

Raising Barriers to 'Outlaw Motorcycle Gang-Related Events'

Underlining the Difference between Pre-Emption and Prevention

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Abstract

Fighting outlaw motorcycle gangs is currently one of the top priorities of many governments around the world. This is due to the notion that outlaw motorcycle gangs do not consist solely of motorcycle enthusiasts. Numerous cases reveal that these clubs, or at least their members, are involved in (organised) crime. In order to tackle these clubs, the former Dutch Minister of Security and Justice announced a whole-of-government strategy towards outlaw motorcycle gangs in 2012. As part of this effort, authorities such as the Dutch National Police, the Public Prosecution Service, the Dutch Tax Authority and local governments aim to cooperate in order to disrupt and restrict outlaw motorcycle gangs by means of Criminal, Administrative and Civil Law. Part of this strategy is to hinder club-related events. This article discusses the latter strategy in light of the distinction between prevention and pre-emption. As the latter two concepts are often used interchangeably, this article attempts to use a more strict division between prevention and pre-emption. Thereby, it becomes apparent that outlaw motorcycle gangs are to some extent governed through uncertainty. The author suggests that maintaining the 'prevention-pre-emption distinction' can offer an interesting and valuable point of departure for analysing today's crime policies.

Keywords: Prevention, pre-crime, pre-emption, risk, outlaw motorcycle gangs

1 Introduction

In 2014, a local Harley-Davidson club in the Netherlands was planning – as it aims to do every year – to organise a motorcycle fair from 11 April until 13 April. Because this motorcycle fair has always taken place without any problems, the mayor of the municipality of 'Laarbeek' initially issued a permit based on which the club was allowed to organise this event yet again. However, the municipality withdrew the assigned permit on the advice of the Dutch National Police as the latter expressed considerable concerns with regard to possible

public order and safety disturbances.¹ This was especially the case because the Dutch National Police feared an escalation of violence between warring outlaw motorcycle gangs (henceforth OMGs).² This incident was not an isolated case as a second motorcycle fair 'Motorcycle-day Zilst' in another municipality was also cancelled by the local government for similar reasons. The event, scheduled for 20 April 2014, was to be organised for the first time by 'Harley-Davidson Club de Kempen'.³ Furthermore, the 'Harley-day', in the village of Valkenswaard, and the motorcycle event 'American Day Uitgeest', both scheduled for 26 April 2014, also did not take place. It seems that these withdrawals of permits were not unique for this period of time, as the local government of the small village of Cuijk had also prohibited the gathering of several international OMGs in May 2013. On this occasion, members of the Dutch Veterans MC were planning to organise a three-day event called the 'Brothers in Arms Run'. However, the municipality of Cuijk decided not to provide the required permit for the event, fearing possible public disorder. Moreover, the Mayor of Cuijk argued that prohibiting the event would be in line with the Dutch nationwide policy to

1. See <https://extranet.laarbeek.nl/actueel/nieuws_3139/item/vergunning-motorbeurs-aarle-rixtel-ingetrokken_12617.html> (last visited 3 August 2015).
2. In academic literature but also in various policy documents, different 'labels' are being used to refer to outlaw motorcycle gangs. Some authors refer to these clubs as '1%-Motorcycle Clubs' or '1%-MCs', while others prefer to use the term 'outlaw motorcycle clubs' (see, for example, A. Blokland, M. Soudijn & E. Teng, 'Wij zijn geen padvindders. Een verkennend onderzoek naar de criminele carrières van leden van 1%-motorclubs', 56 *Tijdschrift voor Criminologie* 3 (2014). A. Veno and J. van den Eynde, 'Moral Panic Neutralization Project: A Media-based Intervention', 17 *Journal of Community & Applied Social Psychology* 490 (2007). The Dutch Government, however, currently maintains the term 'Outlaw Motorcycle Gangs'. Note that this article is not about OMGs itself, but about the Dutch approach towards clubs that are labeled as 'outlaw motorcycle gangs'. In March 2014, the Dutch National Police documented fifteen 'outlaw motorcycle gangs', such as the Hells Angels MC, Satudarah MC, Veterans MC and No Surrender MC. For a complete overview of the listed OMGs in the Netherlands in April 2014, see Politie Landelijk Eenheid, *Outlawbikers in Nederland* (2014), at 19. For the sake of convenience and because I am taking the approach of the Dutch Government as the point of departure for this article, I chose to use the term 'outlaw motorcycle gang' in accordance with the Dutch Government.
3. See <www.omroepbrabant.nl/?news/208924962/Motordag+Zilst+in+Veldhoven+ook+afgelast+om+onrust+motorwereld.aspx> (last visited 3 august 2015).

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fight OMGs.⁴ Indeed, the former Dutch Minister of Security and Justice, Mr. Opstelten, argued that it is important to make a clear statement that the so-called ‘outlaw motorcycle gangs’ are not to be ‘facilitated’ in the Netherlands.⁵

The latter statement – considering the literature on the linkage between OMGs and (organised) crime – clearly did not appear out of thin air. According to many researchers, law enforcement agencies and the Dutch Ministry of Security and Justice, it seems reasonable to assert that OMGs are involved in (organised) crime.⁶ At the same time, researchers argue that it would be unjust to presume OMGs to be criminal enterprises by definition.⁷ Research shows that there are important differences among OMGs concerning the number of convictions of OMG members, as well as the nature and seriousness of the committed crimes.⁸ The Dutch National Police seems to agree with this view, stating that it is not self-evident that every ‘outlaw biker’ is criminally active by definition.⁹

More generally, OMGs have been a foremost priority on the political agendas of many countries around the world. For instance, having its roots in California (1948), the arrival of the Hells Angels MC in Canada led to numerous gang-related incidents in the 1990s (also known as the Quebec biker war), which urged the Canadian Government to begin what Katz described as an ‘... all out crackdown to rid society of the Outlaw Motorcycle Gang problem...’.¹⁰ The Nordic countries have equally been startled by a ‘biker war’ between the Hells Angels and the Bandidos. The ‘Great Nordic Biker War’ in 1990s included numerous murders and attempted murders across Denmark, Norway, Finland and Sweden, which led to a strong focus on OMGs. For instance, in Denmark a law was passed in 1996 that enabled the police to ban members of the Hells Angels MC from certain locations (e.g. a clubhouse).¹¹ Moreover, the German city of Hamburg first banned the Hells Angels in 1983 (‘vereinsverbot’), which also made it possible to ban Hells Angels-related symbols.¹² Both the Canadian and the Australian Governments also adopted an anti-associations legislative model aimed at criminal-

ising associations between members of OMGs and, consequently, to disrupt the OMGs as a whole.¹³

At the same time, however, there has also been a critical debate on how OMGs are being approached. That is, some measures have provoked concern because they tend to forestall risks or crimes that have not yet taken place. In this respect, Ayling has described the approach towards OMGs, or ‘bikies’ in Australia as a ‘pre-emptive strike’. The author has argued that this ‘strike’ aims to *pre-empt* and not necessarily to *prevent* crime.¹⁴ In line with this argument, some authors have stressed that contemporary society is to some extent using pre-emptive strategies – which is different from prevention – to deal with risks, dangers and uncertainties.¹⁵ Although Tulich stated that ‘... prevention and pre-emption are conceptually distinct ...’, the distinction between pre-emption and prevention is not always clear.¹⁶

The distinction between the concepts of pre-emption and prevention is the focus of this article. To lift a corner of the veil, the deployment of ‘preventive’ strategies to inhibit a particular danger from happening is preceded by a more balanced risk assessment, while still accepting a certain amount of exposure to the danger. Pre-emption goes a step further by taking matters into its own hands. That is, by not accepting any risk of danger, pre-emptive strategies aim to take full control over a ‘risky situation’ as though it were certain that the feared danger will actually unfold.

