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Security and Cross-Border Political Crime: The Formation of Transnational Security Regimes in 18th and 19th Century Europe

Karl Härter*

Abstract: »Sicherheit und grenzübergreifende politische Kriminalität: Die Formierung transnationaler Sicherheitsregime in Europa im 18. und 19. Jahrhundert«. This contribution proposes to observe Foucault's concept of the security dispositive from the angle of transnational security and criminal law regimes. Since the late 18th century security and securitization became not only a prime category and field of national policies and discourses but were increasingly influenced by transnational issues and cross-border security threats (or narratives) such as international crime, transnational political violence and international conspiracies. This was accompanied by the formation of transnational security regimes, which concerned cross-border security policies, discourses and legal norms in the fields of extradition, political asylum, and police co-operation, with a variety of different actors: states, police organizations, experts, international organizations. These transnational security regimes and their respective fields were characterized by complex interdependencies and interactions as well as by legal pluralism, flexibility, fragmentation, collisions, and *Entrechtlichung*, transgressing national security and extending securitization to indefinite "global" security spaces. Though this could be interpreted as an "international security dispositive" it as well challenges Foucault's concept which, in the end, should be substituted by the historical model of "transnational security regimes".

Keywords: security, political crime, international crime, criminal law, transnational law, police co-operation, extradition, political asylum.

The following remarks only intend to add a more or less new perspective to further develop the research on the history of security and Foucault's model of the security dispositive. They are conceived as a contribution to the ongoing discussion on security.

In the course of 1977-78 Foucault failed – empirically as well as theoretically – to conceptualize security and abandoned security in favour of governmentality (Foucault 2004; Bigo 2008). However, he indicated several elements and

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references which are crucial to understand the development of security from the early modern period to modernity:

- space, territory, borders/frontiers and sovereignty;
- the complex relations between security, discipline, surveillance, and governmentality;
- the dispositive of security (or security dispositive).

These elements and relations are especially useful to understand the establishment of “international security” in the 18th and 19th century as:

- a specific security discourse based on the narrative of international/cross-border crime/threats, and
- a specific transnational security policy.

This paper suggests observing the development of “international security” as a function (or result) of the formation of transnational security regimes in the 18th and 19th century, which emerged in specific areas of transnational interaction – extradition, asylum, judicial and police co-operation – and were shaped in international treaties, national law, international expert discourses and various state practices (Härter 2011a). With Foucault we may also characterize this development as the establishment of a transnational security dispositive which comprises the normative, material, personnel, and practical infrastructure of the production of discourses as well as the implementation of its “outcome” / “solutions” within a specific area of practice through specific concepts (purposes, strategic configurations), law/norms, institutions, technologies, provisions, sanctions, procedures etc. In addition, security can be conceptualized as a product of communication, discourses and practices (on a symbolic as well as a practical level) manifested in the formation of a specific security dispositive or regime; their historical development and differentiation can be described (very roughly) along the following patterns and shifts (Härter 2010):

- in the early modern period (since Hobbes) the fundamental distinction between internal and external security was established; the latter addresses such fields and discourses as war, peace, military etc. and formed its own security dispositive or regime (which will not be dealt with in the following);
- internal security comprised social security (welfare) as well as public security (*öffentliche Sicherheit*), manifested in the idea of the “good order and government” (*gute Policey*, which we may characterize as the early modern form of governmentality);
- however, during the 18th century we can observe the fundamental separation of welfare (or social security) from public security; the latter formed the basis for the modern notion of internal security (*öffentliche Sicherheit*);
- the dispositive or regime of public/internal security was based on territory and sovereignty, focused on property, trade and commerce, threatened by crime and marginal/dangerous groups, the latter comprising also an external,

cross-border element. In the 18th century foreign vagrants, bandits and gangs endangering internal security from the “outside” (of society or abroad) were perceived and conceptualized as a prime security threat leading to the establishment of several internal security measures (patrolling, passport control, border control, paramilitary police forces etc.) and the first transnational security measures: extradition and extradition treaties, respectively, concluded between France and the Swabian and Franconian Circles of the Holy Roman Empire in 1731 and 1741 concerning state crimes, deserters and vagrants/bandits (Härter 2011b).

