}

All security actors, whether they operate at a national or international level, seem to have unfolded a preventive and even pre-emptive strategy which provides them with legitimate arguments to intervene proactively, in the sense that the intervention beyond their own territory is seen as necessary in order to protect their own security. In the recent past, this has been done in the context of combating drug trafficking, counter-terrorism as well as the prevention of irregular migration.\textsuperscript{45}

III. Preventive Logic in the Security Discourse

The negative and even apocalyptic discourse about insecurity “provides a justification for ‘pro-active’ policing, ‘pre-emptive’ military strikes and ‘administrative and exceptional justice’, all of which consider anticipated behaviour as sufficient reason for action.\textsuperscript{46} According to the same logic, we take “elaborate precautions against cigarette smoke, obesity, fast food, unprotected sex or exposure to the sun”.\textsuperscript{47} Kessler regards the precautionary principle as a representation of a ‘new discursive practice’: “The shift alters the very relation

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\item \textsuperscript{40} Adviesraad Internationale Vraagstukken 2009 supra note 32, p. 11; I. Ioannides, ‘European Union security sector reform policy. What added value?’ \textit{Eyes on Europe}, Autumn 2009, p. 37)
\item \textsuperscript{41} Council of the European Union 2003, \textit{supra}, note 26, p. 12
\item \textsuperscript{42} A/63/677, 12 January 2009, Implementing the Responsibility to Protect, quoted by Dame Rosalyn Higgins DBE QC, “Ethics and International Law”, Cleveringa Lecture 2009, \textit{mimeo}.
\item \textsuperscript{44} Adviesraad Internationale Vraagstukken 2009, \textit{supra} note 32, p. 10
\item \textsuperscript{47} Z. Bauman \textit{Liquid Life}. Cambridge: Polity Press 2005, p. 69; see also Sunstein 2005 \textit{supra} note 16.
\end{enumerate}
\end{footnotesize}
between the political, the economic and the law and thereby goes beyond the image of a ‘broadening’ of the security concept”. This emerging practice goes along with the anticipatory and calculated management of risk.

In this line of thought, we are moving from a post-crime society to a pre-crime society.50 The pre-crime model has a more ‘prospective orientation’, concerned with the “calculation of risk and the prevention of future harms in the name of security”.51 Along with Zedner, Borgers & Van Sliedregt observe the emergence of preventive criminal justice, which increasingly works based on the precautionary principle. Their criticism is that the costs derived from the use of the precautionary principle are not sufficiently taken into account. Against the background of social, legal, economic and political developments, the central notion is that citizens ought to be protected against various dangers. Criminal liability is broadened “by criminalizing the preliminary stage before a harmful act has taken place”.52 In the field of counter-terrorism, the precautionary logic has culminated in “an expansion of investigatory and prosecutorial power with regard to terrorism”,53 which is visible, for instance, in pre-trial detention. Furthermore, Borgers & Van Sliedregt observe the widening of the use of secret information in court proceedings: notifications from the General Intelligence and Security Service (AIVD) can be used as evidence in criminal cases. Finally, it has been observed that there is now – as a consequence of UN and EU regulations – the possibility to freeze the assets and confiscate possessions of organisations that are suspected of (participating in) terrorist activities. The prevention of crime, through early diagnosis and the active undermining of would-be deviant activity, means that a classic principle of law – namely the presumption of innocence – is left behind, and that the legal system runs a higher risk of imposing wrongful convictions.

The preventative logic also has a deep effect on law enforcement practices. According to Zedner, the “preventive possibilities of policing were recognised even in its origins”, but the “point of intervention has been brought forward”,54 and she associates this with the new – not uncontroversial - doctrine of pre-emption or anticipatory self-defence. 9/11 has given a significant impulse to pre-emptive measures, particularly in relation to radicalisation, terrorism and serious crime.55 Anticipatory management of criminogenic situations (actuarial

48 Kessler 2010, supra note 18, p. 23.
49 Arnoldussen 2009, supra note 24, p. 75.
50 Zedner 2007, supra note 4, p. 259.
51 Ibid
54 Zedner, supra note 4, p. 259
55 Ibid
justice) and hyper-social intervention are also identified as factors that encourage the use of pre-emptive measures.

Indeed, with the “War against Drugs” and later the “War against Terrorism”, preventive measures have been widely adopted. Significant is the iterative use of the addendum ‘pre’, for example in Dutch criminal law. In her analysis of the prevention of terrorism through criminal law, Hirsch Ballin talks about “preceding the pre-trial investigation a preliminary investigation can take place on the basis of facts and circumstances that indications exist that in a group of people crimes for which pre-trial detention can be imposed are being planned or committed.” 56 Although the requirement is that these crimes are expected to result in a “serious infringement of the legal order” and that there should be a reasonable suspicion, the “public prosecutor can order a preliminary investigation for the purpose of preparing the pre-trial investigation”, and as such the preliminary investigation is “proactive”. 57

Notwithstanding the introduction of preventive and precautionary measures before 9/11, anti-terrorism legislations have shifted standards and thresholds for the use of special investigation methods. For instance, in the Netherlands, terrorism investigation is extended within the preventive phase. Unfortunately however, the wide-scale introduction of proactive and preventive investigation methods has not been paralleled with a guarantee of procedural rights.

