SECURITY AND HUMAN RIGHTS MONITOR

Juggling the Balance between Preventive Security and Human Rights in Europe

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Abstract[1*]

Within the European Union (EU), security issues are increasingly framed as risks and threats that can be controlled by preventive measures. The EU has established several agencies, legal instruments and databases to facilitate the prevention of crime, terrorism and irregular migration. This article takes stock of the way in which the EU seeks to balance the preventive security logic with its own human rights framework. While human rights can jointly be considered an evolving normative framework in the EU, there is a need to identify which human rights are at risk and how (non-) compliance ought to be monitored.

The article states some concerns about equal access to human rights as well as the lack of a strong general oversight mechanism. Continued structural attention should be given to ex ante human-rights impact assessments and there needs to be more emphasis on regular external evaluations of human rights compliance ex post facto. In relation to the external action of the EU, the EU must practice what it preaches and needs to reflect critically on the necessity and proportionality of precautionary security measures.

Keywords

European Union – Security – Prevention – Human rights

Introduction

Within the European Union (EU), security issues are increasingly framed asrisks and threats that can be anticipated and potentially mitigated through *preventive measures*, which are methods of information-gathering and intervention that operate prior to any formal suspicion of concrete criminal or terrorist offence. Europe's security discourse is built on anticipatory *risk-assessment*, as it seeks to predict the potential of multiple futures. *Prevention* or*pre-emption* in both internal and external security environments has become an almost unnoticed underlying logic, thus preparing the ground for legitimizing the widespread use of surveillance instruments for the *pro-active* monitoring of the movements, transactions, careers and intentions of both European and non-European citizens (De Goede, 2008; Den Boer and Van Buuren, 2011). Europe's increased focus on radicalization, terrorism, irregular migration and organized crime is paralleled by the introduction of proactive and preventive monitoring as a regular means to monitor and control human conduct.

Central to this article is the question whether the preventive-security logicthat is displayed in the strategies, policies and instruments of the EU will influence human rights. Though this question is widely discussed in the academic literature, a prominent challenge remains for the EU: to strike a balance betweenpreventive security and human rights. Toward achieving this end, this articleaddresses preventive-security governance. While human rights can jointly beconsidered an evolving normative framework, there is a need to identify whichhuman rights are at risk due to the preventive-security governance of the EU.To this end, this article discusses some examples of how preventive-securitylogic has entered the EU discourse in, for example, the context of surveillanceand the management of mobility, immigration, organized crime and terrorism.

The next section discusses the emergence of preventive-security governancein Europe. It is followed by a section that concerns the potential human-rightsimplications of preventive-security governance. The article continues by discussing the evolving human-rights framework in the EU, which is succeeded byspecific considerations that merit further reflection. After an analysis of normative alignment and standardisation issues, the article concludes by arguing that the adoption of the preventive-security logic is an incremental process thatrequires constant alertness

1 * The author would like to express her gratitude to the reviewers, whose feedback was used toimprove this article. Mistakes or misjudgments are, however, the sole responsibility of the author.

with regard to its erosive effect on human rights.

Discussing Preventive-Security Governance in the EU

Gradually emerging as a security actor in its own right (Curtin, 2011), the EUhas gradually constructed policy spheres of preventive control in different domains of security governance: notably, border control, immigration, organized crime, terrorism, cybercrime, corruption and fragile states; but also climate, energy, the environment, food and health (Boin, Ekengren and Rhinard,2014). Endorsed by its member states, the EU has steadily erected bureaucraticand institutionalized architectures to deal with a wide range of threats andrisks. Not only the EU but also several other multilateral fora—such as theUnited Nations (UN) and the North Atlantic Treaty Organization (NATO)— have incorporated a preventive-security discourse in their strategic orientation.[2] This may involve different interventions on the preventive spectrum,including preventive diplomacy, crisis prevention or conflict prevention.

The logic of preventive security becomes manifest in many different ways.In particular, the semantics of preventive terms such as *prevention of crime*, *terrorism* and *irregular migration* are clearly noticeable. Not only the words, but also the incremental use of the language of prevention in EU policies, strategies and instruments tends towards the codification of a preventive-security logic. The reiteration of popular concepts (e.g., risk analysis and threat assessment, early warnings, and deterrence) propels preventive-security logic to amantra-like level. Hence, the iterative emphasis on preventive-security logic works on its audience as a well-considered, normal, logical, self-evident, unavoidable strategy of control, thereby leading the audience to believe that prevention is more effective than reactive forms of security governance.