The general aim of this article is to further illustrate how the underlying (criminological) rationale of pre-emptive strategies differs from the rationale of crime prevention strategies. This is done in light of the recent discussion on the ‘pre-emptive approach’ towards OMGs in Australia, the growing worldwide attention towards OMGs and the more stringent focus on OMG-related activities in general. Specifically, I focus on three instances where motorcycle events have been cancelled by a local government in the Netherlands. I make use of the jurisprudence related to the three preliminary proceedings at the Administrative Court. Although this article focuses on the attempt to control the problem of OMGs, it is clear that the discussion can be placed within a much wider security discourse that is ‘...

4. See <www.bndestem.nl/algemeen/binnenland/feest-motorclub-veterans-mag-doorgaan-1.3808222> (last visited 11 August 2015).
 5. *Kamerstukken II*, 2011/12, 29 911, no. 59.
 6. For example, J. Quinn and D. Koch, ‘The Nature of Criminality within One-Percent Motorcycle Clubs’, 24 *Deviant Behavior* 281 (2003); T. Barker, *Biker Gangs and Transnational Organized Crime* (2014); M. Lauchs, A. Bain & P. Bell., *Outlaw Motorcycle Gangs: A Theoretical Perspective* (2015).
 7. Barker, above n. 6 at 71; Lauchs and others, above n. 6, at 92.
 8. Barker, above n. 6; Blokland and others, above n. 2.
 9. Politie Landelijk Eenheid, above n. 2, at 19.
 10. K. Katz, ‘The Enemy within: The Outlaw Motorcycle Gang Moral Panic’, 36 *American Journal of Criminal Justice* 231, at 244 (2011).
 11. Barker, above n. 6, at 208; L. Korsell and P. Larsson, ‘Organized Crime the Nordic Way’, 40 *Crime and Justice* 519, at 542 (2011). For more information about the ‘Nordic approach’ towards OMGs, see also T. Bjørge, *Preventing Crime: A Holistic Approach* (2016), at 117.
 12. Barkers, above n. 6, at 205; See <www.lto.de/recht/hintergruende/h/olg-hamburg-urteil-1-31-13-hells-angels-kutte/> (last visited 25 July 2016).

13. For a more in-depth view of the Canadian and Australian approach towards OMGs, see, for example, K. Katz, ‘The Enemy within: The Outlaw Motorcycle Gang Moral Panic’, 36 *American Journal of Criminal Justice* 231 (2011); A. Loughnan, ‘The Legislation We Had to Have?: The Crimes (Criminal Organisations Control) Act 2009 (NSW)’, 20 *Current Issues in Criminal Justice* 457 (2009); Lauchs and others, above n. 6, at 76-78; M.A. Moon, ‘Outlawing the Outlaws: Importing R.I.C.O.’s Notion of ‘Criminal Enterprise into Canada to Combat Organized Crime’, 24 *Queens Law Journal* 451 (1999).
 14. J. Ayling, ‘Pre-emptive Strike: How Australia is Tackling Outlaw Motorcycle Gangs’, 36 *American Journal of Criminal Justice* 250, at 259 (2011).
 15. R. Ericson, *Crime in an Insecure World* (2007); R. Pieterman, *De Voorzorgscultuur. Streven naar Veiligheid in een Wereld vol Risico en Onzekerheid* (2008); A. Asworth and L. Zedner, *Preventive Justice* (2014).
 16. T. Tulich, ‘Prevention and Pre-emption in Australia’s Domestic Anti-terrorism Legislation’, 1 *International Journal for Crime, Justice and Social Democracy* 52, at 58 (2012).

increasingly dominated by the logic of risk management, a logic which calls for the management and government of risky populations by means of (statistical) calculations and proactive management rather than through the reactive management of real events and threats'.¹⁷

This article is organised as follows: Section 2 provides the theoretical framework and discusses the theoretical difference between pre-emptive and prevention strategies. A brief introduction to the Dutch approach towards OMGs is set forth in Section 3. Section 4 describes the three cases that are subsequently discussed within the 'pre-emption-prevention framework' in Section 5. The conclusion is presented in Section 6, and Section 7 discusses the importance of making a clearer distinction between pre-emption and prevention.

2 Tackling the Future

In this section, I first discuss the concept of pre-emption in relation to prevention. As Kortleven argued in his dissertation about the meaning of pre-emption in the Netherlands, the word 'prevention' is often used as an all-purpose concept. As a result, in the literature the concepts of *pre-emption* or *precaution* and *prevention* are often put forward interchangeably. That is, the author noted that in the context of pre-emption, strategies are also just referred to as preventative strategies.¹⁸ This is not strange because the differences between prevention and pre-emptive strategies do not represent a clear 'black and white' distinction. In this respect, Dershowitz argued that 'prevention, as an element of criminal justice, is best seen as a continuum ...'.¹⁹ Thus, as both strategies aim to tackle a feared danger in the future, pre-emption is best seen as a *category* of various preventative strategies. Heberton and Seddon seem to agree on this by referring to a form of 'radical prevention'.²⁰ Using both concepts interchangeably unjustly nullifies the different rationales underlying these two concepts. In this article, I therefore take the differences between pre-emption and prevention into consideration somewhat more strictly, arguing that prevention as a broad and umbrella term (including pre-emption) is to be distinguished from prevention in a narrow sense, which is thus distinct from pre-emption. It is important to make such a distinction because today, crime prevention runs the risk of becoming, as Haggerty puts it, 'an overly

inclusive concept'.²¹ By confronting the concept of prevention with that of pre-emption – emphasis is sought to be placed on the differences between both concepts. The distinction I would like to address here is very closely related to the often described changing nature of how contemporary societies cope with risks and their related dangers.²² While Garland speaks of a 'Culture of Control', Beck has qualified contemporary society as a (world) 'Risk Society'.²³ While the latter two have somewhat divergent arguments, Borgers and Van Sliedregt conclude that both studies agree that the modern-day adagio is: '... the protection of citizens against all manner of dangers'.²⁴ According to Ericson, this has led to '... the alarming trend across Western countries of treating every imaginable source of harm as a crime'.²⁵ Several other authors have thus noticed a temporal shift towards responding to crime in the direction of controlling risks.²⁶ Generally, instead of focusing on committed crimes, crime fighting has shifted towards anticipating crimes that have not yet materialised. Thus, while the 'post-crime society' aims to detect actual wrongdoers by taking a committed criminal offence as the guiding principle (*e.g.* in order to prevent re-offending), the 'pre-crime society' aims to thwart future harms for the purpose of 'security'. This pursuit of security entails identifying threats and consequently, making interventions before a criminal offence takes place.²⁷ While McCulloch and Wilson, in their recent book on pre-crime, emphasise that the novelty of pre-crime should not be exaggerated, the authors do recognise that today, interventions are made to tackle less-imminent dangers or crimes. Thus, so the authors argue, pre-crime is more forward looking than prevention in the sense that it does not take past (criminal) conduct as the benchmark to assess the imminence of threat or future crimes: '... crime prevention is principally aimed at thwarting the recurrence of the past. Pre-crime, conversely, is not aimed simply at preventing a repeat of past offending,

17. M. van der Woude, 'Dutch Counterterrorism: An Exceptional Body of Legislation or just an inevitable Product of the Culture of Control?', in A. Elian and G. Molier (eds.), *The State of Exception and Militant Democracy in a Time of Terror* (2002) 57, at 78-79.
18. W.J. Kortleven, *Voorzorg in Nederland. Ontwikkelingen in de Maatschappelijke Omgang met Kindermishandeling, Verkeersonveiligheid en Genetische modificatie* (2013), at 70.
19. A.M. Dershowitz, *Preemption: A Knife That Cuts Both Ways* (2006), at 32.
20. B. Heberton and T. Seddon, 'From Dangerousness to Precaution: Managing Sexual and Violent Offenders in an Insecure and Uncertain Age', *49 British journal of Criminology* 343, at 344 (2009).

