THE PARADIGM SHIFT IN THE GLOBAL RISK SOCIETY: FROM CRIMINAL LAW TO GLOBAL SECURITY LAW – AN ANALYSIS OF THE CHANGING LIMITS OF CRIME CONTROL –

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I. Introduction: New Threats, New Fears, and the Dogma of Security

Cases of international terrorism, organized crime, economic crime, and other forms of complex crime illustrate the significant impact of crime and the importance of crime control to society as a whole. Not only do these cases dominate public discussions, the media, and political discourse. They are also causing a fundamental paradigm shift in criminal policy in general and in the architecture of security law in particular – a development that goes largely unnoticed by the general public.

This paradigm shift is based, on the one hand, on objective changes such as the emergence of new threats and new types of complex crime, for example, terrorism, organized crime, and cybercrime. On the other hand, it is due also to changes in people's subjective levels of well-being: objective changes lead to greater fear of crime. In many countries, these feelings of insecurity and the resulting demands for stricter laws are embraced by populist politicians seeking (re-)election. Their policy of "governing through fear of crime" is reflected in the rise of extremist parties calling for protection against migrants and strangers and for increased security against crime.

The combination of these objective, subjective, and political factors has greatly influenced criminal policy in recent years: in many areas, crime control is no longer dominated by the traditional questions of culpability and punishment but rather by the issues of risk and dangerousness and by the future-oriented themes of prevention and security. This dogma of security as described has led to fundamental changes in existing approaches to social control and to the emergence of a new aim: providing security by means of early prevention.

This development can be seen both within and outside of criminal law, dissolving the limits between the legal regimes into a kind of overall "security law". This law is governed by a new architecture, which is no longer monopolized by criminal law but by a variety of different legal regimes such as intelligence law, police law, the laws of war, or civil law. The new architecture of security law goes hand in hand with a loss of legal guarantees within and, in particular, outside of criminal law.

The aim of this lecture is to describe and to understand these fundamental changes within the global risk society better. For this purpose, it will briefly analyse the contours and regimes of the emerging security law (part II), It will then deal especially with the accompanying process of decreasing legal guarantees (part III). Lastly, the summary (part IV) will recapitulate and explain this overall legal development in the global risk society in more detail and stress the need for future research on this topic.

II. The Emergence of Preventive Security Law

A. Preventive Criminal Law

The traditional concept of criminal law is changing in important areas from being a repressive, punitive instrument to being a primarily preventive tool designed to minimize dangers and risks. In the area of *substantive criminal law*, this new preventive approach is based on the protection of overall social interests (such as the „financial market") in advance of criminal activity against individuals as well as on the criminalization of early (often commonplace) preparatory acts that pose specific risks or are executed with the intent of committing a crime. An example of this development is the criminalization of the attempt to leave the country with the aim of receiving weapons training in a terrorist training camp located abroad, as was recently enacted in Germany.

A corresponding preventive aspect of criminal law can also be found in the field of *criminal procedure*: many clandestine powers for secret surveillance available in police law and intelligence law are now also used in criminal procedure or law enforcement. These powers represent the procedural equivalent to preparatory inchoate offenses in substantive criminal law as they facilitate the investigation of activities in this preparatory phase. Such powers are found not only in many legal orders but they also dominate the criminal policies of international organizations. They threaten the balance between security and liberty, a balance essential to democratic societies.

B. Non-Criminal Regimes of Security Law

Parallel and in addition to these changes *in* criminal law, there are similar changes **outside** of **criminal** law: criminal law-based policies for social control are yielding to security-based policies. Thus, police law, intelligence law, laws of war, civil law, and private law are taking over tasks that until recently were within the ambit of criminal law. In many cases, these alternative legal regimes may permit more intrusive interference with civil liberties compared to criminal law and may be subject to significantly less comprehensive legal guarantees.

- This can be seen, for instance, in the use of **intelligence law** for crime control purposes: Enquiries by intelligence agencies do not require the existence of a suspicion; in contrast, starting a criminal investigation requires such a suspicion in order to protect citizens against intrusion and an excessive search for crime.
- **Police law** in many countries is acquiring new and intrusive control instruments, among them those for confronting so-called „endangerers" (in Germany), for „control orders" that are similar to criminal law measures (e.g., in England), and for "administrative detention" with few legal guarantees (such as in Israel).
- The **laws of war** are being construed (esp. in US law) to permit the targeted killing of alleged terrorists without proof of criminal activity and with no judicial oversight.
- So-called **„administrative sanctions"** can lead to the imposition of staggering fines in the course of procedures that offer minimal legal guarantees, as is illustrated by the EU Commission's powers in dealing with the cartel offenses in European competition law or the sanctions against banks and other companies imposed by the American Securities and Exchange Commission.
- **„Civil asset forfeiture"** and „non-conviction based confiscation" against suspected criminals and „unjustified enrichment" permit, in an increasing number of

countries, the confiscation of assets. This approach is based on the less stringent civil law standard of "preponderance of the evidence" and do not require a criminal conviction.