Preventive-security governance—which is applied at all levels of government and governance, including self-governance—may not be entirely new, but it is becoming more pervasive in our daily affairs, particularly through omnipresent surveillance mechanisms and the revolutionary expansion of technological means. Neither technology nor surveillance are neutral mechanisms of governance, however, as they are developed by humans who hold preconceptions about their means and purposes. Moreover, the development of security technologies in the private sector means that interests other thansimple security enter the scene: namely, commercial interests with a specialconcern for the regularisation and expansion of new security technologies beyond traditional sectoral borders. Moreover, preventive-security logic has beenengrained in the EU's external security discourse: e.g., in the European Neighbourhood Programme, its external dialogues, capacity-building programmes and peace and stability missions. Crucially, the recently revised EuropeanNeighbourhood Programme (ENP), "(…) aims to work on conflict prevention through early warning, coupled with early preventive measures, and enhance partners' capacity in this regard."[3] Whether or not the preventive "creep" is intentional cannot be assessed within the contours of this article. What can be observed at this stage is that the EU has shown very little resistance in its policies and programmes to the seductions of preventive security.

Several of the EU's monitoring and information systems allow for the anticipation of risk in different realms of security, including health, energy, geography, commerce and integrity (the latter including early warning systems

2 United Nations, A More Secure World: Our Shared Responsibility, 2004; NATO, Active Engagement, Modern Defence. Strategic Concept for the Defence and Security of the Members of theNorth Atlantic Treaty Organization, 2010. For instance, NATO argues that, "The best way to manage conflicts is to prevent them from happening. NATO will continually monitor and analyse the international environment to anticipate crises and, where appropriate, take active steps to prevent them from becoming larger conflicts", on pp. 19/20.

3 High Representative of the Union for Foreign Affairs and Security Policy, Review of the European Neighbourhood Policy, Joint Communication to the European Parliament, the Council,the European Economic and Social Committee and the Committee of the Regions, Brussels,join (2015) 50 final, 18.11.2015.

and emergency-response centres).[4] These systems seek to enhance the EU's and national authorities' awareness and knowledge of looming dangers. Naturally,the reliability of these systems depends on the quality of the information contributed by the EU member states themselves. Scherrer et al., (2011: 81) warn ofthe potentially major legal and social consequences of anticipative logics and profiling.

Underlying preventive-security logic is the assumption of insecurity (Heller,2009: 12). Because mobility, migration, crime and terrorism are fluid phenomena with a transnational dimension, it is thought that they are difficult to predict and thus hard to manage. Governments are anxious to prevent securitydeficits and leakages and do not want to be confronted with a lack of information and insufficient managerial power to deal with emerging security issues. Patterns of nuisance, deviance, crime and violent extremism are translatedinto different categories of risk and threat. Intelligence, proactive intervention,profiling and tracking techniques, and the monitoring, matching and miningof data are regarded as holy grails for averting dangers. Zedner (2007: 259) diagnoses this trend as a move from a post-crime to a pre-crime society. Moreover,the emergence of preventive criminal justice has been observed, working on the so-called precautionary principle (Borgers and Van Sliedregt: 2009).

The EU has introduced several general surveillance mechanisms that have the potential to monitor and control any type of mobility exhibited by EUcitizens, including mobility for the purposes of travel, tourism or terrorism (Den Boer and Van Buuren, 2011). To this end, various international information systems have been established to facilitate the searching and matching of data about ordinary European citizens. Individuals who do not leave a data trail are becoming increasingly unique, as many aspects of human action are fully or partially digitized (Castells, 2010). This prevalence of data trails makesit possible for governments to monitor, control and intervene as they deemnecessary. However, combined with preventive-security logic, data trails alsoprovide governments with information on the basis of which they can preventindividuals from traveling, studying or working.

Though the Schengen Information System ii makes it possible for competent authorities to check the identities of individuals who cross externalfrontiers (Brouwer, 2008), other instruments, such as the recently adoptedPassenger Name Records (PNR),[5] allow for the wide-scale pre-entrance monitoring of individuals who travel to countries like the United States. Together with advanced passenger information, PNR data may be accessed and used by law-enforcement authorities to identify known terrorists and criminals andto conduct risk assessments on known individuals. Hence, the PNR schemefacilitates proactive systematic checks on large sets of data concerning all passengers. These checks may be used for profiling based on pre-determined general criteria (e.g., nationality), which may result in individuals being refused boarding (Kloppenburg, 2013). Moreover, such checks provide for the wide dissemination and lengthy retention of personal data.

We may observe a similar reliance on preventive-security logic in EU practices concerning migration and border control. For instance, Eurodac, which is the EU fingerprint system for asylum-seekers, can be regarded as an instrument of preventive-security governance, especially considering that lawenforcement authorities were recently given access to the system (Eechaudt, 2011). The Eurodac proposal provides access to Eurodac for the prevention, detection or investigation of terrorist offences or other serious criminal offences; for identifying third-country nationals who cross external borders; andfor sharing data concerning the movements of third-country

4 For an inventory, see Boin et al., 2014, Annex 1.

5 A passenger name record is a unique set of data, created whenever a reservation is made fora flight, which consists of information on all components of that reservation. Such data isprovided by passengers at the time of booking, check-in or boarding, and it is held by airlinesfor their own commercial purposes. The records are complete to various degrees depending on how much information has been provided by the passenger.

nationals within the EU. Subject to verification, designated law enforcement authorities may request access to Eurodac data only if they have reasonable grounds to believe that such access will substantially contribute to the prevention, detection orinvestigation of a criminal offence.