Though these roughly depicted patterns and shifts do not indicate a linear historical development of a “modernization process” of security, at the end of the *Ancien régime* the dispositive of internal security was firmly established and implemented: the maintenance of security was regarded as a prime task of the (modern, national) state, which – based on sovereignty and the monopoly of power – had established corresponding security institutions, techniques, norms (laws) and practices, all together forming a (national) security policy. The security dispositive and regimes focused on the security of the state and the nation, including the majority of citizens and their private property and excluding marginal groups and foreigners. (Internal) security was produced and communicated by means of “national securitization”: national laws (codes), criminal justice, police forces etc. aiming at prevention and the exclusion, normalization, and suppression of internal threats (crime, marginal groups etc.). However, with the foreign bandits/gangs, the establishment of border control and early extradition treaties, some elements of transnational security regimes and the dispositive of international security were already established in an early form.

Research dealing with the development of internal/public security in the 18th and 19th century focused mainly on the development of national security. However, with regard to space and territory and the scope of the security discourses we can observe new developments, already commencing in the 18th century, burgeoning in the 19th century and dominating in the 20th century: the international security dispositive, manifested in the formation of transnational security regimes, which concerns cross-border security policies, discourses and legal norms in the fields of extradition, political asylum, and police cooperation, characterized by a variety of different actors – states, police organizations, experts, international organizations – and related to international crime and political crimes in particular as the main transnational security threats (Ingraham 1979; Härter and De Graaf 2012c).

The formation of transnational security regimes took place in the 18th and 19th century, but was characterized by ambiguous developments: First of all the transition from the *ius commune*, which as a global legal order had provided transnational criminal justice via principles and measures such as compensatory prosecution/justice (*stellvertretende Strafrechtspflege*), the principle of *aut*

dedere aut judicare (legal obligation to extradite or to prosecute crimes), requisition (*Requisitionswesen*), and immediate pursuit (*Nacheile*), to nation-based criminal law systems with a monopoly of penal power (Maierhöfer 2006; Härter 2009).

The nationalization process put criminal law and security at the core of national sovereignty, formed a homogeneous national legal space, and established new principles (notably the nationality and territoriality principle), but generated transnational security problems as well. These shifts and changes culminated in the age of the French Revolution and Napoleon, which in the end changed not only the criminal law system but the security dispositive and the narratives of international/political crime and conspiracy as well, though some early modern elements still persisted or were transformed. The major changes and developments concern:

- 1) The impact of the French Revolution as a transnational (security) threat spreading revolution and subversion across the borders through ideas, news, press, propaganda, emissaries, secret associations/societies, conspiracies and the *expansion révolutionnaire*. This promoted the establishment of the new transnational security and conspiracy dispositive: the threat of international revolution, transnational political subversion and transnational political crime (Härter 2008).
- 2) In addition the French Revolution caused the first wave of political mass emigration/expulsion (the French émigrés), which led to the establishment of an organized political exile. In the 19th century political refugees and organized political exile formed (or were perceived as such) an important threat to internal as well as transnational security via activities such as forming exile armies, exile press/propaganda, propagating political violence, planning assassinations, interventions and insurrections (Reiter 1992).
- 3) This resulted in a new perception and legal conceptualization of political crime as a fundamental – and partially transnational – threat to the nation, the state and internal as well as transnational security, reflected notably in the French *code pénal* of 1810 which was adopted by many other states (Ingraham 1979).
- 4) Since the French Revolution and the *code pénal*, the formation of a homogeneous national criminal law was based on the territoriality and nationality principle: abolition of foreign laws and the *ius commune*, containment against prosecution from the outside, no extradition of nationals, no prosecution/punishment of crimes that nationals committed in foreign states, no prosecution/punishment of crimes that foreigners had committed in foreign states, prosecution of crimes committed against nationals in foreign states and protection of nationals, prosecution of crimes committed by nationals against the nation in foreign states. These different principles/settings could also produce normative collision and as a result legal insecurity and correlated discourses.

- 5) With regard to institutions and measures, we can observe the establishment of national police organizations and the political/secret police in particular dealing with state security and transnational security issues as well, because political crime, subversion, and political asylum/exile were considered, to a certain degree, as cross-border security threats which required cross-border policing – especially police co-operation and the exchange/transfer of knowledge and intelligence – and transnational provision such as extradition (Emsley 1997; 2007).
- 6) The establishment of modern external/interstate political asylum and its counterpart – the extradition of political dissidents, suspects and criminals – implied another “new” element of the emerging transnational criminal law and security regimes. On the one hand the competition between the nation-states influenced the policies of extradition and political asylum, which the states used to demonstrate their national sovereignty or to destabilize other states and as a result to produce insecurity. This, on the other hand, led to the expansion of extradition and extradition treaties which constrained political asylum to produce security on a transnational level (Shearer 1971; Reiter 1992).
- 7) Furthermore, in the 19th century the increase of cross-border activities such as economic transactions, commerce, migration (especially labour migration and journeymen), political activities and crime as well as technical advances (transportation, communication, railroads, telegraph etc.) evoked a growing demand for transnational criminal prosecution and co-operation and in the long run helped to form the image or dispositive of international crime (Knepper 2010).