IV. Preventive Security Instruments

Within EU security bodies such as Europol and Frontex, risk assessment tools have become accepted working methods. These risk assessments and threat analyses, visible in products such as OCTA (Organised Crime Threat Assessment), have evolved into “strategic future-oriented intelligence systems”. 58 Threat assessments are used as methods to assist policy-makers in designing future scenarios of security and policing. Departing from past criminal cases and certain conceptual tools, predictions about serious crime and other security problems are identified: threat analysis, predictive profiling and forecasting are “based on the assumption that uncertainty can be overcome by developing new information cycles and focuses.” 59

Risk assessments at the European level build on assessments composed at the national level. For instance, the United Kingdom’s Serious Organised Crime Agency SOCA publishes an annual threat assessment report about various kinds of organised crime, including drug trafficking, fraud, and trafficking in human beings. In a collaborative fashion, the UK Threat Assessment (UKTA) describes

57 Ibid.
59 Ibid
and assesses the threats to the UK posed by serious organised crime to prevent
the public and private sector, as well as individual citizens, from falling victim to
crime. The Dutch National Police Services Agency (KLPD) produces a similar
annual threat assessment, which emphasises the forecasting perspective, to
be fed into the National Intelligence Model (NIM). The national threat
assessment is defined as a future-oriented analysis of organised crime in which
the threats to Dutch society are addressed specifically. The risk assessment
should help create a basis for policy-making, prioritise the attention for certain
crime-development, and help intelligence-gathering activities.

With this wide definition in mind, risk assessment reports assess a rather wide
variety of phenomena, ranging from trafficking in human beings (exploitation),
smuggling of illegal immigrants, illegal trading in and smuggling of weapons and
explosives, trading in and smuggling of heroin and cocaine, the production,
trading in and smuggling of cannabis and synthetic drugs, the production and
distribution of child pornography, the production and distribution of
counterfeit money, environmental crime, fraud, money laundering, crime
against property, corruption, violence and use of IT.

Surveillance is used widely for proactive security monitoring and has pervaded
most modern societies in that it touches almost every aspect of our daily
lives. Indeed, technology plays a central role in the surveillance society and in
the reconfiguration of security. In a globalised world, where seemingly states
are losing control, they operate as co-producers of technologically driven
security by acting as the sponsors of new technological devices. The financing
of new technological developments that are used for the purpose of enhancing
security can be seen as an exponent of mobilizing power. In the ‘techno-
industrial complex’, where industry, politics and security have developed an
intimate relationship, we have witnessed the application of several new
technologies in security environments. Examples include the wide
introduction of camera surveillance in public and private spaces; the use of
fingerprints and biometrics for identity cards such as passports; iris scans for
pre-boarding procedures; microchips that are placed underneath the skin for
scanning prior to entry to clubs; the introduction of infrared and microwave
body scanners, particularly at airports; the use of the Global Positioning System
(GPS) for the monitoring of mobile telephones; the use of automatic number
plate registration (ANPR) on motorways; the electronic interception of
telephone, email and text messages; and the use of radio frequency identifiers

60 The United Kingdom Threat Assessment of Serious Organised Crime (2006/7).
61 NTA: National Threat Assessment:
64 Cools et al. 2010, supra note 31.
(RFIDs) in consumer products. Eventually, an intelligence-based, electronically monitored system of border controls may be developed across the EU. This includes the introduction of compulsory fingerprint biometric identity cards and specific identity cards for people who work on sensitive locations such as airports.

Conclusion

The emergence of new security threats and the wide propagation of the integrated, preventive, proactive, intelligence-based approach raises a number of questions concerning legal and political governance. Values that are embedded “in a pre-emergency institutional culture that take[s] seriously rule of law values [are] much more difficult to be able to contain official abuses of power, making it more difficult to shift underground.”

A first issue is whether equity – a norm which implies that all citizens should equally profit from the benefits of a social welfare state as the prime provider of security – can still be upheld in an era of asymmetric distribution of rights, justice, and security and surveillance. Future deviance is increasingly often countered through a series of preventive measures against the first people to be suspected. In a patriarchal governance style, the movements and transactions of the masses are anticipated and calculated with the help of surveillance measures. The prevention of future crimes and other forms of misconduct may become subject to social engineering. Though proactive intervention in personal lives seems to have become a widely accepted mechanism, it may gradually lead to the erosion of the presumption of innocence. A related legal challenge is the ability to prove malice aforethought, certainly if there has not been a material or physical perpetration of a criminal offence. In the context of counter-terrorism and anti-organised crime efforts, there has been ample emphasis on the criminalization of preparatory acts, such as conspiracy and the financing of terrorist activities. This involves a close reading of the mind of the potential criminal or terrorist.

Finally, the blurring between police and military, public and private, national and international governance requires new parameters to ensure procedural legitimacy. If the horizon of security-focused thinking is subject to constant change, it will entail the reconfiguration of security organisations and their

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66 Cabinet Office 2008, supra note 17, p. 57.
mandates. Forecasting methods raise pertinent ethical issues, for instance how the information – intelligence – is gathered and whether this involves disproportionate measures at the expense of private life. How serious should indications of future crimes or acts of war be before forecasting methods are legitimised? What kind of conditions apply when police, law enforcement, or military intervene proactively in order to pre-empt public disorder, crime or war? The precautionary principle has already pervaded many spheres of justice, which fact requires an objective, comprehensive and balanced discussion of trust and legitimacy concerns.

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