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# The Politics of Preemption and the War on Terror in Europe

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In the midst of the war on terror and unilateral US security politics, many observers look to Europe for alternatives. It is argued that Europe is particularly opposed to preemptive security practice, and prefers instead to rely on the rule of law. This article examines the meaning of preemption in the war on terror, and analyses three aspects of European counter-terror policy. It becomes clear that, with respect to a number of policies that play a key role in preemptive security practice, including criminalizing terrorist support, data retention, and asset freezing, the European Union is world leader rather than reluctant follower. Instead of relying on images that position Europe as inherently critical of preemptive security, debate concerning the legitimacy and desirability of such practices must be actively fostered within European public space.

KEY WORDS ♦ Europe ♦ preemption ♦ risk ♦ security ♦ war on terror

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The greater the threat, the greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty exists as to the time and place of the enemy's attack. (United States *National Security Strategy* 2002: 15)

Who, then, should check and complement American power? ... My answer is Europe. (Timothy Garton Ash, 2002)

A key element in the war on terror is a politics of preemption, as set out, for example, in the 2002 US *National Security Strategy*. This document has received substantial critical attention for justifying the war in Iraq, but also sets out the preemptive US objective to 'disrupt and destroy terrorist organizations' at an early stage, by 'denying . . . sponsorship, support, and

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sanctuary to terrorists', and attacking terrorist 'communications; material support; and finances' (White House, 2002: 5). This objective blurs the boundary between domestic policing and international intelligence, and entails a justification for a strengthening of sovereign powers, in fields including data retention, communications monitoring and asset freezing. It is important, then, to see how preemptive security plays a role not just in relation to the Iraq war, but manifests itself in everyday life through controversial policy measures, including preemptive arrest, detention and deportation of migrant terror suspects, monitoring library records, the analysis of telephone and other communications data, and the mining of financial data for suspicious transactions (Ericson, 2007). Preemptive measures are rendered possible by conceptualizing terrorism as a catastrophic but incalculable threat that renders earlier security strategies like deterrence obsolete (Sofaer, 2003; Dershowitz, 2006). As the *National Security Strategy* puts it in the quote heading this article, 'The greater the threat, the greater is the risk of inaction'.

In light of this widely criticized preemptive security strategy and, more generally, the perceived US turn to unilateralism in current world politics (Cox, 2004, 2005), a number of commentators, including Timothy Garton Ash, look to Europe for alternatives. For Garton Ash (2002), Europe is the only global political actor that has the ability to check US power on the global stage. Others, as we will see, conceptualize 'Europe' not so much as a concrete political actor that can provide a diplomatic and military counterweight to the US, but more as a political and social imaginary that offers alternative values or visions in contemporary politics. A key aspect of these alternative values is often thought to be Europe's opposition to US preemptive politics, as set out in the *National Security Strategy*.

The question then arises, is 'Europe' currently being constituted in ways that justify these calls? Can Europe be thought of as a political space that offers juridical and normative challenges to the logic of preemption? It is important to see that 'Europe' is not a fixed actor or identity, already there to answer, or not, the calls by Garton Ash and others, but is itself being reconstituted through the practices of securitization in the war on terror. One way of addressing the question of the potential of Europe as an alternative space, then, is to look more closely at the development of European counter-terror policy. It becomes clear that, with respect to a number of policies that play a key role in preemptive security practice, including criminalizing terrorist support, data retention, and asset freezing, the European Union is world leader rather than reluctant follower. Indeed, it is possible to say that a collapse between Europe and the US as distinct entities of governing is effected through anti-terror measures including financial surveillance and asset freezing, enabling what William Connolly (2004: 35) calls a 'complex

assemblage' of transatlantic government. This does not mean that no differences exist in American and European counter-terror policy, let alone other policy domains such as the environment. But it does challenge the widespread assumption that preemptive security practice is specifically American and is either widely resisted, or very reluctantly followed, by Europe. Instead of relying on images that position Europe as inherently critical of preemptive security, debate concerning the legitimacy and desirability of such practices must be actively fostered within European public space.

This article examines the politics of preemption as a practice of securitization currently associated with US policy, but firmly rooted in European history. Then, I consider some calls to Europe in the midst of the war on terror that position Europe as a cosmopolitan entity inherently critical of preemptive security practices. Third, I examine in some detail the practices of governing that emerge in the name of the war on terror in the European Union, and show how these appropriate and develop the logic of precautionary politics. Finally, I consider possible avenues for challenging the politics of precaution.

### *Politics of Preemption*

In a 2003 speech, President Bush drew the parallel between the global offensive against terror and domestic policies: 'Our methods for fighting this war at home are very different from those we use abroad, yet our strategy is the same: We're on the offensive against terror. We're determined to stop the enemy before they can strike our people' (Bush, 2003). Many provisions in the USA Patriot Act, including expanded (electronic) surveillance powers and its financial provisions, embody the move to offensive or preemptive security policy. As legal scholar Christopher P. Banks (2004: 30–1) puts it, the Patriot Act represents 'a radical shift from the policy of "consequence management" in dealing with the terrorist threat. The law, in short, is proactive and attempts to prevent acts of aggression before they materialize.' In effect, this move to 'preemptive law' has the consequence of creating an extra-legal field of intervention in which administrative bureaucracies, immigration officials, consultants and financial dataminers are authorized to make sovereign decisions concerning the normality and abnormality of particular persons, behaviours and transactions, and to detain, question, monitor and freeze those considered abnormal (Graham, 2006; Edkins and Pin-Fat, 2004; van Munster, 2004). As Judith Butler (2004: 51) writes, this reworking of law entails 'a new exercise of state sovereignty, one that not only takes place outside the law, but through an elaboration of administrative bureaucracies in which officials . . . decide who will be tried and who will be detained'.