These shifts, demands or security threats strongly promoted the development and differentiation of extradition, asylum, judicial and police co-operation, and mutual legal assistance as the pivotal elements of the emerging transnational security and prosecution regimes. In this regard the model of transnational security regimes is strongly related to that of a transnational/international security dispositive and comprises as main elements:

- 1) First of all the *normative level*, ranging from national law to the soft law of transnational treaties and agreements, forming a fragmentary order of transnational criminal law based on norms and principles such as the active and passive personality principle, the principles of reciprocity and lenity, the obligation to extradite or to punish, the non-extradition of political refugees and nationals as well as the assassination and anarchist clauses (1856/1892). Many of these laws, treaties and norms refer to the issue of transnational security. The so-called *Bundesbeschluß über Bestrafung von Vergehen gegen den Deutschen Bund und Auslieferung politischer Verbrecher* (18. August 1836), which established a transnational normative order for the sovereign states of the German Confederation, named the maintenance of external as well as internal order and security as the main purpose of the determined ob-

ligation to extradite, and considered treason (*Hochverrat*, *Landesverrat*) as well as associations and conspiracies (including membership, participation and incitement) as the main security threats against the Confederation or a single member state (Härter 2012a, 169). The extradition treaty between Austria and the Kingdom of Sardinia, concluded in 1838, stipulated the mutual extradition of criminals to maintain public security. In the second half of the 19th century many extradition treaties included or referred to the so-called Belgian *attentat* or assassination clause of 1856 which exempted refugees from the privilege of non-extradition and restricted the granting of political asylum if they had murdered or attempted an assassination upon the life of a ruler or his family (and later other state officials). From the end of the 19th century onward the clause was extended on the transnational level to all murderous/terrorist political crimes and criminals suspected to be members of cross-border operating “conspiracies” such as the anarchists (Härter 2012a; 2012b).

- 2) The transnational security regime comprised a variety of diverse and asymmetric national and international *actors and spaces*. The actors ranged from nation states to federal states, from European powers to states in Latin America, Asia or Africa. The United States, for instance, concluded between 1837 and 1889 more than 34 extradition treaties and conventions with states such as Baden (1837), Bremen (1857), German Confederation (1852), Netherlands (1880), Luxemburg (1883), Belgium (1874), Italy (1868), Dominican Republic (1867), Ecuador (1872), Japan (1886) or the Ottoman Empire (1874). On the part of the states, different legal and governmental institutions were involved: police forces/officials, courts, diplomats, and jurists. These international experts and jurists extensively published on issues of trans- and international law, and convened at international conferences such as the *International Congress on the Prevention and Repression of Crime* held in London 1872 or the *International Conference of Rome for the Social Defence Against Anarchists* held in Rome 1898. Moreover, experts, jurists, police officers and state officials formed international associations and organizations (such as the *International Union of Penal Law* founded in 1889) issuing bulletins and journals and dealing extensively with matters of transnational crime, security and international criminal law (Bach Jensen 1981; Bellmann 1994; Kesper-Biermann and Overath 2006; Henze 2010).
- 3) The actors of the transnational security dispositive (or regimes) formed national and international *discourses*, manifested in a variety of expert writings, conferences and associations as well as influencing popular media covering issues of international security. The transnational security regimes were constructed and legitimized by these cross-border security discourses revolving around the issue of cross-border crime and transnational security threats, notably political violence, conspiracies – especially the international anarchist conspiracy – and international political and common crimes such

as slave trading and trafficking in women, drug traffic, piracy, and organized smuggling. Though we may find some historical evidence for an empirical increase of cross-border crime in the 19th century, “international organized crime” and violent political groups or conspiracies in particular constituted the pivotal *narrative* of the transnational security discourse constructing and defining transnational security as well as influencing the concrete security policies dealing with transnational issues (Bercé and Fasano Guarini 1996; Knepper 2010; Messer-Kruse 2012).

- 4) The transnational security regimes were characterized by the establishment and differentiation of specific *practices, security techniques and procedures* in the fields of extradition, judicial and police co-operation. They concerned, for instance, the cross-border exchange of intelligence, border and migration control, surveillance of exiles and asylum seekers as well as the establishment of specific extradition procedures and expulsion measures.