- What is more, **private compliance programs** in many Western states lead to investigations by private companies, all in the absence of proper safeguards.

C. Additional Changes in the Global Information Society

threat to the protection of individual liberty posed by the new "security law" is exacerbated by two additional changes that are caused by the shifts of global risk and information society:

As a consequence of today's **information society**, the use of *effective IT-based technical surveillance measures* and the collection, storage, and mining of massive amounts of personal data lead to new concepts of investigation and prevention that already go far beyond all previous visions of a surveillance („Big-Brother") state. On this basis, new concepts of „predictive policing" might lead to the early identification of potential criminal activity in the future. As a consequence, the traditional conflict between liberty and security has, in this field, expanded to a conflict between privacy and crime control.

In addition, as a result of the **global society**, many legal orders have developed new models for *transnationally effective criminal law*. These new models lead to conflicts between the efficiency of transnational crime control, on the one side, and the protection of individual rights and of the sovereignty of the state involved in a conflict, on the other. This is the case, for example, with respect to the abandonment of traditional models of legal mutual assistance in favour of the direct recognition of foreign decisions, a development that gives precedent to security interests and weakens the protection of individuals. The same applies with regard to global strategies for new sanction regimes – such as the United Nations sanctions against terrorism. Transnational investigations in foreign countries lead to similar results (e.g., with an online investigative measure that, without recourse to mutual legal assistance, directly accesses foreign servers to investigate crime). In all of these models, existing legal guarantees for the protection of citizens are much weaker than in traditional law and may even be completely absent.

D. The Emerging Architecture and Characteristics of Security Law

The above analysis has shown that, in important areas of crime, criminal law is transforming from a repressive to a more preventive function. At the same time, criminal law is losing its monopoly on crime control, as it is amended (and sometimes replaced) by other legal regimes.

The combination of the traditional criminal law, the new preventive criminal law, and these non-penal legal regimes can be more efficient in preventing crime than traditional repressive criminal law is. They permit early arrests and lengthy „incarceration" of potential perpetrators (by preventive criminal law), the targeted killing of suspected terrorists (by laws of war), the comprehensive collection of mass data without any suspicion (by intelligence law), the confiscation of unexplained wealth based on a preponderance of evidence (by civil law-based confiscation systems without conviction), efficient and quick procedures against illegal cartels or fraudulent companies (by so-called administrative sanctions), and the self-investigation of companies that are expected to

present both the offender and the respective evidence on a silver platter (based on compliance regimes and sentencing guidelines).

However, the examples not only illustrate the advantages of these alternative systems of crime control when it comes to improving security. They also show that these systems have less legal guarantees for protecting the liberty of citizens concerned. Compared to the rules of traditional criminal law, the regimes described above might, for instance, overstrain the instrument of criminal law and infringe the principle of culpability (in preventive criminal law), create a non-judicial death penalty (in the laws of war), neglect the limitation of criminal investigations in cases of suspicion (in intelligence law), infringe the criminal law standard of proof beyond reasonable doubt (in civil law-based confiscation), abolish a multitude of legal guarantees (in administrative sanction law), circumvent the interdiction of self-incrimination, and many other guarantees of criminal procedural law (in compliance regimes). All such activities would not be possible under traditional repressive criminal law. This illustrates that the advantage in security reached by these new regimes comes at the expense of liberty. Since the goal of criminal law (and similarly of the other legal regimes) encompasses both aims, security *and* liberty, evaluating this new development is difficult and must be done in a differentiating way.

Up until now, we lack – besides a comprehensive empirical analysis – such an evaluation of the new regimes of security law: The shift to prevention is being critically discussed only with respect to preventive criminal law and many legal scholars reject this change fundamentally. Therefore, the criminal law community is largely oblivious to the increasing shift towards non-criminal regimes for crime control due to its dogmatic focus on the traditional penal law. This insularity brings with it a serious risk: While criminal law might uphold its dogmatic principles and guarantees, these principles could be undermined by changing the legal regimes for crime control or by using a sanction regime with a false non-criminal label (such as possibly „*administrative* sanction law" or „*civil law*-based confiscation"). In some countries this development is already under way.