The EU has sought to develop a European external border-surveillance system called Eurosur to exchange information between EU Member States andFrontex and to thereby, "improve situational awareness and…increase reactioncapability at the external borders of the Member States of the Union for thepurpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants" (Regulation (EU) No. 1052/2013: Art. 1). Situational awareness issupposed to lead to a reduction of migrant fatalities in the proximity of external borders and hence to support crisis prevention and improve "pre-frontier intelligence".[6] Regulation (EU) 656/2014 establishes rules for the surveillanceof external sea borders in the context of operational cooperation coordinated by Frontex. It was adopted on 15 May 2014 by the European Parliament and the Council, following the judgement of the CJEU in the case Parliament v Council.[7] The regulation provides for rules on interception that are applicableto sea-border surveillance operations coordinated by Frontex, and it lays downmeasures of coordination in search-and-rescue situations that arise duringthese operations. With a view to protection and safety, the regulation is supposed to protect fundamental rights. In particular, it is to protect the principle of non-refoulement by establishing a procedure for the implementation of the principle. The regulation requires that persons are disembarked in a place of safety after a rescue operation (European Commission, 2015: 36).

Upon considering the preventive-security logic in the control of organized crime, it may be observed that, in general, the policing of organized crime is increasingly proactive, anticipatory and intelligence-driven (see e.g., Brady, 2008; Verfaillie and Vanderbeken, 2007). In 2000, the EU adopted a Strategy for thePrevention and Control of Organised Crime.[8] Its recommendations includestrengthening the collection and analysis of data on organized crime and preventing organized crime from penetrating the public and legitimate private sectors. The establishment of the European Crime Prevention Network in 2009is a related matter. The prevention paradigm was elaborated by including the method of interception close to the source (Harfield, 2008). In the meantime, European anti-organized-crime discourse has been strongly dominated byterminology that refers to serious organized crime threat assessment and tothe intelligence-based EU policy cycle. In the context of the preventive approach against organized crime, there has been some advocacy for a so-called "administrative approach" in which different intervention tools are combined—usually by local administrative authorities—to prevent (organized) crime from penetrating the public sector or the local autonomy. Meanwhile, Europol's powers will be expanded as a result of the new Europol Regulation, which was adopted by the European Parliament on 11 May 2016 and which will enter into force on 1 May 2017.[9] In the area of prevention, Europol is a core player in offering advice

6 Communication of 13 February 2008 from the Commission to the European Parliament, theCouncil, the European Economic and Social Committee and the Committee of the Regions:Examining the creation of a European border surveillance system (Euros) com (2008)68 final.

7 In this context, see also United Nations Security Council (UNSC) Resolution 2240, which authorizes states and regional organizations to intercept, inspect, seize and dispose (i.e., destroy) vessels on the high seas off the coast of Libya for a period of one year, but only when they have "reasonable grounds to believe" that these vessels, inflatable boats, rafts and dinghies are being used for smuggling and human trafficking from Libya. Discussed in Carrera etal. 2015: 17.

8 http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=URISERV%3Al33125; retrieved 11 May 2016.

9 European Parliament legislative resolution of 11 May 2016 on the council position at firstreading with a view to the adoption of a regulation of the European Parliament and of theCouncil on the European Union Agency for Law Enforcement Cooperation (Europol) andreplacing and repealing Council Decisions 2009/371/jha, 2009/934/jha, 2009/935/jha, 2009/936/jha and 2009/968/jha (14957/2/2015 – c8-0130/2016 – 2013/0091(cod)).

to prevent crime and in the collection, analysis and sharing of proactive intelligence.[10]

If there is one field in which European preventive-security governance isnoticeable, it is counter-terrorism and radicalization. "Prevention" is one of thefour elementary pillars of the EU strategy against terrorism—certainly in its2005 strategy document. Significantly, the wording of this document shows astriking resemblance to the British anti-terrorism strategy that was launchedin 2003, which indicates a discursive spill-over effect from national preventive-security logic into international or multilateral discursive spaces. On the one hand, the prevention of terrorism is geared towards intelligence-driven, proactive measures against persons who are suspected of preparing, organising or financing terrorism. The EU blacklisting instrument is especially contentious from a human-rights perspective (Eckes: 2009). As a consequence, the European Court of Justice annulled the relevant EU Council regulation and rejectedEuropean governments' implementation of the UN terrorist watch list, on the ground that it breaches fundamental rights.[11] The anticipatory logic and the application of profiling techniques are prominent in counter-terrorism discourse. For instance, Scherrer et al., (2011: 81) mention initiatives such as the"Check the Web Project", which is coordinated by Europol and is directly linkedto the prevention of radicalization. The project monitors and evaluates open Internet sources to prevent the misuse of the Internet for terrorist purposes.