21. K.D. Haggerty, 'From Risk to Precaution: The Rationalities of Personal Crime Prevention', in R. Ericson and A. Doyle (eds.), *Risk and Morality* (2003) 193, at 193.
22. It is important to emphasise that danger is '... the potential for harm that inheres in a thing, a person, or a situation...', while risk is '... a measure of that potential's likelihood and extent'. The likelihood of a particular danger to occur is thus expressed through risks. As a result, Garland argues that there is no such thing as objective or actual risks: '... risk-assessments depend for their validity upon a prior system of categorizations and metrics, which are in turn, grounded in specific conventions, institutions, or ways of life'. D. Garland, 'The Rise of Risk', in R. Ericson and A. Doyle (eds.), *Risk and Morality* (2003) 48, at 50-57.
23. U. Beck, *Risk Society: Towards a New Modernity* (1992, reprint 2005); D. Garland, *The Culture of Control. Crime and Social Order in Contemporary Society* (2002).
24. M. Borgers and E. Van Sliedregt, 'The Meaning of the Precautionary Principle for the Assessment of Criminal measures in the Fight against Terrorism', *2 Erasmus Law Review* 171 (2009), at 172.
25. Ericson, above n. 15, at 1.
26. See, for example, B. Hudson, *Justice in the Risk Society. Challenging and Reaffirming Justice in Late Modernity* (2003); L. Zedner, 'Pre-crime and Post-criminology?', *11 Theoretical Criminology* 261 (2007); Ericson, above n. 15; Pieterman, above n. 15.
27. Zedner, above n. 26.

but at pre-empting offending altogether'.²⁸ The result is that the 'pre-crime society' tends to focus on identifying and classifying suspicious groups – without worrying about false positive identifications – rather than dealing with individual offenders. Liability for pre-crime offences, consequently, '... is established on the basis of suspicion about the crimes an accused of this "type" might commit, given the opportunity'.²⁹ As a result of this, the distinction between the offender and the suspect is not as clear-cut as it was before. Ericson has stated that agencies tend to criminalise not solely the people who have actually committed a crime, but also the people who are suspected of committing a crime in the future.³⁰ In a similar way, Feeley and Simon have elaborated on the subject of controlling groups rather than punishing individual offenders. The authors explain that an important element of today's 'New Penology' is the process of identifying and managing groups justified by their risk profiles.³¹ As a result, groups that are regarded as 'dangerous' tend to be excluded from society.³² Recently, there has also been a stronger focus on addressing, or criminalising, seemingly innocent acts that are less imminent and temporally further removed from the actual substantive crime.³³ One striking example of this is the imprisonment of five OMG members in Australia in 2014, because of their buying ice creams as a group. This followed from the controversial Vicious Lawless Association Disestablishment Act 2013.³⁴

2.1 Pre-Emptive Strategies versus Prevention Strategies

Hence, it seems agreed upon that coping with crime is concerned not only with *reacting* to conducted crimes but increasingly with the prevention of crime. However, prevention of (organised) crime is at the same time a rather broad and vague concept, and some scholars have argued that '... new developments *are* occurring under the rubric of crime prevention'.³⁵ That is, the shift towards the 'pre-crime society' approach seems to be increasingly dominated by a precautionary principle.³⁶ While the latter principle has been a dominant principle

in international environmental law since the 1990s,³⁷ various scholars have argued that this principle has also been adopted in relation to other fields. As a result, similarly to what Ayling has done with regard to the Australian approach towards OMGs, and McCulloch and Pickering in relation to counterterrorism strategies, it has been advocated that a differentiation is called for between the meaning of pre-emptive strategies and what is commonly understood as crime prevention strategies.³⁸ In this respect, as noted in the introduction, the Australian approach towards OMGs in Australia has deliberately been characterised as a 'pre-emptive strike'.³⁹ Thus has Ayling emphasised the difference between pre-emption and prevention.

In general, crime prevention is about non-punitive measures that take away opportunities to commit crime.⁴⁰ Furthermore, crime prevention is about fighting dangers that are calculable and demonstrable and are thus put forward on the basis of predictions and risk assessments. In theory, whether or not to apply a certain prevention strategy depends on a cost-benefit analysis. In other words, the risk that a danger will actually occur and the costs of the prevention strategy are both taken into account.⁴¹ The concept of (crime) prevention and thus the underlying decision-making processes are grounded in a more objectified risk assessment of the feared danger. Pre-emption, on the other hand, focuses more on the prevention of (future) dangers despite the uncertainty that the feared dangers will actually unfold. These uncertain dangers are treated '... as if they had already happened ...', and the (pre-emptive) interventions are implemented in order to prevent a possible hazardous situation *at all costs*.⁴² While prevention focuses on imminent or foreseeable threats, pre-emption thus targets uncertain situations. Simply put, pre-emption is about preventing uncertain dangers that might arise in the future. Importantly, pre-emptive strategies are also – compared with prevention strategies – to a lesser extent attuned to the level of threat. Pre-emption therefore puts more emphasis on the possible negative effects of a particular situation and pays less attention to the actual chance that the danger will occur.⁴³

Treating both concepts as 'ideal types', Kortleven has pointed to three key features that help to untangle the

28. J. McCulloch and D. Wilson, *Pre-crime. Pre-emption, Pre-caution and the Future* (2016), at 3.

29. *Ibid.*, at 20.

30. Ericson, above n. 15, at 1.

31. M. Feeley and J. Simon, 'The New Penology: Notes on the Emerging Strategy for Corrections', 30 *Criminology* 449 (1992).

32. Hudson, above n. 26, at 75.

33. McCulloch and Wilson, above n. 28, at 17-18.

34. *Ibid.*, at 136; See <www.goldcoastbulletin.com.au/news/crime-court/bikie-association-charges-dropped-against-men-buying-ice-cream-on-gold-coast-holiday/news-story/d0ca09cf34d61c140380257bb5e1215b>.

35. H. van de Bunt and C. van der Schoot, 'Introduction', in H. van de Bunt and C. van der Schoot (eds.), *Prevention of Organised Crime. A Situational Approach* (2003) 17, at 17; Haggerty, above n. 21, at 193.

36. M. Schuilenburg, 'De paradox van het Voorzorgsbeginsel. Over 'un-kunk' en uitsluiting', in D. Siegel and others (eds.), *Culturele criminologie* (2008) 57.

37. At the United Nations Conference on Environment and Development held in Rio de Janeiro (3-14 June 1992), the following definition of the precautionary approach was adopted (Principle 15): 'in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation ...'. UNCED, Rio-Declaration, Principle 15.

38. Ayling, above n. 14; J. McCulloch and S. Pickering, 'Pre-Crime and Counter Terrorism: Imagining Future Crime in the War on Terror', 49 *British Journal of Criminology* 628 (2009).

39. Ayling, above n. 14, at 259.

40. McCulloch and Pickering, above n. 38, at 629.

41. R. Prins and H. Boutellier, 'De Lokale Voorzorgcultuur. Over de steeds naar voren erkende Overheid in de Aanpak van Sociale Onveiligheid', 9 *Tijdschrift voor Veiligheid* 3, at 5-7 (2010).

42. McCulloch and Wilson, above n. 28, at 1.

43. Schuilenburg, above n. 36, at 57; Prins and Boutellier, above n. 41, at 7.

different underlying principles of prevention strategies and strategies of pre-emption.⁴⁴ These differences are believed to act as a justification for distinguishing between both concepts. By doing so, Kortleven has built on the literature proclaiming that contemporary society has shifted from a modern risk culture towards a late modern precautionary culture.⁴⁵ I will elaborate on these three features in what follows. Note that the following three features are interrelated and thus show some overlap. Untangling the concept of pre-emption in this way, however, is helpful to pinpoint the differences with prevention strategies.