The politics of preemption in the war on terror is a practice of securitization that has to be conceptualized through the larger philosophical-political

turn towards *risk* in diverse areas of contemporary politics (Rasmussen, 2004: 388; Coker, 2002; cf. Buzan, 2006). A number of studies trace the emergence of modern governance pivoted on the classification of places and people along probabilistic axes of risk-measurement and management in, for example, crime, health and social security (Adams, 1995; Ericson and Haggerty, 2003; Baker and Simon, 2002). The assumption that, for example, crime and health risks can be measured and (partly) predicted reconfigures politics by emphasizing preventive policy and individual responsibility. Initiatives to make citizens more aware of the risks of burglary and car theft that take place in the context of large-scale public awareness campaigns simultaneously demand that citizens 'become self-policing agents of preventive security' (Ericson and Haggerty, 2002: 249). In this sense, the politics of risk fosters 'prudential citizenship' in which responsibility for social harms, including joblessness and ill-health, is increasingly transferred to the individual (O'Malley, 2004). In the context of the war on terror, the use of risk assessment and statistical profiling in the field of security has accelerated, leading to, for example, biometric technologies deployed at the border that classify travellers into 'trusted' and 'suspicious', opening up fast-processing lanes for the former group, and new barricades for the latter (Amoore and de Goede, 2005; Amoore, 2006; Sparke, 2006; Zureik and Salter, 2005).

At the same time however, the configurations of risk at work in the war on terror are not simply a continuation of the risk calculations deployed in the domains of crime and welfare (Amoore and de Goede, 2008). Put simply, the war on terror recognizes that the sheer uncertainty and randomness of terrorist attack renders conventional risk assessment techniques inadequate. However, it subsequently moves to incorporate this uncertainty into policy-making as a basis for preemptive *action*. This is what Ron Suskind has called the *One Percent Doctrine*: the security paradigm that says the US should act to preempt security threats even if there is only a 1 percent chance of a particular threat coming to fruition. Writes Suskind (2006: 166): 'Essentially, the war on terror [is] being guided by . . . "the principle of actionable suspicion" . . . The whole concept [is] that not having hard evidence shouldn't hold you back.' It is precisely the conceptualization of terrorism as a threat that is simultaneously technologically unprecedented and politically dispersed, that enables action on the basis of incomplete knowledge (Sofaer, 2003: 209–10). For example, according to legal scholar Alan Dershowitz, a leading proponent of preemptive security, preemption distinguishes itself from prevention because it is a more imminent, yet a less precise threat, while the failure to act 'may cost a society dearly . . . even catastrophically' (2006: 19). Or, as Bush himself put it in his famous Westpoint speech, 'If we wait for threats to fully materialize, we will have waited too long' (quoted in Suskind, 2006: 149).

The appropriation of uncertainty as a basis for action in contemporary security practice as advocated by Bush and Dershowitz closely resembles a politics of precaution as it has developed with regard to environmental politics (Runciman, 2004; Aradau and van Munster, 2007). According to François Ewald (2002: 283–4), precaution addresses situations marked by the twin features of (scientific) uncertainty coupled with a possibility of ‘serious and irreversible damage’. Thus, the politics of precaution informs decision-making when there is, in Ewald’s words, ‘*a risk beyond risk*, of which we do not have, nor cannot have, the knowledge or the measure’ (2002: 294; emphasis added). As such, precaution exceeds the logic of (statistical) calculability, and involves, instead, imaginative or ‘visionary’ techniques such as stress-testing, scenario planning and disaster rehearsal (O’Malley, 2004: 5). In order to provide a basis for decision, then, precaution invites reflection on all manner of disastrous (un)expected future scenarios guided by ‘suspicion, premonition, foreboding, challenge, mistrust, fear, anxiety’ (Ewald, 2002: 294). Precaution, moreover, entails an urgency of political *action*, not just because of the imagined ‘apocalyptic’ future (Fitzpatrick, 2003: 247), but also because of the implicit ‘assumption that the responsible institutions are *guilty* if they do not detect the presence, or actuality, of a danger even before it is realized’ (Ewald, 1994: 221–2; emphasis added).

Although appropriated and reworked in the context of the war on terror, it is important to note that the politics of precaution is a profoundly *European* phenomenon. The precautionary principle is ‘a central plank’ of EU policy in the domains of environment, health and consumer protection, where it has become accepted that regulatory action must be taken even if scientific evidence concerning the imminence and precise nature of threats remains disputed (Majone, 2002: 90; Sunstein, 2003: 1005–8). In the Commission’s own words, the precautionary principle underpins policy decision when ‘scientific action is insufficient, inconclusive or uncertain’, while proven ‘potentially dangerous effects on the environment, human, animal or plant health’ exist (Commission of the European Communities, 2000: 10). Although differences exist between the precautionary principle in environmental regulation and the way in which it is appropriated in security practice, the EU’s deployment of the concept does point to some problems that are relevant to security practice. Most importantly, the legitimacy of decision-making based on ‘worst cases’ may be questioned, as will be further discussed below (Majone, 2002: 103).