For these reasons, criminal lawyers should neither prematurely reject nor close their eyes to the development of these non-criminal systems for social control. On the contrary, we must actively participate in the construction of the emerging new legal architecture. Criminal lawyers possess not only a general knowledge of crime control. They also have the necessary experience and understanding to grasp the potential for abuse inherent in crime control since the history of criminal law is, to a large extent, a history of its abuses. For this reason, criminal lawyers must always be aware that criminal law has two equivalent aims: providing security *and* protecting freedom.

Since the practical advantages of applying the new legal regimes are obvious, we should deal especially with the necessary safeguards against abuses of crime control in the emerging security law. The following part of this analysis therefore deals with the question of how far the guarantees of criminal law are changing and could or should be upheld if crime is tackled by preventive criminal law and non-criminal legal regimes.

III. Legal Limits for the New Architecture of Security Law

Legal limits to an otherwise boundless security law can be derived primarily from national *constitutional law* and from international human rights guarantees, such as the European Convention for Human Rights, the EU Charter of Fundamental Rights, the Geneva Conventions and Additional Protocols, as well as other international conventions.

In addition, limits of law can also be based on general principles of legal doctrine, especially the dogmatics of criminal law *(Strafrechtsdogmatik)*. Some of the respective fundamental principles are recognized by all and some only by a number of scholars. These dogmatic principles are non-binding for the legislature, but can be advocated as best practices for good legislation. However, these differentiations between constitutional law and dogmatic principles are blurring: A specific guarantee can be based on constitutional law in one country and be justified as a dogmatic principle in another legal order; in addition, some of these principles might have a chance to develop into future constitutional law at a later stage; in some cases it is unclear if a guarantee has constitutional or only a dogmatic justification. Thus, the legal sources of limits to the emerging security law may vary between different legal orders, are time-dependent, and often controversially disputed.

For this reason, an internationally viable concept for the limits of security law should not be based on legal sources, but be structured according to factual questions. These concern:

A. the definition of criminal law, its specific guarantees with respect to preventive criminal law, and the possible recognition of a „light criminal law” with attenuated guarantees, as well as

B. the development of special safeguards for other (non-criminal) legal regimes with specific foundations, applications, and exceptions.

A. Defining Criminal Law and Its Limits

Criminal law has developed specific guarantees for protecting civil liberties since the Enlightenment. Due to this long historical development and the dominance of criminal law-based guarantees, the following concept on the limits of security law starts with three fundamental questions: (1) Does criminal law have specific features which differentiate it from the other regimes of security law and which can justify and define the range of specific guarantees applicable to criminal law? (2) Which limits exist or can be developed based on the range of these guarantees in order to guard against a too far-reaching preventive criminal law? (3) Can these limits for criminal law be reduced by creating a “light criminal law” (e.g. an “administrative sanction law”) with more lenient penalties and attenuated guarantees compared to traditional criminal law?

1. The Definition of Criminal Law and the Justification of Specific „Penal” Guarantees

The severity of criminal sanctions alone cannot be viewed as a specific feature of criminal law and as a special justification of its guarantees, since grave consequences – including the deprivation of liberty – can also be found in other regimes of (esp. public) law. For this reason, the main particularity of the legal consequences of criminal law lies in the combination of a sanction with ethical blame (e.g., connected with the criminal label provided by the legislature, which defines crimes esp. by specific names for „criminal” sanctions). In addition, sanctions of criminal law go beyond the restitution of illegal enrichment and beyond measures necessary for the technical prevention of future acts (e.g., by police law) or other specific legal purposes (such as taxation). What distinguishes criminal sanctions from the preventive measures of German police law, from the confiscation measures for re-establishing the *status quo ante*, and from the other measures

listed above is its imposition of the legal detriment with the goal of deterring the perpetrator and/or the general public.

Based on this concept, specific guarantees of criminal law can indeed be justified in light of the combination of these severe factors of blame, detriment, and the "use" of the perpetrator to deter others (a mechanism that can be called into question with respect to its operability and the legitimacy of "using" the perpetrator to deter others). In addition, these special guarantees of criminal law historically originated in reaction to specific abuses and risks of criminal law which continue to exist in many legal orders. Such special guarantees safeguarding against typical abuses of criminal law include, for example, the principle of „nullum crimen sine lege parlamentaria", the rejection of an analogous application of criminal statutes, the principle „ne bis in idem", or the necessary proof beyond reasonable doubt.