2.1.1 *Prevention at All Costs*

First, the prevention of loss is deemed much more important with pre-emptive strategies than with prevention strategies. Although prevention strategies are indeed aimed at preventing harm, they are not expected to prevent *all* possible harms.⁴⁶ In other words, a certain amount of damage is accepted and is believed to be unavoidable. Whether or not to promote a prevention strategy in a certain situation is largely a result of ‘calculation and scientific insight’.⁴⁷ In other words, a cost-benefit analysis is carried out in which the costs of a strategy are weighed against the chance that the danger will occur vis-à-vis the estimated damage that it causes (the risk). These costs, unsurprisingly, include the amount of money it costs to implement the particular strategy, but could also include other possible side effects of a measure such as the limitation of one’s personal freedom and/or negative (crime) displacement effects. Damage, on the other hand, is to be understood as the costs that are involved when the feared danger eventually materialises. In this respect, one can think of all sorts of costs, such as material costs, physical costs or environmental costs, depending on the specific context.⁴⁸ Pre-emptive strategies, however, do not reckon with the idea of damage or loss to begin with. That is, pre-emptive measures aim to prevent damage at all costs and do not weigh the costs of a certain intervention. In other words, the costs of an intervention are deemed to be less important as the prevention of the harm is regarded as the topmost priority. In this way, prevention strives for *optimal* security, while pre-emption seeks to provide *maximal* security.⁴⁹ To make this distinction even clearer, it is insightful to refer to a distinction Hudson (2003) has made between the concepts of *risk management* and *risk control*.⁵⁰

44. Kortleven, above n. 18, at 54.

45. Pieterman, above n. 15.

46. Kortleven, above n. 18, at 41.

47. Prins and Boutellier, above n. 41, at 6.

48. For a further reading on the role of cost-benefit analysis in crime policies, see, for example, F. van Tulder, ‘Afweging van kosten en baten in criminaliteit(sbestrijding)’, 47 *Tijdschrift voor Criminologie* 291 (2005).

49. Pieterman, above n. 15; Schuilenburg, above n. 36, at 58.

50. Hudson, above n. 26, at 50; for a further discussion on this difference see also T. Clear, T. and E. Cadora, ‘Risk and Correctional Practice’, in K. Stenson and R. Sullivan (eds.), *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (2001) 51.

In describing how contemporary societies cope with ‘risky’ situations and people, Hudson has emphasised the difference between risk management and risk control. *Risk management* agrees with the notion that a risk situation is always associated with a certain amount of uncertainty. Since uncertainty is accepted and believed to be inherent to risk situations, risk management techniques do not focus on eliminating these uncertainties. In fact, techniques of risk management aim to cope with these uncertainties in such a way that they are reduced to a minimum. In doing so, risk management takes into account the costs of so-called ‘false positives’. That is, it aims to prevent people from being falsely accused of having committed a crime. The strategy of *risk control*, on the other hand, does not aim to actually manage risks, but focuses on controlling risks. This means that risk control strategies do not accept the existence of uncertainties. As a result, risk control measures aim to take absolute control over situations that are deemed risky as a means to reassure that a would-be offender is unable to commit a crime. Consequently, risk control strategies attach less weight to false positives since the primary objective of these strategies is to prevent the risky situation at all costs, even when it is not entirely certain whether the feared ‘risky’ situation will unfold. By differentiating between these two strategies, Hudson stated that contemporary society increasingly tends to act upon strategies of risk control in order to cope with risky situations in such a way that (presumed) risky situations are neutralised beforehand.⁵¹ With this in mind, one could, for example, argue that holding presumed ‘terrorists’ captive at the Guantanamo Bay detention camp is not a measure of risk management, but one of risk control.

2.1.2 *Preventing Uncertain Situations*

The second feature described by Kortleven relates to the problem of uncertainty. Put simply, the author has argued that today’s spirit of pre-emption prescribes that – contrary to prevention strategies – a lack of knowledge about the nature, size and cause of the risk at hand is no reason not to implement a (pre-emptive) measure.⁵² Therefore, many authors have argued that strategies of pre-emption are based on the previously mentioned ‘precautionary principle’. Although it is agreed that it is difficult to provide a clear-cut definition of this principle and that the practical meaning is, moreover, believed to differ from one context to the other, this principle is usually operationalised as follows: ‘... if and when a threat of serious or irreparable harm arises, a lack of scientific certainty cannot apply as a reason not to take or to postpone preventive measures’.⁵³ This principle urges one to pre-empt danger even when it is far from certain that the danger will actually unfold. In the face of irreversible damage to society, there is no place for risk in the meaning of risk management as the costs of these risks are deemed to be high when materialised. With

51. Hudson, above n. 26, at 50.

52. Kortleven, above n. 18, at 54.

53. Borgers and Van Sliedregt, above n. 24, at 183.

respect to these types of risks (*e.g.* environmental disasters or large-scale terrorist attacks), one longs for certainty.⁵⁴ In other words, where prevention strategies avoid calculated risks, pre-emptive strategies aim to avoid uncertainty (better safe than sorry).⁵⁵ Obviously, this does not mean that all preventative action related to severe and irreversible damage is pre-emptive by definition. What makes these strategies pre-emptive, however, is the notion that the uncertainty often related to such cases calls for far-reaching risk-averse strategies. While the precautionary principle was originally developed as a way of reasoning in the context of averting potential environmental dangers, Ericson has argued that this principle can also be recognised in contemporary approaches towards crime. The author has argued that the problem of uncertainty (*i.e.* the problem of not being able to base decisions on scientific forms of knowledge) has led to a ‘politics of uncertainty’, which has consequently resulted in the intensification of security measures.⁵⁶ As ‘uncertainty’ gives rise to the desire to avoid risks, ‘uncertainty’ has become the new basis for governing crime and thus for safeguarding security. The amount of knowledge upon which pre-emptive strategies are based is also lower because ‘... pre-emption permits interventions that are so far removed from the anticipated harm ...’.⁵⁷

2.1.3 Risk Assessments Are Less Important

The third feature that can also be recognised when thinking about pre-emption is closely linked to the two preceding differences. That is, besides the idea that uncertain risks as such do not constitute a barrier to the implementation of an intervention, less importance is also attached to risk assessments as a whole. In other words, risk assessments are to a lesser extent the determining factor for preventative action. This is due to the idea that taking risks is not accepted under the precautionary logic. Namely, taking risks would leave open the possibility of false ‘negatives’, which Heberton and Seddon described as ‘... incorrectly rating a person as “safe” ...’.⁵⁸ Such an error could subsequently result in (catastrophic) dangers. As I noted before, it is the sole possibility of such a consequence that pre-emptive interventions aim to eliminate. In this respect, Furedi also speaks of a shift towards possibilistic risk management, which symbolises a shift away from ‘probability-based risk analysis’.⁵⁹

54. Heberton and Seddon, above n. 20, at 358.

55. Prins and Boutellier, above n. 41, at 7.

56. Ericson, above n. 15, at 1.

57. Tulich, above n. 16, at 59.

58. Heberton and Seddon, above n. 20, at 252.

59. F. Furedi, ‘Precautionary Culture and the Rise of Possibilistic Risk Assessment’, 2 *Erasmus Law Review* 197, at 205 (2009).

3 The Dutch Approach towards Outlaw Motorcycle Gangs

Before applying and further discussing the aforementioned differences between pre-emption and prevention, this section will briefly provide the context in which OMGs are being approached in the Netherlands. Moreover, it will explain why the approach towards OMGs, in particular, acts as an interesting case to explore the meaning of pre-emption.