Human-Rights Concerns about Preventive Security Measures

In this context, many data-protection and human-rights concerns have beenexpressed about the criteria for risk profiling and the potential denial of rightsof redress to individuals who are affected by decisions based on these profiles(De Schutter and Ringelheim, 2008). The fundamental rights at stake include the right to privacy (Article 7 of the EU Charter of Fundamental Rights); the right to data protection (Article 8 of the Charter); the right to non-discrimination (Article 21 of the Charter); and the right to free movement and residence (Article 45 of the Charter). The EU Data Retention Directive—which demandsthat telecommunication providers store the telecommunication data (trafficand location) of all their customers for between six months to two years—allows authorities to identify patterns of communication, mobility and financial transfers and to make this data available to law-enforcement authoritiesupon request. This directive was annulled by the European Court of Justicebecause of its blanket application. In the Digital Rights Ireland case, the courtruled on 8 April 2014 that, because it is not limited to what is strictly necessary,the directive entails a wide-ranging and particularly serious interference in the fundamental rights to privacy and protection of personal data (Granger andIrion, 2014).

Except for instruments that allow data retention and data-matching, other instruments, such as the Terrorist Finance Tracking Programme (TFTP), havethe potential to infringe upon human rights. The TFTP was developed in theUSA in the aftermath of 9/11. According to the European Commission, the TFTPhas generated significant intelligence that has been beneficial to both the

U.S. and EU member states in the fight against terrorism.[12] However, Murphy (2012: 157) argues that, "the principal

10 See e.g., https://www.europol.europa.eu/content/page/crime-prevention-advices-129; retrieved 7 July 2016.

11 For a discussion, see European Parliament, Directorate General for Internal Policies (2011),Developing an EU Internal Security Strategy, Fighting Terrorism and Organised Crime, authored by Scherrer et al.; http://www.europarl.europa.eu/document/activities/cont/201206/20120627ATT47777/20120627ATT47777EN.pdf, accessed 26 October 2016, on page 25.

12 "Since the inception of the TFTP in 2001, it has produced tens of thousands of leads and over 3,000 reports (which contain multiple TFTP leads) to counter terrorism authoritiesworldwide, including over 2,100 reports to European authorities", p. 3, Joint Report from the Commission and the U.S. Treasury Department regarding the value of TFTP Provided Data pursuant to Article 6 (6) of the Agreement between the European Union and theUnited States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program to the Communication from the Commission to the European Parliament and the Council.

interference with human rights is causedby the bulk transfer of personal data from the EU to the US", which makes itdifficult to assess the proportionality of the system and to ascertain whetherpersonal data have been transferred to the United States.

Despite the relatively high level of awareness within the European Commission and the European Parliament about the human-rights implications of the introduction of preventive-security logic in the EU, there has been a steadyincrease in the number of databases, legal instruments, tools and methods thatare used to collect information proactively and to allow preventive interventions (see e.g., Stewart, 2005: 158). The trend is to couple actionable intelligence with immediate action, thereby potentially reducing the self-discretion of security professionals (Crawford, 2009: 103). The EU's awareness of human rights and its readiness to reflect ethically on its decisions is pivotal for the human rights climate in Europe; however, the automation of intelligence and preventive intervention may have various implications for ethical and human-rights assessments (Verweij, 2011).

Implicitly, the logic of the suspect who has committed a crime is substitutedby a logic according to which any person who is capable of committing a crimebecomes a suspect. The general lack of reflection on what this means for the rule of law and human rights testifies to the widespread acceptance of preventive security in our everyday society.

Evolving Human Rights in the European Union

Human rights is an important cornerstone for EU-policymaking, but it is still evolving. The integration of human rights has gradually occurred through successive strategic-action programmes that have laid the basis for the EU Areaof Freedom, Security and Justice. Since the adoption of the EU Fundamental Rights Charter, more explicit reference has been made to the human-rightsframework. According to Inglesias Sánchez (2012), the EU Fundamental RightsCharter occupies a central position in the constitutional architecture of theEU and the European Court of Justice is increasingly integrated in its legalreasoning. It should also be noted that the Organisation for Security and Co-operation in Europe (OSCE) and the Council of Europe are indispensable actors in the advocacy of human rights and fundamental freedoms.