The characteristic features of this definition of criminal law and the scope of its guarantees can be found in slightly different variations in the concepts of criminal law and criminal sanctions as developed by constitutional courts and human rights courts. For example, the respective Engel criteria of the European Court of Human Rights define criminal sanctions by (1) the classification of the measure in national law, (2) the nature of the offence (esp. its aim and purpose), and (3) the degree of severity of the penalty risked (with no minimum requirement for criminal sanctions). If sanctions are not characterized by the legislature as criminal, the ECtHR does not judge them to be criminal as long as they only re-establish the *status quo ante* or are focused on future prevention. This means that the confiscation of the proceeds of crime or of dangerous instruments used to commit crimes, as well as other purely preventive measures do not fall under the concept and the guarantees of criminal law if the legislature does not label these instruments as criminal and does not attach any ethical blame. Thus, based on the ECtHR definition of crime, the legislator can exclude the legal consequences of police law, intelligence law, the laws of war, and civil asset confiscation from an application of the criminal law guarantees if he defines these legal consequences properly. As a consequence, purely compensatory and purely preventive regimes have to be restricted by their own guarantees and limits.

Contrary to these legal regimes, the preventive criminal law discussed above is unquestionably part of criminal law since it combines ethical blame (through its designation and classification by the legislature) with grave legal consequences going far beyond restitution and direct ("technical") prevention and instead aims to deter the perpetrator and the general public from further acts.

2. The Specific Limitations for Preventive Criminal Law

The above-mentioned alignment of preventive criminal law leads to the question of whether constitutional law or dogmatic principles of criminal law are able to effectively limit a preventive criminal law that has become excessive. This question becomes relevant, for example, if the legislature decides to criminalize purely subjective criminal ideas or everyday actions performed with criminal purpose. An example of the latter is a recently-enacted German statute criminalizing the collection of assets with the intention to finance terrorist acts. In the hearing of the expert commission of the German parliament, I argued that this extension of criminal law comes quite close to criminalizing pure thoughts and contradicts the principles of criminal law and possibly also the constitutionally protected principle of culpability.

In German law, the principle of culpability is not mentioned in the text of the Constitution, but is recognized by the Federal Constitutional Court as a special constitutionally protected principle. The Federal Constitutional Court requires that the penalty must be proportionate to the gravity of a criminal act and the perpetrator's degree of fault: Culpability is thus both „one of the legitimizing reasons for, as well as the outer limit to imposing and enforcing a prison sentence." The basis for punishment lies in the offender being guilty of „reproachable wrongdoing". Thus, culpability for an action must be derived from a combination of both objective wrongdoing and personal fault. For this reason, one can argue that the respective statutes of preparatory criminal law are only legitimate if they are not only based on *subjective intentions* of the perpetrator but also require *indicative objective elements* of crime.

In a similar way, it is possible to develop limits against other types of „inchoate offences", „abstract endangerment statutes", or other types of preventive criminal law. Under German law, for example, limits for statutes designed to safeguard vague social interests (like the public peace) can be based on the constitutional requirement of a legitimate aim and a proportional means of protection, or (less binding but more specific) the dogmatic requirement that criminal statutes should only protect precisely defined legal interests. These examples illustrate that constitutional law and legal doctrine are capable of developing at least some adequate limits for preventive criminal law.

3. Recognition of a "Light Criminal Law" with Attenuated Guarantees

According to the Engel criteria of the ECtHR described above, the scope of criminal law with its specific guarantees encompasses not only the traditional core criminal law but also the regimes of so-called administrative criminal law, administrative sanction law, and the law of regulatory offences (e.g., the German *Ordnungswidrigkeitenrecht*). In the context of administrative criminal law, the Court stresses that „there is nothing in the Convention to suggest that the *criminal nature* of an offence, within the meaning of the Engel criteria, necessarily requires a *certain degree of seriousness*" (emphasis added). It reiterates that „the *lack of seriousness of the penalty* at stake cannot deprive an offence of its inherently *criminal character*" (emphasis added). Thus, as far as administrative offences are concerned, there is no requirement in the jurisprudence of the ECtHR of a certain minimal degree of ethical blame, a factor that traditionally forms the basis of criminal culpability in national penal law regimes. The ECtHR deals with minor offences in a more flexible manner and extends its application of Article 6 of the Convention to include such cases if the nature of the administrative offence in question protects values or interests of society that are *„usually protected by criminal law"* and if „the aim of administrative sanctions is to *punish* offenders and to *deter* them from reoffending" (emphasis added). In these cases, the sanctions are imposed „on the basis of the gravity of the impugned conduct, and not of the harm caused".