3.1 The ‘Uncertainty’ of ‘Outlaw Motorcycle Gangs’

As noted in the introduction, there remains a certain amount of ‘uncertainty’ in the literature about the exact (criminal) nature of OMGs as a whole.⁶⁰ Consequently, Ayling argued that it would be unjust to assume that OMGs consist solely of criminals.⁶¹ The recent findings of Blokland and others seem to be in line with this view as some OMGs are believed to be more ‘radical’ than others.⁶² In other words, ‘... the available literature on OMGs does not provide for a clear answer to the question: Are all outlaw motorcycle clubs (1%-clubs) criminal gangs ...?’⁶³ While the latter is more an empirical and criminological question, up to now, no OMGs in the Netherlands have – by means of Criminal Law – been declared a criminal organisation.⁶⁴ The Dutch Public Prosecution Service has, moreover, unsuccessfully tried to prohibit the Hells Angels MC by means of the Dutch Civil Code on several occasions.⁶⁵ While it is beyond the scope of this article to discuss at length all the Civil cases, the judgments in these cases have shown that it is difficult to *legally* ascribe individual criminal

60. It is important to emphasise that this literature does not underplay the link of OMGs with (organised) crime. In fact, Blokland and others have shown that most members in their dataset have a criminal record. It is argued, however, that it is unclear whether all OMGs should be understood as criminal organisations by definition. Blokland and others, above n. 2.

61. Ayling, above n. 14, at 260-61.

62. Blokland and others, above n. 2.

63. Barker, above n. 6, at 71.

64. In 2007, the Public Prosecution Service tried to prosecute the Hells Angels MC as a criminal organisation (Art. 140 Dutch Criminal Code). It must be said that in this case, the Public Prosecution Service was declared inadmissible owing to infringements on the rights of the suspects. Therefore, the Court did not discuss this case on its contents (Dutch Court 20 December 2007, ECLI:NL:RBAMS:2007:BC0685).

65. When the activities of a legal entity are believed to be contradictory to the public order, the Public Prosecution Service is able to request the Court to prohibit and abolish the legal entity in question (Art. 20 subsection 1 of the Dutch Civil Code). It is important to notice that Art. 2:20 of the Civil Code is thus not based on Criminal Law. The Criminal Code in the Netherlands focuses on the individual offender. Instead, Art. 2:20 originates from the Dutch Civil Code and aims to prohibit foundations and associations of which the activity is alien to the public order. In this case, not the individuals within these organisations are the main concern, but organisations as such are being dissolved.

behaviour to the legal entity of an OMG.⁶⁶ Any criminal activities of a single OMG member cannot, by their very nature, be ascribed to the legal entity of the OMG.⁶⁷ A request to prohibit an entity can be granted only if it is deemed to be a necessary means to prevent conduct that actually violates commonly accepted democratic foundations and could possibly have a disruptive effect on society. Kesteloo, however, concluded that this ‘public order principle’ – in the context of the prohibition and abolishment of a legal person – is applied with great reticence.⁶⁸ All in all, the Supreme Court gives much weight to respecting the right to freedom of peaceful assembly and freedom of association (Article 11 ECHR).⁶⁹ Hence, although there are ample indications that members of some OMGs are guilty of various serious crimes, in the Netherlands there remains some (legal) ‘uncertainty’ surrounding the criminality of some OMGs as a whole.

Moreover, while in the Netherlands no OMGs have been prohibited yet, something else might have further amplified the uncertainty surrounding the criminal nature of OMGs. As noted in the introduction, the Dutch Government currently maintains that the term ‘outlaw motorcycle gang’ refers to motorcycle clubs that are believed to undermine the rule of law. However, the Dutch National Police has noted that not all clubs that have been listed as ‘outlaw motorcycle gang’ have – by definition – been under criminal investigation.⁷⁰ In other words, it is not necessary for members of a motorcycle club to be guilty of crimes in order to have their club listed as an ‘outlaw motorcycle gang’. In the meantime, these listed ‘gangs’ are, as a result, subject to a nationwide policy. In this way, one could say that the perception of the existence of ‘outlaw motorcycle gangs’ is real in its consequences.

I would like to stress that this line of reasoning does not underplay the gravity of crime within some OMGs. In fact, ample examples have revealed that members of some OMGs are indeed guilty of a wide range of serious and organised crimes. This paragraph, however, does reveal that it remains uncertain whether *all* listed ‘outlaw motorcycle gangs’ can – in legal terms – be regarded as criminal organisations. As the concept of uncertainty plays a pivotal role under the ‘logic-of-pre-emption’, the example of OMGs is an interesting case to reveal how state agencies deal with this uncertainty.

3.2 A Zero-Tolerance Approach towards OMGs

At the start of the year 2012, the former Minister of Security and Justice, Mr. Opstelten, stated that the problems with OMGs are persistent and severe. According to the Minister, members of some OMGs are relatively often connected with various criminal activities. It is argued that members of OMGs have been striving for a key position in organised crime. OMGs are, moreover, associated with extortion, intimidation and violence (*e.g.* in the hotel and catering industry), which has led to the belief that outlaw bikers are assuming an undermining position within society. In other words, the activities of OMGs are believed to threaten the integrity of a democratic society. The Minister has also pointed to signs of tax and social security fraud. Finally, local governments have experienced a rise in the number of OMG chapters in their municipality, which is believed to be the cause for increased tensions between rival OMGs. All in all, this has led to the notion that OMGs disobey the rule of law and consider themselves to be inviolable.⁷¹

The Minister stated that OMG members who consider themselves untouchable and thus undermine the rule of law need to be stopped in any possible way. Those who violate the law should, he argued, in any way pay back the bill.⁷² To put a stop to OMGs, the Dutch Minister of Security and Justice – in cooperation with agencies such as the Dutch National Police, local governments, the Dutch Tax Authority, the National Intelligence and Expertise Centre (LIEC) and the Regional Intelligence and Expertise Centres (RIEC) – announced a whole-of-government and zero-tolerance approach towards ‘outlaw motorcycle gangs’ in 2012. Under this whole-of-government approach, a so-called ‘framework of barriers’ (in Dutch: *barrièremodel*) has been developed in order to – by means of administrative, fiscal and criminal law enforcement – raise barriers and, consequently, prevent rule-breaking behaviour of OMGs and its members. To do so, the Dutch Minister of Security and Justice formalised eight guidelines or priorities to fight OMGs.⁷³

One of these guidelines, for instance, advocates a strong focus on OMG clubhouses. That is, in order to put a stop to the inviolability of OMGs, local governments are required to take a critical stance towards clubhouses and aim to hinder the establishment of new clubhouses in their municipality. Clubhouses that do not comply with the local development plan or that do not have a liquor licence are shut down with administrative force, the ultimate goal being to lower the total number of clubhouses in the Netherlands. From January 2012 to May 2014, a total of 111 clubhouses were either closed or deterred.⁷⁴ A second guideline aims to counteract the influence of OMGs in the hotel and catering industry.

66. See *e.g.* Dutch Court of Appeal 10 April 2008, ECLI:NL:GHAMS:2008:BC9212; Dutch Court of Appeal 25 April 2008, ECLI:NL:GHSHE:2008:BD0560; Dutch Supreme Court 26 June 2009 ECLI:NL:HR:2009:BI1124.

67. Dutch Court of Appeal 10 April 2008, ECLI:NL:GHAMS:2008:BC9212, at no. 4.10.2.

68. A. Kesteloo, *Deelneming aan een Criminele Organisatie. Een Onderzoek naar de Strafbaarstellingen in Artikel 140 Sr* (2011), at 87.

69. T.J. van der Ploeg, ‘Hoe moeilijk is het om een vereniging -of andere rechtspersoon- te verbieden?’, 16 *Nederlands Juristenblad* 1094 (2012).

70. Politie Landelijke Eenheid, above n. 2, at 19.

71. *Kamerstukken II*, 2011/12, 29911, no. 59, at 1-2.