While no longer based on a purely calculative logic, then, preemptive security practice increasingly requires the work of what Didier Bigo (2002: 73) calls ‘the managers of unease’, who conceptualize and classify, calculate and grade terrorist threats (see also Huysmans, 2006; Ericson and Doyle, 2004). The war on terror, in fact, ‘displays an insatiable quest for knowledge’, in the

form of communications data, financial data, electronic surveillance and monitoring of internet sites and chatrooms (Aradau and van Munster, 2007: 91; de Goede, forthcoming). These data are mined and assessed in order to 'connect the dots' of terrorist networks. In the words of US Homeland Secretary Michael Chertoff (2006):

If we learned anything from Sept. 11, 2001, it is that we need to be better at connecting the dots of terrorist-related information. After Sept. 11, we used credit card and telephone records to identify those linked with the hijackers. But wouldn't it be better to identify such connections *before* a hijacker boards a plane? (emphasis added)

It is in the context of this quest for knowledge that current controversial surveillance and datamining programs became possible, such as the National Security Agency (NSA) database of international telephone records to and from the US (Cauley, 2006).

Perhaps the 'war on terrorist finance' illustrates best the quest for knowledge embodied in the politics of precaution. As journalist Robert O'Harrow (2005: 260) puts it, 'There's no overstating the value government investigators place on financial activity. It's considered almost like a fuel for their intelligence engine.' Repeatedly, officials have asserted that 'money trails don't lie', and that the analysis of financial data has the capacity to reveal 'blueprints to the architecture of terrorist organisations' (Zarate, 2004: 3; see also Snow, 2006). In this sense, the war on terrorist finance is widely inscribed with a precautionary function, and measures including financial datamining and asset freezing are seen as cutting-edge ways of tracing and disabling terrorist networks at an early stage (de Goede, 2006a; Biersteker, 2004). One important element of the financial war on terror, to be further discussed below, is the practice of preventive freezing, that targets the assets of possible terrorists and terrorist organizations. As former US Treasury Secretary Paul O'Neill recounts the development of asset freezing in the wake of 9/11,

[We] moved on ... setting up a new legal structure to freeze assets on the basis of evidence that might not stand up in court ... Because the funds would be frozen, not seized, the threshold of evidence could be lower and the net wider. Yet 'freeze' is something of a legal misnomer — funds of Communist Cuba have been frozen in various US banks for forty years. (quoted in Suskind, 2004: 192)

O'Neill's account demonstrates clearly how those aspects of the war on terror that pivot on financial surveillance have not criminal conviction, but precautionary disruption and extra-legal intervention, as their main objectives.

The uncertain yet catastrophic imagination of precautionary politics, coupled with the imperative *to act*, then, goes some way towards explaining the extent of the surveillance measures enabled under the Patriot Act. These

developments have given rise to deep concerns over civil liberties and democratic values in the war on terror in the US and beyond. One of the leading US critics is law professor David Cole, who strongly criticizes the premise that ‘the new threat requires a new paradigm’, as a discourse of exceptionalism justifies the weakening of constitutional rights, including the right to liberty and due process, privacy, political expression and property (Cole, 2002; see also Cole and Dempsey, 2002; Lyon, 2003; Welch, 2003). Many of these critiques, however, focus on the politics of precaution and legal exceptionalism at work in the Patriot Act or Guantanamo Bay, and can thus be read to apply first and foremost to the US.

### *Calls for Europe*

In the storm of critique over US preemptive security practices, a number of observers are looking to Europe for alternatives. According to Étienne Balibar, who lists and listens to the calls for Europe in the midst of the war on terror, Europe is being imagined ‘either as a demand for a *check and balance*, in order to countervail the American (super) power, or a demand for *mediation* within the “war of civilizations” that America is now apparently waging’ (2004: 214; emphases in original). We have already seen that Garton Ash sees Europe as a concrete political actor that has the ability to check US power on the world stage. Others, like legal scholar Bruce Ackerman, who strongly criticizes US policy but stresses that we do need ‘new constitutional concepts’ and new ‘political imagination’ in the fight against terrorism, look to Europe as a potential source of these. Ackerman (2002) concludes: ‘Europeans should take the lead in developing more constructive solutions . . . A framework law emerging from any major European state would have worldwide influence.’ Ackerman’s point resonates with the widespread idea that Europeans are ‘more concerned with the human rights consequences of counter-terrorist military action’ than Americans are (Fitzpatrick, 2003: 262).

In these debates, a key difference between Europe and the US is thought to be European apprehension of *preemptive* security practice. According to Wyn Rees (2006: 73), for example, ‘the Europeans have expressed profound misgivings over the new American policy direction towards preemption’, and instead regard ‘terrorism as an issue for law enforcement . . . *after* an offence has been committed, [demanding] high levels of proof’ (emphasis added). These differences in ‘strategic culture’, according to Rees and Aldrich (2005: 914), have caused ‘an iciness in transatlantic relations that has not been easy to thaw’.

By comparison, for Jürgen Habermas, in his piece co-signed by Jacques Derrida (2003: 294), European opposition to American preemption is central

to their hope that Europe may 'defend and promote a cosmopolitan order on the basis of international law against competing visions'. The European 'mentality' of a multilateral and legally regulated international order demonstrated itself, according to Habermas and Derrida (2003: 295) when on 15 February 2003, 'so many in Europe who welcome the fall of Saddam as an act of liberation . . . [rejected] the illegality of the unilateral, pre-emptive and deceptively justified invasion'. Other examples that constitute 'Europe' as an alternative normative space within current global security practice could be explored (e.g. Beck, 2002). Here, it is important to emphasize that authors from across the political spectrum explain the transatlantic rift through a conceptualization of Europe that hinges on a rejection of preemption.