Within these administrative offences, the ECtHR distinguishes between two types: the first category comprises so-called *minor* or *petty crimes*, which have often been removed from the core criminal law in the course of decriminalization due to the minimal nature of wrongdoing involved and in order to unburden the prosecution office (e.g., with respect to the above-mentioned traffic offences). The second category consists of administrative offences whose prosecution is conducted by a special supervisory authority within its general competence for the overall regulation of a particular field, such as agriculture or financial markets.

This broad concept for the guarantees of „criminal law" and „criminal fines" leads to the question of whether the limits of criminal law – which were historically developed for core criminal law – can be softened for legal regimes that dispense with terms of imprisonment and limit their sanctions to monetary fines or other alternative sanctions for cases of minor wrongdoing. Such attenuation is accepted by the ECtHR to a certain degree: The Court has accepted the fact that the two categories of administrative offence are both prosecuted *and* adjudicated in the first instance by the same administrative body. However: "decisions taken by administrative authorities which do not themselves satisfy the guarantees of Article 6 § 1 of the Convention must be subject to subsequent control by a judicial body that has full jurisdiction". Yet, even in the subsequent judicial proceedings, procedural tools such as conducting proceedings in writing, fast-track procedures, and the limitation of evidence in order „to deal quickly and efficiently with *petty offences*" are not *per se* impermissible, provided the procedure still satisfies the main purpose of Article 6 of the Convention, namely, to „guarantee the right of an accused to *participate effectively in his criminal trial*". Other guarantees of the ECHR might also be attenuated for „offences of a minor character." This can apply with regard to the right of appeal to a superior court (Art. 4 of Protocol No. 7). There is also an exception with regard to the principle of *ne bis in idem* (Art. 4 of Protocol No. 7) if a criminal sanction and a „regulatory offence" differ in their essential elements.

However, even for minor administrative offenses, the Court does not accept wide-reaching limitations, for example, with respect to the right to be informed of the accusations and to prepare for defence, to have an oral hearing, to ask for exonerating witnesses or experts, to use the services of a translator free of charge, to receive reasons for the verdict as well as with respect to the principle of the finality of judgments. The same holds true with respect to the principle of *nulla poena sine lege* (Art. 7). In all cases, the Court addresses the individual complaints and procedures as a whole.

This illustrates that the ECtHR compensates to a certain degree its broad and rigid concept of „criminal law" and „criminal sanctions" by applying flexible legal consequences with respect to the relevant guarantees. However, this flexible application of these guarantees was developed chiefly for petty offences. In addition, in various decisions the Court has declared that the degree of some procedural guarantees depends, *inter alia*, on „what is at stake". The Court also stressed that there „are clearly 'criminal charges' of differing weight" and it justified the need for a public hearing with regard to the „financial severity" and the „significant degree of stigma" of the penalties and with regard to the loss of the "professional honor and reputation of the persons concerned." This modulation of the level of guarantees according to the gravity of the intrusion is justified especially by the principle of proportionality: the more serious an intrusion in civil liberties is, the higher the level of procedural safeguards must be.

As a consequence, the system of protective guarantees does not jeopardize a decriminalization of petty offences or the efficiency of administrative and sanctioning proceedings in the above-mentioned second category of administrative offences. However, there are also limits for such attenuations, especially for cases with significant financial penalties. This is relevant, for instance, with respect to the methods used in calculating the sometimes staggering fines that can be found in EU competition law. For example, regarding limits to administrative discretion and the minimal level of specificity exhibited by the applicable fining guidelines, the current state of affairs in cartel enforcement appears troubling, considering the gravity of the sanctions imposed. In some of these areas there seems to be an urgent need for reform. A more detailed critical assessment of these proceedings

under the ECHR, EU law, and national constitutional law is therefore called for. However, the present analysis shows that there are limits and guarantees which can be used.

B. Defining the Limits of Crime Control Outside Criminal Law

In order to avoid a security law without restrictions, there must also be limits on measures *outside criminal law*. This is especially the case with respect to the above-mentioned legal regimes of police law, intelligence law, the laws of war, civil law, and private compliance regimes. If these regimes are employed for the purpose of crime control, constitutional or dogmatic limitations, I suggest that they should be developed in the course of a three-stage review procedure: (1) checking for elements of criminal law, (2) applying general principles of constitutional law and international human rights law, as well as (3) verifying the prerequisites, specific limits, and dogmatic principles of the respective non-criminal control regimes.

1. Checking for Elements of Criminal Law

In an initial check for limits of specific control regimes used against crime, the question dealt with above of whether the respective measures used for crime control purposes fall within the concept of criminal sanctions should be analysed, for example, according to the Engel criteria of the ECtHR. If this question is answered in the affirmative, the traditional guarantees of criminal law are applicable, possibly with some attenuation for administrative sanctions that deal with less serious offences.