72. *Ibid.*, at 1.

73. *Kamerstukken II*, 2011/12, 29911, no. 71.

74. Annual Progress Report Outlaw Motorcycle Gangs, June 2014 (RIEC/LIEC), available at: <www.riec.nl/doc/140616-integrale-landelijke-voortgangsrapportage-omgs-def-2.pdf>, at 9.

Since restaurants, pubs and clubs are expected to be used for money laundering activities or to act as club-houses, the main goal here is to scrutinise the possible weaknesses of companies for any involvement with OMGs. By cooperating with entrepreneurs, the police and local governments aim to avoid any influence of OMGs in the hotel and catering industry.⁷⁵ The remaining six priorities put the focus on the criminal prosecution of OMGs and its members; hindering the influence of OMGs within security companies and football hooliganism; tax evasion by OMG members; OMG members working in the public sector; and OMG-related events. These guidelines are assumed to break the OMGs' inviolability, reduce their effectiveness and, as a result, have a preventative effect.⁷⁶

4 Prohibiting OMG-Related Events

Over the past three years, the aforementioned priorities have been the starting point for many interventions towards OMGs in the Netherlands. To further assess the differences between prevention and pre-emptive strategies, I will zoom in on three cases related to the focal point of not facilitating OMG-related events.⁷⁷ According to the former Minister of Security of Justice, 'it is important to give a clear statement that concerned motorcycle clubs and members are being approached and that all necessary means to do so will be used'.⁷⁸ Following from this, the idea is that OMGs – by definition – should not be granted any stage or platform. This means that especially the government should not, so it is argued, facilitate the possibility for an OMG to organise, for example, an event. Here lies a task for the mayor as he or she is the provider of the permit that is needed for these events.⁷⁹ Following from this, part of the Dutch Approach thus entails the focus on the prevention of OMG-related events, based on the principle that the government should not partake in any OMG-related event.⁸⁰

As said, I will zoom in on three occasions where motorcycle events were cancelled by a local government (*i.e.* no new permits were distributed, and granted permits were withdrawn). The first example can be understood

as a direct result of the aforementioned policy to not facilitate any OMG-related event. The two other cases were cancelled on the basis of the advice of the Police not to facilitate any motorcycle-related events in April and May of 2014. The Police has issued this advice in the context of possible large-scale public order distortions.

4.1 The 'Brothers in Arms Run'

As I briefly mentioned in the introduction of this article, members of the Veterans MC were planning to organise the 'Brothers in Arms Run' in May of 2013, which was supposed to involve the gathering of ex-military motorcyclists from various countries.⁸¹ Part of this three-day event was a motorcycle tour planned on 11 May 2013. However, the local government of 'Cuijk' prohibited this get-together by not providing the permit that was required for the event.⁸² This refusal was grounded in public order and safety regulations, and the Mayor of Cuijk argued that the prohibition of this event would be in line with the prescribed nationwide policy to hinder OMG-related events. Interestingly, after the Veterans MC appealed against this decision in a preliminary proceeding, the Court decided that banning this event would be unlawful.⁸³ As a result, the ban on the 'Brothers in Arms Run' event was lifted.

It follows from this verdict that the initial ban of the event by the mayor was based on two arguments – first, because of the earlier described nationwide policy of the Ministry of Security and Justice, which proscribes support of any OMG-related events, and, second, on the grounds of maintaining public order. In short, it was feared that this event would attract members of other OMGs such as the Hells Angels MC. Yet it seemed that the mayor based his decision mainly on the policy of the Minister of Security and Justice and, to a lesser extent, on a report (*i.e.* a risk analysis of the event) created by the Dutch National Police on 2 April 2013.⁸⁴ However, the Court reasoned that a nationwide policy in itself cannot serve as a valid ground for prohibiting a local event. In a case like this, the municipality is duty-bound not to act solely on general (nationwide) policies but to also consider the local circumstances.

The Court argued that the arguments of the municipality to cancel the planned events were based mainly on general assumptions rather than specific risks of danger. That is, the report by the police revealed that no previous incidents were known in respect of other events of the Veterans MC. The 'Brothers in Arms Run' in 2008 – which also took place at this venue – moreover, passed off without any trouble.⁸⁵ Since the municipality was at

75. *Ibid.*, at 10.

76. It is beyond the scope of this article to provide a comprehensive overview of all eight guidelines. For a more extensive view of the 'framework of barriers' see *ibid.*

77. It has to be emphasised that these three examples by no means reflect the Dutch approach as a whole. Analysing only three occasions simply does not offer enough 'power' to do so. I use these three examples merely to initiate a discussion on the difference between prevention and pre-emption.

78. van der Ploeg, above n. 69, at 3.

79. *Ibid.*

80. Annual Progress Report Outlaw Motorcycle Gangs, June 2015 (RIEC/LIEC), retrieved from: <<https://www.rijksoverheid.nl/documenten/rapporten/2015/06/12/integrale-landelijke-voortgangsrapportage-outlaw-motorcycle-gangs-omg-s-juni-2015>>, at 12.

81. The Veterans MC is one of the motorcycle clubs that the Dutch National Police regards as an 'outlaw motorcycle gang'. Politie Landelijke eenheid, above n. 2, at 23.

82. Above n. 4.

83. The outcome of this preliminary proceeding was not published by the Court itself. Instead, the verdict was found on the website of the Veterans Motorcycle Club. See <<http://veteransmc.com/Vonnis-VoorzienigenRechter.pdf>> (last visited 11 August 2015).

84. *Ibid.*, at no. 5.

85. *Ibid.*, at no. 6.

that moment unaware of any criminal investigations related to the applicant and the event itself was not accessible to everyone, the Dutch National Police estimated the risk of public order disturbances at this event as being *low*. All in all, the Court ruled that the mayor was unable to provide enough indications that that year's 'Brothers in Arms Run' would cause serious trouble or would in fact disrupt the public order.

The decision not to provide the needed permit was – according to the Court – also based on the notion that the Veterans MC, being a member of the Dutch Council, is a so-called 'outlaw motorcycle gang'.⁸⁶ The sole argument of being an 'OMG', however, was considered to be inadequate to inhibit this event. Thus, although this event was initially prohibited, the arguments put forward by the mayor for doing so turned out to be based mainly on (nationwide) assumptions, which could not support the fear of any future public order disturbances.

4.2 The 'Harley-Day Valkenswaard'

One year later, a somewhat similar case took place in the municipality of Valkenswaard (located in the same province as the municipality of Cuijk). In this case the 'Foundation Harley-day Valkenswaard' (in Dutch: Stichting Harleydag Valkenswaard) requested authorisation for its seventh edition of the 'Harleydag Valkenswaard', which was planned on 26 April 2014. This freely accessible event usually involves live music, a market for motorcycles, entertainment for children and was expected to attract approximately 12,000 visitors. The organisation committee received permission to carry through their plans and activities on 26 February 2014. However, on 28 March, one month before the event was scheduled, the mayor of Valkenswaard revoked this permit. As was the case in the preceding example, the 'Foundation Harley-day Valkenswaard' appealed against this decision in a preliminary proceeding.⁸⁷