### *Governing Europe through the War on Terror*

The question now becomes, can Europe be thought of as political space that offers juridical and normative challenges to US-driven preemptive security practice? Do practices of European governing in the war on terror resist the quest for knowledge embodied in the politics of preemptive security? Expectations concerning the role of Europe as a global counterbalance to US power seemed confirmed when in 2003 France and Germany publicly opposed the US-led invasion of Iraq and effectively prevented the second UN Security Council resolution desired by the US and UK to authorize the use of force (Jones, 2004: 484–6; Cox, 2005: 217–21).

At the same time, however, calls to Europe assume that 'Europe' as a political actor, geographical entity and/or normative framework already exists to answer, or not, to the US politics of preemption. They fail, to some extent, to recognize that Europe *itself* is being reconstituted through the practices of securitization that are embodied in the war on terror. As Jef Huysmans (2006: 148) argues, understandings of insecurity and terrorism and play a key part in constituting the 'governmental identity of the European Union'. In this light, it is important to ask what kind of Europe is brought into being through the war on terror. What 'new conceptions of Europe are at stake' in the war on terror, and 'through what technologies is it to be produced?' (Walters and Haahr, 2005: 92; see also Walters, 2004).

A closer examination of European technologies of counter-terror reveals that Europe, or at least the European Union, vigorously appropriates and develops preemptive security practice.<sup>1</sup> This is not just because the newly drafted European Security Strategy (2003: 7), like its American counterpart, articulates a security environment beset by radical 'new threats' that render the 'traditional concept of self-defence' obsolete, which implies 'that we should be ready to act before a crisis occurs. Conflict prevention and threat prevention cannot start too early.' Even more relevant to the argument here,

are the new measures with regard to, for example, data retention and asset freezing, that enable and underpin precautionary decision-making as a central characteristic of European security practice. The fact that these measures are sometimes *better* embedded in law than they are in the US only means that such practice will be more entrenched in Europe.

This section examines in more detail three technologies of government in the realm of counter-terrorism in the European Union (EU) — in turn, its terrorism definition, its data retention policy, and its fight against terrorist financing. These are important precisely because they embody the quest for knowledge within the politics of precaution, while being particularly depoliticized in comparison to issues like Guantanamo Bay and extraordinary rendition.

### *Criminalizing Terrorism in Europe*

At the heart of the EU's fight against terrorism is its Framework Decision on Combating Terrorism of June 2002, that provides a uniform legal framework for fighting terrorism in the Union (Council of the European Union, 2002). The Framework Decision adopts a broad definition of what constitutes terrorism, defining it as 'intentional acts', committed with the aim of

... seriously intimidating a population; or unduly compelling a Government or international organization to perform or abstain from performing any act; or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization, (Article 1, §1)

Moreover, the Framework Decision sets out measures designed to 'prevent terrorist acts from their earlier stages' in its Articles 2–4, which include 'the incrimination of a new category of terrorist activities, namely, the "acts relating to a terrorist group"' (Dimitriu, 2004: 598, 591). Such a group, however, 'does not need to have formally defined roles for its members, continuity of its membership or a developed structure' (Article 2, §1) and may include 'informal structures' (Dimitriu, 2004: 598). Newly incriminated acts include funding the activities of a terrorist group (Article 2, §2b) and 'aiding or abetting' a terrorist offence (Article 4, §1). The Framework Decision has been criticized for casting its net too widely, and possibly incriminating protest actions by civil society groups (Bunyan, 2002; Amnesty International, 2005: 8–10). The EU terrorism definition has further been criticized for its 'vagueness' (Amnesty International, 2005: 10), and even legal scholar Eugenia Dimitriu, who generally welcomes the Decision, states that 'its scope of application is difficult to assess' (2004: 598).

Particularly important in relation to Europe's turn to preemptive security practice is how the Framework Decision's new incrimination of belonging to

a terrorist group requires the law to look into the future in order to punish not a suspect's actions but a suspect's attitudes and possible future actions (Sorel, 2003). In other words, criminalizing terrorist groupings, terrorist financing and terrorist facilitation fulfills a precautionary function that enables the pursuit and punishment of suspects who have not engaged in any violent act but may (or may not) do so in the future. Such measures, according to Richard V. Ericson (2007: 48), are motivated by the desire to 'cast the net as widely as possible, identify suitable enemies, not worry about false positive identifications'. This results not so much in a law that is proactive, but in the creation of a legal space of exception, where some networks, communications and financial transactions that are not in themselves illegal are singled out for surveillance and intervention.

Indeed, the European Union, through the European Council Strategy for Combating Radicalisation and Recruitment to Terrorism, has created an extra-legal sphere of intervention, where a wide array of functionaries, including teachers, prison workers and community workers, are authorized to intervene in people's lives in the name of preventing radicalization (Council of the European Union, 2005). The European Council Strategy was adopted in December 2005 and sets out a strategy for 'disrupting existing terrorist networks and . . . preventing new recruits to terrorism' (§1). The document calls upon member states to:

... spot such behaviour by, for example, community policing, and effective monitoring of the Internet and travel to conflict zones ... [and] to disrupt such behaviour. We will limit the activities of those playing a role in radicalisation including in prisons, places of education or religious training, and worship ... We must put in place the right legal framework to prevent individuals from inciting and legitimising violence. (§9)

The Council Strategy thus authorizes what Judith Butler calls 'petty sovereigns' to decide on rights of travel and internet use, rights of worship and education, for an undefined group of citizens who may be thought prone to 'radicalization'. In this manner, the Strategy enables far-reaching practices of biopolitical governing, which distinguishes some population groups for exceptional monitoring and treatment (Foucault, 2003), without, as noted by Swedish journalist Mats Engström, much debate on these issues on European level. In fact, Engström (2005: 2) expresses concern about the European identity politics inherent in the Strategy, and writes: 'instead of trying to formulate a shared vision the strategy builds on a dangerous underlying assumption: that "we" (the white part of the European Union population), must prevent "them" (the Muslims) from being radicalised'. For Engström, the secrecy surrounding the Council document is particularly harmful, as it was not subject to public debate in member countries, nor with representatives of

political groups (including Muslim groups), nor within the European Parliament. Debate about the document was in the Council, behind closed doors, and the document was not made public until after it had been agreed upon (except in Sweden).