The European Convention on Human Rights (ECHR)[13] and the EU Charter of Fundamental Rights[14] are two core instruments for human rights in the EU.The European Court of Human Rights scrutinizes the compliance of nation states with the European Convention on Human Rights, which has yielded a rich jurisprudence that covers issues such as detention or interception of telecommunication by police in the nation states that are covered by the ECHR.

The EU Charter of Fundamental Rights, which is deemed consistent withthe European Convention on Human Rights, brings together the fundamental rights that are protected in the EU. The charter was adopted in 2000 and became legally binding when the Lisbon Treaty came into force on 1 December2009. The charter entrenches all rights that are found in the case law of theEuropean Court of Justice, the rights and freedoms that are enshrined in the European Convention on Human Rights, and other rights that result from the common constitutional traditions of EU countries and other international legal instruments.[15] The European Commission

13 European Court of Human Rights, European Convention on Human Rights, and amending protocols: http://www.echr.coe.int/Pages/home.aspx?p=home; retrieved 12 May 2016.

14 Charter of Fundamental Rights of the European Union (2010/c83/02), 30.3.2010; http:// ec.europa.eu/justice/fundamental-rights/charter/index_en.htm; retrieved 12 May 2016.

15 See e.g., European Parliament, Directorate-General for Internal Policies, The Evolution ofFundamental Rights Charters and Case Law: A Comparison of the United Nations, Council of Europe and European Union systems of human rights protection, authored by Liora Lazarus et al., 2011, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/432755/IPOL-AFCO_ET(2011)432755_EN.pdf; accessed 12 May 2016.

integrates the charter in all itspolicies (European Commission, 2015: 6). With regard to preventive security measures in the context of the external action of the EU, the EU Court of Justice has heard cases concerning the procedure to impose measures on individuals and entities to have their funds and economic resources frozen. Of more than 30 judgements issued in 2014 on the legality of these restrictive measures,the court upheld the listings in only a quarter of cases (id). The commission isreviewing the grounds for listing in cooperation with the relevant UN bodies (European Commission, 2015: 9).

At the moment, the debate focuses on the accession of the EU to the European Convention on Human Rights (EU member states have individually ratifiedthe ECHR). The European Court of Justice delivered its negative opinion on thedraft agreement concerning EU accession to the ECHR in December of 2015,which was described as a "bombshell" decision. The court identified problemsconcerning its compatibility with EU law and called for amendments regarding the judicial protection in the area of common foreign and security policy (European Commission, 2015: 15). The latest opinion (2/13) of the European Court of Justice further complicates access by the EU to the ECHR.[16]

Human-Rights Considerations in the Evolution of Europe's Preventive Security

The first five-year action programme—which prepared the basis for the strategic development of the EU Area of Freedom, Security and Justice—was adopted in 1999 and is often referred to as the "Tampere Programme". It uses the following wording to express its link with human rights:

> From its very beginning European integration has been firmly rooted in a shared commitment to freedom, based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging European Union.

Human rights are also mentioned in the context of specific subject areas, suchas migration, border control and asylum policy.

In the successor action programme—adopted in 2004 as the "Hague Programme"—the European Commission formulated the strengthening offundamental rights and citizenship as one of its ten priorities: the European Monitoring Centre on Racism and Xenophobia was converted into the Fundamental Rights Agency (FRA),[17] which is based in Vienna and has been operational since 1 March 2007. Its human-rights objective is stated as follows: "to improve the common capability of the European Union and its MemberStates to guarantee fundamental rights, minimum procedural safeguards and access to justice". In the evaluation of the Hague Programme and its actionprogramme in 2009, it was acknowledged that the sharing of information could potentially be detrimental to personal privacy, and counter-terrorism instruments were observed as potentially

16 See e.g., Editorial Comments, 'The EU's Accession to the ECHR – a 'NO' from the ECJ!', Common Market Law Review, 2015, 52, pp. 1–16, http://media.leidenuniv.nl/legacy/editorial-comments--february-2015.pdf; and http://europeanlawblog.eu/?p=2731, both retrieved 12 May 2016.

17 Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European UnionAgency for Fundamental Rights, OJ L 53, 22.2.2007.

incompatible with human rights.[18] The evaluation document argues that "significant improvements" were made when a "systematic and rigorous monitoring system was put in place" to ensurethat the commission's legislative proposals are fully compatible with the Charter on Fundamental Rights.[19] Moreover, the evaluation document advocates theextension of "fundamental-rights-proofing" of EU policies to all stages of EU-decision making and to implementation by member states of legislative *acquis*.[20] Hence, human-rights proofing of existing and new instruments is within sight.