The decision to revoke the permit was based on a (confidential) note-of-advice of the Dutch National Police (Police region Oost-Brabant). This note prescribed a negative advice for *all* motorcycle-related events planned in April and May 2014 in the Police region of Oost-Brabant. This advice also had a direct bearing on events that had already been granted a permit to organise such an event. This negative advice was based on the fear that motorcycle events could attract OMGs, which in turn might result in (large-scale) public order disturbances. Besides this, the Police also made a risk assessment on this particular event and concluded that there was a *high*

risk of large-scale public order disturbances.⁸⁸ This conclusion was, among other reasons, grounded on the notion that the Harley-day of Valkenswaard might possibly be the ideal platform for the Bandidos MC to provoke the Hells Angels MC.⁸⁹ This stemmed from the idea that members of the latter are well-known visitors to this particular event and are generally seen as being in dispute with the Bandidos MC. Thus, the possibility of the Bandidos MC attending this event was believed to result in heightened tensions and possible public order and safety disturbances. At the same time, the Police reported that it was still not certain or at least somewhat uncertain that if both clubs met, it would indeed come to a direct confrontation.⁹⁰ Some concern also related to the uncertainty surrounding the position of chapters of No Surrender MC, which might be taken over by the Bandidos MC. It was, furthermore, argued that as other motorcycle events in the same area were also cancelled, allowing the 'Harley-day Valkenswaard' could instigate a 'honeypot effect' for various OMGs. Overall, the mayor of Valkenswaard attached more significance to safeguarding the public order and safety at the expense of the interests of the 'Foundation Harley-day Valkenswaard'.⁹¹

The Court argued that the mayor was justified in grounding his decision on the risk assessment made by the police. That is, the assessment contained risks that related directly to this particular event. So contrary to the previous case, local circumstances were taken into account on this occasion. The assessment was believed to be grounded in a realistic threat as the risk of a conflict between the Hells Angels MC and the Bandidos MC was deemed plausible.⁹²

4.3 The 'Easter Show DCA Motorcycles'

On the same day, the same Court ruled differently in yet another similar case. In this case, the owner of a motorcycle shop ('DCA Motorcycles') applied for a permit to organise a relatively small event on 21 April 2014. This event was set up as an 'open day' to promote the company of 'DCA Motorcycles'. However, the mayor refused to provide the company with the needed permit for fear of public order and safety disturbances.⁹³

The mayor followed the same note-of-advice of the Police as was referred to in the previous case (*i.e.* advising against all motorcycle-related events in April and May). This fear for disturbances was fuelled mainly by the fact that all other motorcycle-related events in neighbouring municipalities were also cancelled.⁹⁴ The mayor did not intend to make an exception for this event, as this was believed to have the effect of drawing

86. This Dutch Council, also known as the 'Council of eight' (in Dutch: 'Raad van Acht'), was founded in 1996 and was regarded as a way to reassure stability between the OMGs in the Netherlands. To take one example, members of this Council (*e.g.* the Hells Angels MC, Satudarah MC and the Veterans MC) discussed whether a motorcycle club was allowed to wear three back-patches on their vests, which stands for being a so-called 'full colour MC'. At the end of 2013, the council was dissolved after several OMGs abandoned the Council (Politie Landelijke Eenheid, above 2, at 24-25).

87. Dutch District Court 17 April 2014, ECLI:RBOBR:2014:2146.

88. *Ibid.*, at no. 1.

89. The Bandidos MC set up its first chapters in the Netherlands in March 2014 (Politie Landelijke eenheid, above n. 2, at 20).

90. Dutch District Court, above n. 87, at no. 1.

91. *Ibid.*

92. *Ibid.*, at no. 13.

93. <www.omroepbrabant.nl/?news/209463932/Helmond+geeft+geen+vergunning+voor+paasshow+van+motorwinkel+DCA+Motorcycles> (last visited 11 August 2015).

94. Dutch District Court 17 April 2014, ECLI:RBOBR:2014:2271, at no. 5.

several OMGs to this particular event (resulting in a possible confrontation between warring OMGs). This was because members of OMGs had no other event to attend during this period and were therefore expected to go to any other motorcycle-related event that was available. As was the case in the previous examples, ‘DCA Motorcycles’ also appealed against this decision.⁹⁵

In short, the Court argued that the report of the Police (advising against all motorcycle-related events in April and May) alone offered an unsatisfactory argument for refusing a permit for this particular event. The argument that this event would have been the only motorcycle-related event and would thus attract much attention from OMGs was not adequately justified. In other words, the mayor provided not enough concrete indications that the assumed disturbances of conflicting OMGs would take place at this particular venue.⁹⁶ Overall, the mayor should have motivated more precisely why the refusal of this permit was necessary. Consequently, the Court argued that the mayor had unjustly refused to provide ‘DCA Motorcycles’ with the required permit.

5 Pre-Empting OMG-Related Events

Having described these three cases, the next step is to apply the ‘framework of pre-emption’ outlined in Section 2; to what extent can these cases be understood through the concept of pre-emption?

The first distinction between the concepts of prevention and pre-emption relates to the difference between ‘risk management’ and ‘risk control’. As I have explained, pre-emption aims to prevent harm and danger *at all costs*. This is done not solely by *managing* risks, but by taking complete *control* over a ‘risky’ situation. Either by retrieving a permit or by not providing a permit, to begin with, the mayors in the foregoing examples aimed to ensure that these particular events would not take place. So – apart from the question of whether these decisions were legally justified – the mayors sought to take full control over the risks related to these events, and thus strived for maximum security. The costs of retrieving such a permit (*e.g.* expenditure made by the organising committee) were deemed less important than the possible risks arising from the event. A simple example of a strategy that would have taken these ‘costs’ into account would be the increase of police surveillance during the permitted event. By doing this, the risk of public disorder would be minimised and *managed*, while a certain amount of risk was still tolerated (*i.e.* the event is permitted, which leaves open the opportunity of OMGs disrupting the event). By prohibiting an event beforehand, the respective mayors do not accept any

risk of danger and thus aim to take *control* over the risks related to the event.

Another important (interrelated) concept that explains the difference between pre-emption and prevention strategies is ‘uncertainty’. That is, pre-emptive strategies tend to avert dangers whose manifestation is yet highly uncertain. However, a lack of knowledge about the problem at hand does not constitute a barrier to the implementation of a controlling measure. In this regard, it is relevant to review what the underlying rationale for taking action was in the aforementioned examples. Considering the first example (‘The Brothers in Arms Run’), the Court ruled that the decision to cancel the event was based mainly on the nationwide policy implemented by the Dutch Ministry of Security and Justice, that is, not to facilitate an OMG-related event to begin with. In fact, the Police assessed the risk of large-scale public disorder during this event as being low. The decision to cancel the event was thus grounded in a more general policy line rather than in concrete indications that the event would actually cause any trouble. I therefore tend to conclude that – especially considering the fact that previous occasions of this event did not cause notable troubles – there was a great amount of uncertainty about the dangers of this particular event. The second example (‘Harley-day Valkenswaard’) reaches a somewhat different conclusion. On this occasion, the Court argued that the municipality had based its decision to cancel the event on more local and concrete risk indications. In fact, this decision was grounded in a risk assessment linked to the local circumstances of the event. The third event (‘Easter show DCA Motorcycles’) was, however, banned on the basis of a more uncertain and general risk. As the remaining motorcycle events in that period were also banned, the mayor assumed that this event would attract significantly more motorcycle enthusiasts and, more importantly, more OMGs as well. The general presumption of this possible gathering of (rival) OMGs acted as a ground on which to refuse the necessary permit. According to the Court, this line of reasoning was not justified, or in other words, the risk of such a danger was deemed yet too uncertain to justify banning this event. Thus, it is not so much uncertainty as such (of some particular future danger) that is of importance here; the occurrence of future dangers is always to some extent uncertain. This particular danger was, however, regarded as too uncertain and not sufficiently backed up by a concrete risk assessment, which thus did not reasonably justify the cancellation of the event beforehand.

The third difference relates to the importance of risk assessments. It was argued that decisions under the logic-of-pre-emption are to a lesser extent the result of risk assessments. Prevention strategies are based on risk assessments that take the gravity of the particular risk into consideration, while pre-emption, on the other hand, is grounded in the idea that risks are not accepted to begin with. Overall, one cannot conclude that the importance of risk assessments in the aforementioned examples is reduced to zero. In fact, the Dutch National

95. *Ibid.*

96. *Ibid.*, at no. 9.