### *Data Retention*

Second, it is important to examine the recent adoption of the EU Data Retention Directive, as it can be said to illustrate a European appropriation of the precautionary quest for knowledge in which the historical possibilities of the welfare state and new demands of securitization are joined. The Directive was approved by the European Parliament (EP) in March 2006, and requires member states to oblige service providers to retain telecommunications data, including (mobile) telephone, email and internet data, for a period between six months and two years for access by law enforcement agencies (European Parliament and the Council of the European Union, 2006).<sup>2</sup> The Directive is justified by the assertion that electronic communications are a 'particularly important and therefore a valuable tool in the *prevention*, investigation, detection and prosecution of criminal offences, in particular organised crime' (§(7); emphasis added), and thus is explicitly *not* restricted to terrorist investigations. The Directive's ambition to retain and make available for inspection data of *all* communication within Europe fits seamlessly into precautionary security practice, where it is assumed, in the words of Van Munster (2004: 151), that 'the front is everywhere and no one can expect to be exempted from the network of surveillance and inspection. In a sense everybody is a suspect.'

The adoption of the Data Retention Directive was a direct result of a particular political appropriation of the tragedy in London in July 2005. At the Extraordinary Council Meeting of 13 July 2005 in the wake of the London bombings, UK Home Secretary Charles Clarke strongly supported implementation of the data retention proposal that had previously been controversial in the European Parliament (EP). In a September 2005 speech to the EP, Clarke emphasized the precautionary potential of data retention:

Information is the life-blood of law-enforcement operations ... To tackle organized crime and to stop terrorist groups before they carry out activities [law enforcement] need a clear picture of who the criminals are, what they are doing, where they are and how they communicate with each other.

Earlier, the Committee on Civil Liberties, Justice and Home Affairs of the EP had objected to the proposal and called for its withdrawal. In May 2005, the Committee released a report contesting the proposal's basis in

Community Law, and arguing that it failed the test of proportionality. The Civil Liberties Committee wrote,

The ends [of the data retention proposal] do not justify the means, as the measures are neither appropriate nor necessary and are unreasonably harsh towards those concerned. Given the volume of data to be retained, particularly Internet data, it is unlikely that an appropriate analysis of the data will be at all possible. (Alvaro, 2005: 7)<sup>3</sup>

The Committee, in other words, tried to contest a fundamental aspect of the politics of precaution, which is that proportionality is no longer applicable in security practice, as the terrorist threat is to be conceptualized as potentially catastrophic. However, the objections of the Civil Liberties Committee found little resonance in European public debate, and in the wake of the London bombings they were widely thought to be disproved.

It is important to note, then, that the EU Data Retention Directive goes some measure beyond current US policy — the NSA's ambitions notwithstanding. In the US, it remains politically controversial to require data retention for access by government, and issues of privacy and civil liberties are able to generate widespread political support, also among Republicans (Hansell and Lichtblau, 2006). In Europe, privacy is less a point of politicization as the welfare state has historically demanded extensive government access to personal information, and strong welfare states like the Netherlands and Germany are at the forefront of fusing governmental and non-governmental databases in the name of security practice, without causing so much as a ripple in public debate (e.g. Vedder, 2006). Privacy certainly is a questionable point of politicization; it can be criticized for being a libertarian middle-class concern and, more importantly, it does not question the premise that data-mining and surveillance can correctly identify suspicious groups if appropriate legal safeguards are in place (Amoore, 2006: 340–1; see also Stalder, 2002). However, in the absence of privacy as a concept with broad public appeal, there was very little politicization at all of the Data Retention Directive within European public space.<sup>4</sup>

The ways in which the politics of precaution are given shape through data retention in Europe still depend on the implementation of the Directive, as it leaves the stipulation of legal safeguards around the retained data up to individual member states. The European Data Protection Working Party has already called for a number of legal safeguards to be put in place, including the juridical authorization of data access on a case-by-case basis and on grounds of reasonable suspicion. The Working Party further rejects data-mining as well as the possible use of retained data for commercial purposes (EDPWP, 2006). But it is clear that with the Data Retention Directive, the EU has given its member states the incentives and the tools to introduce

unprecedented preemptive security practices into national law, without, at this point, stipulating legal safeguards.

### *Terrorist Finance*

Finally, it is important to examine how the fight against terrorist finance is taking shape in Europe, as this fight is at the heart of current preemptive security practice. As discussed earlier, asset freezing is a preferred measure in the war on terror because it enables security action on the basis of evidence that is not designed to hold up in court. Blacklisting and freezing, then, are preemptive measures targeted at terror *suspects*, and juridical review does not necessarily follow these security actions. In the wake of 9/11, the assets of a number of European citizens and organizations were frozen, most notably of Swedish citizens of Somali descent involved in money transfers to Somalia through the al-Barakaat financial network. Al-Barakaat was believed by the US to be channeling money to al-Qaeda, and its US offices were raided in November 2001 after which its name was placed on a terrorism blacklist. This blacklist, like previous terrorism blacklists, was subsequently transposed into international law by the UN Sanctions Committee, and into European law by various Council Regulations (Tappeiner 2005; Guild 2008). As a result, the affected Swedish citizens did not just have their assets frozen, but it became interdicted for third parties to offer them money or financial services, as a result of which life in modern society for targeted persons became extremely difficult. As legal scholar Iain Cameron and his colleagues put it, 'the sanctions . . . are designed to paralyse totally the applicants' economic lives' (Andersson et al., 2003: 137).