The next Action Programme for the Area of Freedom, Security and Justice was adopted by the European Council in December of 2009.[21] As a consequence of this EU Stockholm Programme, the EU Fundamental Rights Agency Multiannual Framework now covers the domain of police and judicial cooperation in criminal matters. The Fundamental Rights Agency (FRA) has provided an opinion on the Stockholm Programme.[22] Its recommendations refer to the need to foster a human-rights culture throughout the EU and to acknowledgethe rule of law as a cornerstone to mutual recognition in a Europe of law and justice—particularly in the fields of procedural safeguards in criminal lawand victims' rights. Furthermore, the EU Area of Freedom, Security and Justice would depend on the quality of law-enforcement activities and their impact on the protection of citizens.[23] Furthermore, the FRA recommended that access to EU territory should be dealt with under the rule of law, that privacy rights should be guaranteed in the modern information society, and that organized crime should be combated without undermining human dignity.[24]

Amnesty International (ai) criticized the "Stockholm Programme" (in draftform) for not displaying a clear vision of a human-rights policy for the EU.[25] The European Civil Liberties Network (ECLN) called for the rejection of theStockholm Programme on grounds that the EU had, "taken a dangerously authoritarian turn, putting in place militarized borders, mandatory proactive surveillance regimes, and an increasingly aggressive external security and defencepolicy".[26] Concern was also expressed about the online police searches of computer hard drives, internet surveillance, profiling systems, risk assessment andother technological security applications (see also Den Boer

18 Communication from the European Commission, 'Justice, Freedom and Security in Europe since 2005, An Evaluation of the Hague Programme and Action Plan', Brussels, 10.6.2006, sec, 2009, 767 final; http://eur-lex.europa.eu/legal-content/EN/TXT/?uri

=celex:52009DC0263; accessed 12 May 2016.

19 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals – Methodology for systematic and rigorous monitoring', com, 2005, 172 final.

20 Communication from the European Commission, 'Justice, Freedom and Security in Europe since 2005, An Evaluation of the Hague Programme and Action Plan', Brussels, 10.6.2006, sec, 2009, 767 final; on p. 14; http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52009DC0263; accessed 12 May 2016.

21 The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, Official Journal C 115, 04/05/2010, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:115:FULL&from=EN; accessed 12 May 2016; see also European CommissionCommunication, Delivering an Area of Freedom, Security and Justice for Europe's Citizens. Action Plan Implementing the Stockholm Programme, Brussels, com, 2010, 171.

22 European Union Agency for Fundamental Rights, Opinion on European Commission Communication, 'An Area of Freedom, Security and Justice Serving the Citizen', com 262/4, 10 June 2009. The Stockholm Programme: A Chance to Put Fundamental Rights Protection Right in the Centre of the European Agenda, Vienna, 14 July 2009.

23 Ibid, pages 6 and 7.

24 Ibid.

25 Amnesty International, Amnesty International Briefing on the future Stockholm Programme, July 2009, page 3, http://www.amnesty.eu/static/documents/2009/AIBriefing Stockholm.pdf; accessed 12 May 2016.

26 European Civil Liberties Network, "Oppose the "Stockholm Programme", April 2009, page 1; http://www.ecln.org/ECLN-statement-on-Stockholm-Programme-April-2009-eng.pdf;accessed 12 May 2016.

and Van Buuren,2011). This criticism was expressed irrespective of whether these measures areof a national or international (European) nature. Lack of oversight and accountability of the emerging Justice and Home Affairs, including Europol andFrontex, was regarded as another source of concern.[27]

In June of 2015, the EU adopted a follow-up to the Stockholm Programme: namely, the Internal Security Strategy (ISS).[28] This strategy emphasizes *inter alia* that, "a swift and flexible intelligence-led approach should be followed, allowing the EU to react in a comprehensive and coordinated way to emergingthreats, including hybrid threats, and other challenges to the internal security of the European Union".[29] The concept of "prevention" is strongly articulatedin the strategic document, as it calls for action to tackle and prevent terrorism,including recruitment into terrorism, radicalisation and financing of terrorism. It recommends, "special attention to the issue of foreign terrorist fighters,reinforced border security through systematic and coordinated checks against the relevant databases based on risk assessment as well as integrating the internal and external aspects of the fight against terrorism", the prevention of serious and organized crime, and the prevention of and fight against cybercrime.

Moreover, the strategy calls for the quick implementation of strengthenedrules that can prevent money laundering and terrorist financing.[30] Further on,the document pleads for, "enhancing prevention and investigation of criminalacts, with a particular focus on organised financial crime and confiscation of criminal assets, and of terrorist attacks, including the prevention of radicalization and the safeguarding of values through the promotion of tolerance, non-discrimination, fundamental freedoms and solidarity throughout the European Union".[31] These citations illustrate the prevalence of preventive-securitylogic in the latest EU Internal Security Strategy. They also show that this logicis apparently compatible with adherence to human rights.