This would be the case, for example, if short-term security arrests under police law were used not only for the prevention of danger but also for purposes of deterrence and punishment. The same would apply if a so-called civil asset forfeiture were not limited to the profits of crime or to clearly preventive purposes but rather extended to other assets belonging to the suspect. Due to such a „surplus”, the confiscation would be a penalty and as such subject to the guarantees of criminal law.

2. Applying General Principles of Constitutional Law and International Human Rights Law

If the special guarantees of criminal law are not applicable, general principles of constitutional law and international human rights must be considered.

a) Example: Police Law and Intelligence Law

The main fields of application for these general guarantees are coercive police powers and powers of intelligence agencies used for information gathering. For these cases, the fundamental rights at issue (e.g., rights concerning the protection of liberty, privacy, and the home) in connection with the principle of proportionality apply. The requirement of a statutory reservation for a parliamentary law allowing limitations of fundamental rights also plays an important role. The German Constitutional Court has announced a multitude of decisions that nullify the procedural powers of police law and intelligence law, for example,

with regard to online searches (forensic software) or data mining. In this field of procedural powers, constitutional guarantees in the area of criminal law and those in the area of police law are often quite similar. The respective guarantees for the information-gathering activities of intelligence agencies are generally less strict, since the information collected in this context is used only for monitoring purposes and generally not for more serious consequences such as arrest or conviction (as may be the case under criminal law).

b) Example: Confiscation Law

The important function of general constitutional guarantees in the field of crime control can also be seen with respect to non-criminal confiscation measures. If confiscation measures are criminal sanctions, this implies *inter alia* the presumption of innocence (Art. 6 § 2 ECHR) so that the underlying crime and its connection with the confiscated assets must be proven beyond reasonable doubt. If, however, confiscation measures are limited to re-establishing the *status quo ante* or if their only aim is to prevent future crime (e.g., by confiscating instruments for committing crime) the guarantees of criminal law do not apply. However, this does not exclude constitutional protection. In these cases, the *general* safeguards for protection may be applicable, especially the protection of property (Art. 1 of the Protocol No. 1 of the ECHR) and the right to a fair trial in civil matters (Art. 6 of the Protocol No. 1 of the ECHR).

According to the ECtHR, these non-criminal guarantees do not exclude civil conviction orders based on a preponderance of evidence or with a high probability of illicit origins, as well as a reversal of the burden of proof. Similar results for non-criminal confiscation can be expected under EU law (esp. Art. 17 EUC). Contrary to these interpretations, under German constitutional law, the protection of property goes further: it requires the court, after exhausting all available evidence, „to be *convinced* that the assets concerned were obtained illegally". Thus, this example shows that substantial legal guarantees are also possible outside criminal law in other legal regimes. However, these guarantees may be weaker, less developed, and more insecure than those of criminal law, due to the lesser intrusiveness of the respective measures.

3. Verifying the Prerequisites and Specific Limits of Non-Criminal Control Regimes

As illustrated above, the control regimes outside of criminal law are often able to provide more efficient interventions than criminal law can, since they are designed for specific situations and purposes. For example, the laws of war deal with exceptional threats by serious armed attacks. Intelligence law was developed as an early warning system against special dangers to the state. And in many legal orders, preventive police laws are particularly suited to dealing with the prevention of future dangers. For these reasons, the decisive limits to the application of these alternative control regimes outside of criminal law are often to be found in the prerequisites for their application. This tends to be easily forgotten in light of the multitude of political announcements regarding wars or specific emergency programs against crime.

a) Example: The Laws of War

Special prerequisites for application play a major role in the laws on armed conflicts. These laws are used in “wars” on terror, on drugs, on organized crime, or in cyberwars in order to justify specific actions that would not be legal in times of peace. However, the main goal of *ius in bello* is to limit armed conflicts with a high military potential; thus it contains a variety of important limits and protective guarantees.