Two elements of the implementation of economic terror sanctions in Europe are particularly relevant to the argument being developed here. First, the sanctions depend upon a blurring of the boundaries between US and European governing, as the European blacklist is based on secret evidence from intelligence sources, most often US intelligence. As a consequence, blacklisted persons often do not know why exactly they are being sanctioned, and neither the EU, nor the state in which the targeted citizen resides, has the ability to see and judge the evidence against the targeted person (Cameron, 2006). Second, blacklisting represents a legal space of exception, as it is not done by a court of law but by the Sanctions Committee of the Security Council (often on the instigation of the US government). If those targeted feel they have been wrongly accused, it is their task to prove their innocence. Because the EU Council Regulations that implement the UN sanctions *directly* affect EU citizens, targeted persons cannot appeal to the national judiciary for removal from the list but have to start proceedings at the European Court in Luxembourg, which the targeted Swedes did (Cameron, 2003; Andersson et al., 2003; Vlcek, 2005).

Apart from these legal issues, it is important to note that substantial evidence has emerged that there are errors with the US terrorism list in general and the accusations against al-Barakaat in particular (de Goede, 2003). The US itself has dropped proceedings against al-Barakaat, and a number of suspects, including two of the targeted Swedes, were removed from the UN blacklist in August 2002.<sup>5</sup> One al-Barakaat suspect, Mohamed Hussein, *was* convicted in the US of operating an unlicensed money transfer business, but no mention was made of terrorism or terrorist finance in his indictment. Moreover, the 9/11 Commission's investigation into terrorist finance contains a detailed case study of al-Barakaat, which finds no evidence that it was linked to terrorism. The Commission's *Monograph on Terrorist Finance* concludes:

Notwithstanding the unprecedented cooperation by the UAE, significant FBI interviews of the principal players involved in al-Barakaat (including its founder), and complete and unfettered access to al-Barakaat's financial records, the FBI could not substantiate any links between al-Barakaat and terrorism. (Roth et al., 2004: 82–4)

Despite these developments, the EU Court of First Instance in Luxembourg ruled against the Swedish petitioners in September 2005. The Court of First Instance ruled asset-freezing to be part of the United Nations' legitimate fight against international terrorism and decided that UN law takes precedence over European law. The Court did, however, evaluate the freezing order in terms of a possible breach of the suspects' human rights. What is most striking about the Court's ruling is its annulment of the pleas alleging a breach of human rights on the basis that blacklisting and freezing are legitimate *precautionary* instruments in the war on terror. According to the Court (2005a: §299), 'the freezing of funds is a *precautionary measure* which, unlike confiscation, does not affect the very substance of the right of the persons concerned to property in their financial assets but only the use thereof' (emphasis added; see also Court of First Instance, 2005b). The most important aspect of the Court's definition of 'precautionary measures' seems to be the *temporality* of a measure, emphasized in many paragraphs of the ruling (e.g. §§16, 26, 37, 344). The precautionary and temporary nature of asset-freezing subsequently serves as the legal basis upon which the Court (2005a: §320) concludes that the right to a fair hearing is *not* breached:

[When] what is at issue is a temporary precautionary measure ... the Court of First Instance considers that observance of the fundamental rights of the persons concerned does not require the facts and evidence adduced against them to be communicated to them.

The Court legitimates asset-freezing as a precautionary security practice and transposes the language of precaution into European jurisprudence, while

failing to acknowledge the more problematic aspects of freezing. For example, we have seen that former US Treasury Secretary O'Neill admitted that freezing was developed *precisely* in order to enable action 'on the basis of evidence that might not stand up in court' (Suskind, 2004: 192). Indeed, as Cameron (2006) writes in his report to the Council of Europe, 'freezing measures are *alternatives* to criminal investigations', meaning that a trial and juridical review of the measure does not automatically follow. And indeed, as we have seen, Cuban funds have been frozen in the US for up to 40 years.

The European Court's decision has consequences that resonate far beyond the affected Swedes' position, as fighting terrorist finance in general and preemptive freezing in particular are practices vigorously being developed by the EU.<sup>6</sup> The Netherlands, for example, has been so active in the fight against terrorist finance that the US appointed it to host a special seminar on the topic, which took place in March 2006 in The Hague (de Goede, 2006b). In his opening speech to the seminar Dutch Minister of Finance Gerrit Zalm (2006) emphasized the importance of freezing, and said, 'The freezing of assets is still not as preventive as it should be ... This should be a key priority for all countries.' The extent to which authorities are willing to go in targeting terrorist finance is evident from recent remarks by (now former) US Treasury Secretary John Snow, which criminalize the everyday financial activities of the would-be terrorist who supports his family: 'A terrorist organization like al Qaeda needs to be able to raise, move and store money in order to recruit, train and pay operatives, *support their families*, purchase false documents and detonators, as well as to plan and carry out attacks' (Snow, 2006; emphasis added). The remarks by Zalm and Snow carve out a legal space of exception where everyday and perfectly legal financial transactions of particular groups can become subject to monitoring and freezing, without juridical remedy.