This is not the end of the story. As a component of external EU affairs, the EU advocates capacity building in third countries, with an emphasis on conflict prevention. Human-rights tragedies like the death of boat migrants have led the EU, as an external security actor, to compromise its human-rights standards by forging a "deal" with Turkey over the return of migrants to Turkey andresettlement of Syrian refugees (Carrera et al., 2015: 17; Saunders, 2014). Thereturn policy contributes to preventing and deterring would-be refugees from traveling to Europe. Hence, the external-security discourse of the EU is alsocouched in the logic of preventism, by which it aims to protect and enhancelevels of security inside the EU itself.

Towards Normative Alignment: Mainstreaming Human Rights in Europe's Preventive Security

The above paragraphs emphasize the fact that—despite the binding natureof the EU Fundamental Rights Charter and the fostering of a human-rights culture within the EU—JHA agencies have disparate human-rights policies and compliance regimes (Den Boer, 2013). In fact, the way in which agencieslike Europol and Eurojust comply with EU human-rights policies is often not made explicit. Frontex seems the notable exception, as it does have an explicithuman-rights policy (id.). Moreover, Frontex' training programmes for borderguards have

27 Ibid.

28 http://data.consilium.europa.eu/doc/document/ST-9798-2015-INIT/en/pdf; accessed 12May 2016.

29 Ibid, p. 6.

30 See e.g., European Commission Communication, "The European Agenda on Security", com (2015) 185 final, Strasbourg, 28.4.2015; http://eur-lex.europa.eu/legal-content/EN/ TXT/?uri=COM:2015:185:FIN; retrieved 8 July 2016.

31 Ibid, p. 9.

mainstreamed human rights.[32] Another EU Agency in this realm is the European Union Agency for Law Enforcement Training CEPOL, which offers a variety of courses and webinars on human rights and police ethics—forexample, in relation to police detention.[33] Europol and Eurojust focus almostentirely on a data-protection framework: human rights are merely implicit in the crime priorities and in the protection of victims of crime (e.g., in relation to trafficking in human beings). The new Europol regulation improves its data-protection regime, for instance, by establishing an independent data-protection officer and by installing a Europol data-protection board. The commission believes that the new EU Data Protection Framework will lead to animproved protection of personal privacy. Still, there is good reason to questionthe application of this new framework to Europol's proactive, intelligence-driven, crime-analysis methods (see e.g., Gutwirth et al., 2015).

The European Ombudsman receives very few human-rights complaintsfrom individuals. This may be understood in the light of the European Ombudsman's institutional mandate, which focuses on good administration. In the recent past, the European Ombudsman visited all Justice and HomeAffairs-agencies, including Europol[34] and Frontex. The European Ombudsmaninitiated an inquiry into the implementation of fundamental rights obligations by Frontex in light of the entry into force of the Lisbon Treaty (1 December2009) and its Charter on Fundamental Rights. Meanwhile, Frontex adopteda fundamental rights strategy and issued a code of conduct.[35] The European Ombudsman also opened (and closed) an inquiry into Europol's refusal togrant public access to a document related to the implementation of the EU-U.S. Terrorist Finance Tracking Programme (TFTP).[36]

The European Data Protection Supervisor (EDPS) has issued numerous critical opinions on a wide range of instruments that pertain to European police cooperation and information exchange.[37] Rather contentious is theaccess by national law-enforcement authorities and Europol to EU data systems such as the Visa Information System (VIS) and the EU fingerprint system for asylum-seekers (Eurodac). In the end, the question that looms is to which legal authority citizens can turn when they are negatively affectedby preventive-profiling practices. Similarly, when refugees are stopped at aborder or sent back to a third country, they may face a legal vacuum whenthey submit complaints against border guards who act on the basis of EU instruments. Routes to external legal redress seem virtually choked off (Ball,2014: 104).

The practice of policing and security in the EU would benefit from independent external oversight (Sen, 2010: 130)—preferably a mix of institutional, legal, parliamentary and civil oversight (Den Boer, 2002). It may be observed that, in fact, EU agencies and instruments are subject to internal oversight. When itconcerns internal institutional oversight, the mandate of the FRA does not include European police and crime-control matters. The European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) has been criticalof this. It argues that cross-

32 For the Manual, Fundamental Rights Training for Border Guards, (2013), see http:// frontex.europa.eu/assets/Publications/Training/Fundamental_Rights_Training_for

_Border_Guardsl.pdf; retrieved 13 May 2016.

33 https://www.cepol.europa.eu/education-training/what-we-teach/webinars/ webinar-762016-human-rights-police-ethics-detention; retrieved 13 May 2016.

34 http://www.ombudsman.europa.eu/cases/decision.faces/en/54568/html.bookmark; retrieved 11 May 2016.

35 See http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/11758/html.bookmark; retrieved 12 May 2016.

36 2 September 2014: http://www.ombudsman.europa.eu/en/cases/decision.faces/en/ 54678/html.bookmark; accessed 26 October 2016.