These limits and guarantees of the laws of war are most illustrative for methodological purposes. They show that the aims and tasks of the different special regimes used in crime control are not only decisive for the *limits of applying the respective regimes* as such and at all. In addition, the aims and tasks of the various regimes as well as their typical subject matter are also affecting the types, the intrusiveness and the *guarantees of respective control measures or powers* admissible under this regime. For this reason, these two types of limits and safeguards have to be discussed in more detail.

aa) The essential *prerequisite for applying the laws of war* is either an international or a non-international armed conflict. In the context of an initiative against serious crime (a “war on crime”), the rules on non-international armed conflicts are more important. These rules are found primarily in Article 3 of the Geneva Conventions I–IV, in their first additional protocol, and in customary international law. According to these rules, a conflict does not qualify as a non-international armed conflict unless a certain duration and a certain intensity are reached that surpass those of „internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature” (Art. 1 AP I and Art. 8 (2) (f) Rome Statute). The total number, the duration, the weapons used, the number of combatants and victims, as well as the destruction caused by the acts of violence must be comparable – in their nature and their effect – to military attacks between regular armed forces of belligerent states involved in an international armed conflict. Therefore, the ICTY stated in the *Tadić* case “that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. This is a quite rigorous requirement that does not allow for the application of the laws of war against „mere” large organized criminal groups.

bb) However, limitations of the laws on war lie not only in the requirements for their application but also within the range of their application. Such limitations result especially from the system for distinguishing among different types of people which typically take part or suffer in armed conflicts: The laws define who can act under the respective powers *and* which persons can be attacked under which conditions. A major protective means here lies in the distinction between „combatants” and „civilians”, both of whom are protected in a specific way under international humanitarian law. Pursuant to Article 3 of the Geneva Conventions and Article 43 Additional Protocol I, combatants are defined as members of the armed forces of a party to an international armed conflict. Thus, the invention of a third (new) category of „illegal combatant”, which has neither the protection of a combatant nor that of a civilian, is highly problematic. Yet, the conflicts of the 21st century are characterized by civilians who participate directly in armed conflict. Therefore, the Internatioal Committee of the RedCross (ICRC) has developed criteria that must be fulfilled before civilians lose the benefits of their protective „civilian” status as a consequence of direct participation in the conflict. The three ICRC criteria for direct participation in hostilities are as follows: a likely „threshold of harm”, which would be „caused directly” by the act in question with a „belligerent nexus”.

A similarly problematic concept for extending the powers of the laws on armed conflict is the concept of „targeted killing" if it is used in a non-international conflict that is not clearly defined in terms of scope and time. In this context, „targeted killing" describes some states' practice of killing pre-selected individuals who neither pose an immediate direct threat to other individuals nor are executed as enforcement of a death penalty on the basis of a criminal proceeding. The oftentimes missing link to the battlefield and the lack of a trial of the targeted individual raises severe concerns as regards a violation of international humanitarian law and international human rights. This concern is fueled particularly by recent operations of "target killings" which were not performed against regular „combatants" on the battlefield or which concerned targeted individuals who were linked to irregular armed groups within armed conflicts. Without the concept of "unlawful combatant" these persons are categorized as „civilians" under international humanitarian law and might only be attacked „for such time as they take a direct part in hostilities" (Art. 51 (3) AP I).

In an armed conflict, legal limits concern even the guiding principle for war powers, namely that of military necessity. This principle, on the one side, permits the killing of persons, the demolition of houses, and the occupation of territory. On the other side, it also limits military actions only to those actions that are „necessary" for the realization of military aims. Therefore, the dogma of "military necessity" simultaneously both legitimates and limits military actions. Additionally, the laws of armed conflict are guided by the principle of proportionality and humanity in order to keep the conflict as „humane" as possible and to avoid unnecessary harm. Further protective rules also originate from the general principles of international human rights law, which are applicable as *lex generalis* in addition to the *lex specialis* of the laws on armed conflicts. This illustrates that the concept of legal limits and guarantees for crime control outside criminal law works even within the laws of war, however that their scope and content are influenced by the special regime.

b) Emergency Security Laws

Special prerequisites of specific legal regimes can also be important for emergency laws that allow intensive state intervention in emergency situations. France's currently applicable emergency law (whose prolongation and codification is under discussion) permits the proclamation by the Council of Ministers of a state of emergency for 12 days; subsequent prolongation is possible only by parliamentary law. The present emergency law in France allows warrantless searches and seizures, access to systems of information technology, establishment of security zones with limited accessibility, dissolution of groups, house arrest and residence requirements, bans on assemblies and the closing of meeting places, seizure of weapons, as well as drafting to military or civil service. This area of law shows again that the threats to civil liberties posed by crime control arise not only in the context of penal law but also – and even moreso – within the framework of other systems of crime control. As a consequence, the efforts made in criminal law since the Enlightenment to protect civil liberties must also be undertaken in these alternative crime control regimes.

IV. Summary, Evaluation and Future Research

A. The Emergence of Security Law

The global risk society is characterized by new and complex crimes, an increasing fear of crime, a dogma of risk prevention, and a shift in criminal policy from traditional criminal law to preventive security law. The emerging new architecture of security law combines new forms of preventive criminal law with other preventive legal regimes into a new risk-oriented security law.