### *Challenging the Politics of Precaution*

It becomes clear that, with respect to technologies of government that play a key role in preemptive security practice, including criminalizing terrorist support, data retention, and asset freezing, the European Union is world leader rather than reluctant follower. European leaders — with obvious exceptions — may have challenged the war in Iraq, but they are themselves vigorously appropriating and developing important aspects of preemptive security, especially those that make 'precautionary logic part of everyday life', such as data retention and financial transactions monitoring (Ericson, 2007: 39). This challenges the widespread assumption that preemptive security practice is specifically American and is either widely resisted, or very reluctantly followed, by Europe. To some extent, the very

conceptual separation between Europe and US as distinct entities of governing needs to be questioned in light of some recent counter-terror measures, for example asset freezing (see also Den Boer and Monar, 2002).

It is perhaps *precisely* Europe's cosmopolitan image, and especially its perceived opposition to a politics of preemption, that stifles broad public debate about precautionary security practice in the European Union. I argue instead that there is nothing inherent in European politics or values to question preemptive security practice. Debate concerning the legitimacy and desirability of precautionary security practices must be actively fostered within European public space. Such debates need to examine how in the war on terror complex assemblages of government are forged in which the boundaries between European and American power, as well as public and private power, are collapsed. It seems that there are at least three avenues along which the democratic implications of preemptive security practice ought to be evaluated and critiqued. First, precautionary security practice produces unaccountable spaces of decision-making. Second, the legitimacy of the work of the 'managers of unease' may be subject to debate. Third, there is a worrying absence of reflexivity in the logic of precaution that disables political responsibility for the consequences of security decisions. This article can do no more, by way of conclusion, than offer a preliminary discussion of each of these avenues.

First, as we have seen, precautionary security practice enables spaces of governing where unaccountable and pre-legal security decisions are made. Butler coins the term 'petty sovereigns' for bureaucrats and mid-level officials who are newly authorized to make security decisions in the extra-legal spaces of detention and freezing. The petty sovereigns' lack of legal and democratic accountability is particularly worrisome to Butler (2004: 56), who writes:

Petty sovereigns abound, reigning in the midst of bureaucratic army institutions mobilized by aims and tactics of power they do not inaugurate or fully control. And yet such figures are delegated with the power to render unilateral decisions, accountable to no law and without any legitimate authority.

Importantly, these unaccountable spaces of decision-making are found not *just* in government bureaucracies, but increasingly also in diffuse private spaces, such as airline companies and banks. Their governing effects do not just target precisely circumscribed risk groups (which in itself is problematic), but affect society at large, through assumptions and definitions of 'normal' behaviour. Even those broadly in favour of precautionary security practice will have to engage with the question of the legitimacy of these spaces of unaccountable decision-making and the ways in which they resonate throughout society.

Second, a debate on precautionary security practice would have to address the legitimacy of the work of the 'managers of unease,' who imagine, calculate,

and classify terrorist threats. While technologies of calculating uncertainty are multiplying far outside traditional domains of science and statistics, their expertise remains largely unquestioned. If precautionary security entails new practices of imagining the 'unimaginable', in the form of, for example, disaster rehearsal and worst-case scenario planning, ought we then not to scrutinize precisely these techniques and assess their 'scientificness'? Suskind's investigation of CIA practice in the war on terror certainly suggests the urgency of such questions. He reveals how the grounding of a number of Air France flights around Christmas 2003 was based on a numerological analysis of 'the summary of headlines' running along the bottom of the TV screen of the Al-Jazeera daily broadcast. 'In the numerology', according to the CIA Office of Science and Technology, 'were plans for an attack that would exceed 9/11' (Suskind, 2006: 284). The managers of unease are engaged in the pursuit of security *action* (such as grounding planes) precisely because of the reworked political responsibility that entails that governments are *guilty* if they do not detect a danger even before it is realized. In contrast, however, risk specialist John Adams questions this 'blame culture' and offers the possibility of re-appropriating conceptions of radical contingency. Adams (2005) writes:

God and bad luck have been banished. Large armies are employed in the production of risk assessments, whose purpose is the identification and avoidance of all conceivable sources of misfortune. But whatever risk assessors might want from the world, the future remains uncertain.

Third, and paradoxically, the same logic that holds government responsible for disasters not averted disables political responsibility for disasters *brought about* by precautionary action. The vision of the worst-case scenario, 'too awful to contemplate', has substantial power of justification for bad security decisions. As David Runciman (2004) puts it, 'Should worst-case scenarios, if they are sufficiently terrible, trump all other considerations when politicians have to decide what to do? . . . This stance . . . does not take seriously enough the downside of getting things wrong.' It is not just the case that, as Adams (2004: 10) puts it, 'risk aversion is not cost free'. It is moreover the case that there is a lack of reflexivity that makes it almost impossible to debate the role that precautionary action *itself* plays in shaping a contingent future. Because the politics of precaution perceives itself to act on a virtually existing future disaster (albeit one not yet actualized), its intervention is seen as merely disrupting, or not, that future, and cannot be held responsible for the full complexity of a *contingent* future that would never have been without its acting. For example, Dershowitz (2006: 16–17) defends his position as follows:

It has been argued that ... predictive decisions are inherently probabilistic (e.g. how likely is it that it will rain tomorrow?), whereas retrospective decisions are

either right or wrong ... But this is really a matter of how the issue is put. Predictive decisions are also either right or wrong: *It will either rain tomorrow or not.* (emphasis added)

Clearly, Dershowitz employs an unreflexive conception of decision-making, where the future is uncertain because we have a lack of knowledge (it has already been decided whether it will rain tomorrow, we just do not know it yet) and *not* because it is contingent (whether it will rain depends upon a complexity of factors that is still unfolding and that is partly shaped by decisions in the present).<sup>7</sup> As a consequence, current decision and action are seen to have no bearing on the ways in which the future unfolds. This approach can only see casualties in the war on terror as collateral damage — if it notices them at all — and not something for which the political practice of precaution itself has to take full responsibility.