37 For an overview of publications and opinions, see www.edps.europa.eu.

border police and judicial co-operation in criminalmatters reflect core policies of the EU.[38] FRA's mandate does, however, include EU policies such as immigration and border control, which involve operationalaspects of policing and law enforcement. The cooperation agreement betweenFRA and Frontex stands out as an example of an inter-agency agreement with an explicit reference to human rights.[39] In relation to preventive security, FRAand Frontex hold consultations, "with a view to strengthening the capacity to collect data and information on the situation at the border, including an appreciation of the likely protection and assistance needs of vulnerable individuals and groups, particularly as regards unaccompanied minors and other children at risk, victims of trafficking and persons in need of international protection". It should be noted that, in this context, the FRA merely enjoys the mandate toconsult.

Conclusion

On the basis of illustrative examples, this article has discussed preventivesecurity logic within the EU, not only within the area of freedom, security and justice but also more widely. For example, the mandate of Europol, Eurojust and Frontex can be characterized as subject to creeping incrementalismand a gradual focus on intelligence-gathering and analysis, thereby preparing the ground to stage preventive interventions such as the removal of information from the Internet. EU legal instruments, particularly those that focus oncounter-terrorism, have introduced a gradual thickening or accumulation ofmeasures and methods to intervene proactively—for instance, by freezingthe finances of individuals or groups who are listed as potential terrorists. Technology—particularly technology that is used for proactive informationgathering, data-mining and data-matching—cannot be considered neutral.

Since its introduction, preventive security has gradually become mainstreamed in different layers of human action. Industrial innovation and commercial interests may be considered significant "push factors" for the introduction of preventive-security technologies. Increased interoperability between technical systems that contain proactive information, may imply thatwe lose sight of the finality principle (the original purpose for which data were entered into a certain system). Politically neutralized agencies like Europoland Frontex are visible messengers of preventive-security methods and play asignificant role in the dissemination and standardization of preventive control mechanisms. More research is required on the effects of fair-trial rightsprotection in the context of preventive-security instruments such as intelligence-gathering and proactive interception. The EU's roadmap for procedural justice applies in particular to suspects in criminal proceedings rather than to people who occupy a legal void.[40]

This, in turn, brings us to ask whether the human-rights framework and newdata-protection legislation in the EU can keep pace with the rapid development of preventive security. In this article, we have observed that surveillanceprogrammes in Europe tend to be narrowly and technocratically framed ina debate about personal privacy and data protection. Although the bindinghuman-rights framework may be considered

38 In turn, LIBE has been criticized for its position on the new EU Directive on Countering Terrorism (which was also suggested without an impact assessment). There is alsocriticism regarding the distant link between the behaviour and the principal act. See e.g.,https://www.opensocietyfoundations.org/press-releases/after-fast-track-process-europe-an-parliament-takes-troubling-position; accessed 26 October 2016.

39 "FRA and Frontex discuss enhanced cooperation to strengthen respect for fundamentalrights http://fra.europa.eu/en/news/2016/fra-and-frontex-discuss-enhanced-cooperation-strengthen-respect-fundamental-rights; Cooperation Agreement between the Europe – an Agency for the Management of Operational Cooperation at the External Borders ofthe Member States of the European Union and the European Agency for FundamentalRights, http://fra.europa.eu/sites/default/files/fra_uploads/891-Cooperation-Agreement-FRA-Frontex_en.pdf; retrieved 13 May 2016.

40 Council Resolution of 30 November 2009 on a Roadmap for strengthening proceduralrights of suspected or accused persons in criminal proceedings (OJ 2009/c 295/01). http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF; retrieved 13 May 2016.

progress, individuals who live in legal limbo and do not have access to justice are more likely to be subjectsof disproportionate targeting. On the bright side, human rights are increasingly mainstreamed in the policies of agencies (Frontex) and in the trainingof border-control guards and law-enforcement officials. Now that the road of access by the EU to the European Convention of Human Rights is shut off, at least for the time being, Europe may face a future in which no further significant progress is achieved.

Nor can one expect drastic steps towards an independent, external oversight architecture that monitors the EU's compliance with the Universal Declaration on Human Rights, the European Convention of Human Rights andits own Fundamental Rights Charter. Intra-EU agencies such as the FRA are vested with soft or no powers of oversight. Hence, the European Parliamentand the European Court of Justice are pivotal for continuing to monitor EUcompliance with fundamental rights—certainly when it concerns the widespread introduction of preventive-security logic. Alternative ways to monitor include giving continued structural attention to *ex ante* human-rights impact assessments and a more explicit emphasis on regular external evaluations on human rights compliance *ex post facto*. In relation to the external action ofthe EU, the EU does not need merely to practice what it preaches; it must also share critical reflections on the necessity and proportionality of precautionary security measures.

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