Since definitions are always functional and serve specific objectives, a research approach to crime control can define this new ‘security law” as the norms dealing with the prevention of risks caused by human activities. Applying a more focused approach in criminal law and criminology, these activities can also be specified as acts that are or should be covered by criminal law. Such a narrower focus concentrates on more serious acts and respective control methods. This restriction increases the chances of finding more commonalities and achieving better results for controlling crime in view of a tailored future criminal policy. In addition, the term „security law” should be limited in its definition to law aimed at eliminating risks, dangers, and detriment (and not only punishing culpable perpetrators, as is the case in criminal law).

Defining security law in this way unites various legal regimes, especially preventive criminal law, administrative criminal law, police law, intelligence law, the laws of war, and civil law. One could also add elements of the laws relating to migrants and foreigners, or telecommunication law. With respect to the goal of providing security, criminal law is losing its monopoly in the field of crime control. For the purpose of security, criminal law is also being reshaped from a repressive to a preventive tool. This leads to the significant changes in criminal law described above, in both the fields of substantive law and procedural law.

B. The Advantages for Security

The shift from repressive criminal law to prevention and the combined use of various legal regimes unquestionably contribute to a more effiicient crime control. This is primarily accomplished by a simple additive effect, since, in principle, these different regimes act independently from each other. Yet, the combined use of the various regimes also leads to additional synergies, especially if information gathered within the legal regimes is exchanged or joint actions are executed. In specific cases, the regime combination may also lead to undesirable results and tension (e.g., when the risk-based power of police law is combined with a preparatory offense in criminal law). However, such effects can be minimized by adequately crafting legal provisions.

All in all, and from a security perspective, the bundling of these various legal regimes can certainly improve security. In the present-day risk society, there is no alternative to embracing this new preventive approach and to the bundling and intergration of various legal regimes for controlling complex crime.

C. The Detriments to Civil Liberties

The negative effect of this new orientation concerns civil liberties. Based on the above analysis, three separate grounds can be identified that are responsible for this curtailing effect:

The *first reason* is that the new threats and fear of crime are leading to a climate which gives priority to the objective of security, whereas civil liberties and especially privacy protection become secondary interests. This development is responsible, for example, for shaping a legal landscape in which criminalization is increasingly extended to the preparatory phase or in which new investigation tools (such as online searches of computers) are implemented and accepted.

The *second reason* for the loss of civil liberties is the fact that „prevention", „risk reduction", and „security" are, in principle, borderless concepts. Whereas the traditional criminal law concept of a previously committed culpable wrong deals with a concrete and fixed fact in the past, prevention depends on an open and future-oriented prognosis. In todays complex society, there are always risks (some of them are expected in daily life) and absolute security is not possible. In an atmosphere of serious new risks (e.g., terrorism) and voter-oriented policies based on „governing by fear of crime" there is always more that can be done for security and an incentive to do so.

The *third reason* for the loss of civil liberties is the most interesting one and came to light in the course of the above analysis: The analysis showed that there are immense discrepancies between the various disciplines of security law with regard to legal guarantees, despite the fact that the constitutional starting points, for instance, are quite similar. This is due to the fact that the aims and tasks of the various regimes used for crime control are very different. Throughout the course of this analysis, the respective consequences became especially clear for the laws of war: Whereas most criminal justice systems have abolished the death penalty, the laws of war still permit the killing of persons without any preceding judicial control mechanisms whatsoever. The reasoning for this significant difference results from the different tasks of the various legal regimes. However, such differences also illustrate that major changes in legal safeguards can easily be condoned by bringing a certain case from one legal regime under the roof of another. This is the case, for example, when the competence of intelligence agencies is extended to certain crimes or when the prosecution of a terrorist or criminal organization is considered to be fighting war by assuming an armed conflict. Such shifts of entire concepts are the most serious threats to civil liberties discovered in the above analysis.

D. Future Research

This result has an important influence on the continuation of future research on the new security law: We can solve the questions relating to the limits of security law only if we take an indepth look at the aims and tasks of the various regimes contributing to the emerging security law. With respect to future criminal policy, we must especially analyse and reconsider the basic elements of the present security architecture.

Thus, the present threats of complex crime might lead to fundamental changes in the present system of police law, intelligence law, the laws on war, and others The need for such a holistic approach justifies the overall analysis and the above definition of a security law. Comparative law research also indicates that there are alternatives to our present solutions. For this reason, research in security law and its architecture is just beginning.