At the same time, however, the violence and casualties of the preemptive imperative to act are multiplying across Europe. As Louise Amoore points out in relation to the London police shooting dead of innocent Jean Charles de Menezes in the wake of the London bombings, in the moment of decision of shooting ‘the logic of the profiling of suspicious behaviour’ was at work (2006: 348). And it is precisely this violence, that is not accidental but inherent in current anti-terror action, violence not just in terms of the wrongly shot, but also of the wrongly accused, preemptively arrested and economically expelled, that is currently shaping our contingent future in unpredictable ways. Hannah Arendt’s thoughts *On Violence* illustrate precisely this, as she writes:

While the results of men’s actions are beyond the actor’s control, violence harbors within itself an additional element of arbitrariness; nowhere does Fortuna, good or ill luck, play a more fateful role in human affairs than on the battlefield, and *this intrusion of the utterly unexpected does not disappear when people call it a ‘random event’* and find it scientifically suspect; nor can it be eliminated by simulations, scenarios, game theories and the like. (1972: 106; emphasis added)

Questioning the logic of the politics of precaution does not rely on a particular geographically imagined actor or identity, but depends upon a contingent political space in which a profound unpredictability of the future is recognized.

### *Conclusion*

In Europe, we like to think that the language of hunting down the terrorists and striking preemptively is particularly American. More importantly, we think that policies authorized in the name of preemption and the issues they

raise concerning human rights and civil liberties are typically American. To some extent, it is precisely this discursive positioning of the US that underpins the image of Europe as particularly multilateral and cosmopolitan. In this article I have tried to show that we must remain critical of the image of cosmopolitan Europe, lest it enables precisely those precautionary politics that Europeans are thought to object to.

Indeed, the positioning of Europe's cosmopolitan identity in the war on terror partly hinges on a questionable opposition between force and law. As we have seen, according to Rees and Aldrich (2005: 913–14) Europe's desire to adhere to the 'rule of law' makes it less disposed to use force. This argument, however, assumes law and force to be opposites and disregards the important implications of what Jacques Derrida calls the 'force of law'. The enactment of law itself, according to Derrida (1992: 13), depends upon a *coup de force* that is understood to be an 'interpretative violence that in itself is neither just nor unjust', since it precedes law. Thus, the foundation of law *itself* entails an original violence, and the law 'is always an authorized force' (Derrida, 1992: 5). Rendering visible the force of law sheds a different light on Europe's supposed reluctance to use force in the context of the war on terror. If it is indeed the case that Europe is a stronger proponent of the rule of international law than the current US administration, then it may also be more willing to enable the violent performance that entrenches preemptive security practice in law. This is perhaps best exemplified by the European Union Austrian Presidency's alleged proposal to *legalize* extraordinary rendition, by making it admissible within certain legal constraints. Such legalizing of what was a preemptive, prejuridical, practice, would require the force of law — which Europe, at the moment, seems more willing to deploy than the US. In this sense, then, law and force are not opposites, and Europe's identity can only be comprehended through its willingness to deploy the force of law to legalize a politics of preemption (cf. Ericson, 2007: 26).

Challenges to the politics of precaution cannot be founded upon a securely imagined geographical space, but arise in a contingent space of politics where the force of preemption is rendered visible. By letting imagined catastrophes and disasters guide policy-making, new uncertainties and accidents are manufactured, including the injustices associated with wrongful arrest and freezing, and the resentment that these 'security actions' engender. Instead, as Didier Bigo (2001) recommends, 'Rather than the ambiguous discourse of politicians and experts who, in trying to reassure the public, conjure up an impressive list of vulnerabilities never imagined by this very public, we would do well to adopt the slogan of "living with terrorism".' Living with terrorism would not reject prosecuting those involved in violence, but it would put the risk of terrorism into perspective (Buzan, 2006: 1118), and resist policy-making on the basis of imagined catastrophic futures.

### *Notes*

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1. It is not my intention to reduce Europe to the practice of the European Union. But I do argue that looking at EU technologies of governing gives substantial insight into current developments across Europe. Policies in individual member states at times go far beyond the measures discussed here; for example, UK policies on preemptive detention. National counter-terror policy is beyond the scope of analysis here; for a comparative analysis, see Neve et al. (2006).
2. The data retained do not include the *content* of communication.
3. The Committee also judged the data retention proposal to be incompatible with Article 8 of the European Convention of Human Rights, which stipulates the right to privacy, and it expressed worry that the large amount of data to be retained violates the principle of presumption of innocence (Alvaro, 2005).
4. Organizations that did try to generate public debate on these issues in Europe are the European Digital Rights Forum and European Civil Liberties Network.
5. See Security Council Press Release at <http://www.un.org/News/Press/docs/2002/sc7490.doc.htm>.
6. As this article goes to press, there are indications that the EU may be forced to reconsider its stance on blacklisting. In a case similar to that of the Swedish suspects, Advocate General Poirares Maduro recommends that the European Court of Justice disregards the Security Council decision, and delists Saudi business man Yassin Abdullah Kadi (European Court of Justice 2008). It remains to be seen whether this recommendation will lead to a challenge to the politics of preemption in Europe.
7. In addition, of course, Dershowitz' weather example is misleading and intended to naturalize terrorist futures (by comparing them to the weather). The problem of reflexivity in terrorism is much more acute because of its social dimensions.

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