Whereas the practice of extradition and mutual legal assistance are hardly researched, some studies have thoroughly analyzed political/secret police and trans- and international police co-operation (Fijnaut and Hermans 1987; Fijnaut 1993; Liang 1992; Emsley 1997; Deflem 2002; Jäger 2006). Cross-border activities of political dissidents and violent groups (such as the anarchists), the formation of political exiles as well as assassination attempts (especially in the last third of the 19th century) were perceived as a transnational security threat and “international conspiracy” to which many states reacted with the establishment and expansion of political police. For instance, between 1790-1900 in Central Europe/Germany the following organizations were established and operated: the Central/Extraordinary Investigating Commission (*Zentraluntersuchungskommission Mainz*, 1819-1828); the Central Investigating Agency (*Zentraluntersuchungsbehörde Frankfurt*, 1833-1842); the Political Police Agency of Prussia and the *Generalpolizeidirektor* (1848/1853); the Secret State Police (*geheime Staatspolizei*, 1866); the German Police Association and Police Conferences (*Polizeiverein und Polizeikonferenzen*, 1851-1866); the reorganized Political Police Agency of Prussia (1878), and the Central Agency to Combat the Anarchist Movement (*Zentralstelle zur Bekämpfung der anarchistischen Bewegung*, 1898/99). These organizations also operated on a transnational level and collected and exchanged intelligence, controlled communication and public activities (speech, assemblies, pamphlets, foreign press, smuggling of propaganda), controlled migration and mobility (passport control, examination of passengers at railway stations), employed “modern scientific” methods of identification (Bertillonage, *portrait parlé*, fingerprints), conducted investigations of suspect foreigners and groups, established and employed informers, secret and double agents, agents provocateur and confidants in foreign states, and helped in the surveillance of foreign dissidents, refugees and exiles. The practical experience and the intelligence gained were used to produce, distribute and exchange knowledge of security threats via files, card

indexes, lists, dossiers, black lists, black books, periodical reports, the continuous anarchist album, semi-official prints, or police journals. All in all, this resulted in a growing knowledge base and fundamental techniques of transnational policing and securitization, established through the co-operation and communication of police officials and experts who, for instance, participated in international conferences, meetings and discourses such as the International Conference of Rome for the Social Defense Against Anarchists (1898), the Second Anti-Anarchist Conference (St. Petersburg 1904), or the First International Criminal Police Congress (Monaco 1914), which in the end led to the establishment of Interpol (Bach Jensen 1981; 2001; 2009; Deflem 1996; 2000; 2005; Dipaola 2004; 2007; Jäger 2006).

These elements of the international security regimes and their respective fields – extradition, asylum, judicial and police co-operation – were characterized by complex interdependencies and interactions, and their practices and discourses formed a security dispositive that influenced the perception and legal conceptualization of cross-border security threats and “international political crime” as well as transnational conspiracy theories. However, the formation of transnational security and criminal law regimes was also characterized by legal pluralism, fragmentation and “regime collisions”, resulting in specific (as well as changing) configurations and uncertainty. To indicate just a few key questions which could direct (or irritate) further research:

- the *scope of the transnational regimes*, notably with regard to the diverse actors and the integration of non-European states into the emerging international security regime; this is related to the question of whether we can discern groups of states following different security policies, grounded in different legal traditions or different symbolic functions of security policies on an international level;
- the *effects of negotiated transnational “soft law”* and regulations on national criminal law and practices of security (for instance police activities, surveillance of foreigners, political groups etc.). There is strong evidence that the emerging transnational security (and criminal law) regimes altered national law and led to processes of criminalization, impaired the legal control of security practices (institutions, procedures etc.), fostered or legitimized the restriction of civil and liberal rights – notably concerning political asylum and the extradition of suspects – in favour of security;
- the *conceptualization of crimes and security threats* on a trans- and international level as well the retroactive effect of the transnational security regimes on the (national) perception and legal construction of specific international and political crimes;
- the intensification and extension of *political police and political policing* (and concomitant security techniques) to a trans- and international level via co-operation, congresses, and the cross-border production and distribution of knowledge and intelligence.

In conclusion, this proposal argues that these roughly depicted developments and changes did not produce a coherent international legal order of criminal law, but transnational security regimes which are characterized by flexibility, various practices, fragmentation, collisions, and *Entrechtlichung*, transgressing the national legal order, extending securitization to indefinite “global” security spaces, and exerting the narratives of international crime, political violence and conspiracies. This may yield some explanation for current structural problems of international criminal law and criminal justice dominated by security issues, but principally challenges Foucault’s security dispositive, which, in the end, should be substituted by the historical model of “security regimes”.

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