Police made a risk assessment on the specific and local dangers of the ‘Harley-day Valkenswaard’ event, which made the mayor of Valkenswaard decide to cancel the event. As a result, this case can hardly be typified as a form of pre-emption. In the case of the ‘Easter show DCA Motorcycles’, however, such a specific risk assessment was absent. That is, its refusal was based mainly on general assumptions, and no sufficient cause was provided as to why public disorder was to be expected at this specific local and small event. In the first example, the role of a risk assessment is somewhat different. As previously mentioned, ‘The Brothers in Arms Run’ was cancelled mainly on the basis of the national guideline forbidding facilitation of any OMG-related events issued by the former Minister of Security and Justice in 2012. This is not to say that there was no risk assessment drawn up for this particular event to begin with. However, this risk assessment revealed that the risk of any danger was perceived as low. Hence, although a risk assessment was actually drawn up, its conclusions did not constitute a decisive role for the adopted decision to cancel the planned event. This risk assessment thus seems to have had no or a marginal role in the decision to cancel the event. The fact that the latter event was organised by a listed OMG itself (unlike the other two events) seemed to have played a decisive role in cancelling the event.

5.1 Pre-Emption: The Denial of Rationality

As I have tried to explain in the first section of this article, pre-emptive strategies – similarly to prevention strategies – aim to prevent risk of dangers. The examples in this article similarly focus on changing situations that are believed to facilitate dangers. The motorcycle events are regarded as situations that might facilitate a clash between rival OMGs, which ultimately would lead to a situation of public disorder. Although it might be true that the Police had indications of a possible clash between rivaling OMGs, this fear inherently constituted an uncertain and perceived risk. However, whether or not any danger will occur in the future is inherently uncertain for all types of future dangers. It would thus be too simplistic and unjust to – for this reason – ‘label’ these cases as examples of pre-emption. In fact, given the infamous reputation of some OMGs, it is understandable for a mayor to be on his guard with OMG-related events. Revoking permits for events can be regarded as a useful way to prevent possible public disorder and, more precisely, a clash between warring OMGs. By cancelling such an event beforehand, however, the local government tries not only to minimise the risks (‘risk management’), but also to foreclose all possible risks in such a way that the level of risk is reduced to zero. The uncertain risk of public disorder is not accepted as the event – by not providing the needed permit – cannot pose any danger to public security to begin with. Thus, one could state that in the aforementioned examples, the local government tries to neutralise or take total control over the ‘risky situation’. As a result, as the events cited in this article were cancelled beforehand,

the possibility of any public disorder became real in its consequences. That is, the feared yet not materialised danger is acted upon (by means of cancellation) as if this danger *will* materialise. The consequence is real in the sense that the event is actually cancelled and, consequently, cannot be attended to begin with.

Not providing a permit for a motorcycle event also cancels out the possibility that (in these cases) OMG members will not use the event to cause any trouble (‘false positive’). Where prevention strategies solely try to alter one’s decision-making process, pre-emptive strategies thus take a more radical step by ensuring that the individuals do not come in a situation where he or she is able to make his or her own rational decision. A strategy of prevention would have, for instance, advocated – after the event was permitted – initiation, for example, of more police surveillance at the particular venue. This strategy would still have treated visiting OMG members as rational individuals capable of making their own calculated decisions. By treating the uncertain as certain, and thus by taking total control over an uncertain situation, one cancels out the possibility that a subject (*i.e.* members of OMGs) will not cause any trouble. In this way, pre-emptive strategies tend to disrespect what Smilansky has termed the ‘window of moral opportunity’.⁹⁷

It is important to emphasise here that it would be wrong to suggest that cancelling any risky event beforehand would subsequently make an example of pre-emption. In fact, the decision to cancel the ‘Harley-day Valkenswaard’ clearly showed a relation to the outcome of a risk assessment that qualified this event as a ‘high-risk’ event. The mayor in this case thus seems not to have cancelled this event in order to take full control over ‘uncertainty’, but actually based his decision on concrete risk indications. Interestingly, the ‘Brothers in Arms Run’, on the other hand, was prohibited because of a more general and political line of reasoning that a municipality should not make OMG-related events (*e.g.* parties organised by an OMG) possible to begin with (in this case by not providing a permit). The general notion that OMGs should not be granted any stage and that the government should not partake in any of its activities proscribes to cancel out, or raise barriers, to various OMG-related activities beforehand. Not providing a permit because of this line of reasoning, as the latter case shows, causes the role of ‘the risk assessment’ to fade into the background. That is, when put into practice, the decision not to provide a permit for an OMG-related event is decoupled from the outcome of a risk assessment (*e.g.* the risk of a possible clash between warring OMGs).

Therefore, the ‘denial’ of one’s ability to make law-abiding decisions becomes mostly apparent when looking at this latter case, as this example followed from the general focus on OMGs as briefly described in Section 3, and not from concrete and situation-specific risks. The belief of prohibiting any OMG-related event before-

97. S. Smilansky, ‘The Time to Punish’, 54 *analysis* 50 (1994), at 52.

hand (regardless of its ‘riskiness’), subsequently takes away the capacity of OMG members to decide not to act in a disorderly or criminal way, which denies the rationality of its members. The notion that local governments should not facilitate any OMG events by definition, seems to move beyond the statement of the former Minister of Security and Justice (Section 3) that those who transgress the law should, in any way, pay back the bill. While the latter refers to a *reaction* to misconduct (tit for tat), the former pre-empts the possibility of misdemeanor by making sure there is nothing to be paid back.

6 Conclusion

It is clear that today’s crime fighting policies attach much relevance to the prevention of crime. Quite simply, crime fighting today constitutes more than only reacting to criminal conduct by tracking down and prosecuting criminals. This preventative shift has been discussed in much detail by many scholars. At the same time, some authors have argued that some prevention strategies are increasingly based on the principle of pre-emption. While such pre-emptive strategies also aim to prevent crimes, it is believed that pre-emption is somewhat different from what is commonly understood as prevention. This article was an attempt to untangle the broad and all-embracing term of crime prevention by exploring and untangling the differences between prevention and pre-emption. This was done by analysing three examples in which local governments tried to prevent a motorcycle club-related event from taking place. Although the three cases are most certainly not perfectly clear examples of pre-emption, the present analysis has shown that there might indeed be different underlying rationales to be recognised, which justifies the statement that pre-empting crime is different from preventing crime. Overall, the distinction between pre-emptive and prevention strategies can be found in how one deals with the uncertainty inherently related to the future risk of danger. The measures described in this article aimed to take full control over the uncertain risk related to a particular event. In other words, the uncertainty surrounding the problem of OMGs (*e.g.* a possible clash between the Hells Angels MC and the Bandidos MC) called for a far-reaching strategy in an attempt to control (and not only manage) the feared danger before it actually emerged. One could say that, as the risk of public disorder was not accepted to begin with, the feared danger became real in its consequences. Under pre-emption, the uncertainty surrounding a threat is thus treated as certain. It must be noted, however, that the denial of the permit in the case of the ‘Harley-day Valkenswaard’ was based largely on a specific and locally embedded risk assessment, which clearly makes that this case cannot be explained through the concept of pre-emption. The role of a risk assessment was, however, rather marginal in the ‘Brothers in Arms Run’ case, as the Mayor of Cuijk based his decision largely on a gen-

eral approach that OMGs are not to be facilitated by the government. Such a belief devalues the role of risk assessments and treats an uncertain risk as certain. By doing so, it also denies the possibility that OMG members will not cause trouble at one of these events.

I think it is important to emphasise that – with this article – I do not claim that the Dutch approach as a whole is to be characterised as a pre-emptive approach. As already noted, the difference between prevention and pre-emption constitutes a gradual difference, and ‘reality’ could be too complex to clearly distinguish a prevention strategy from a pre-emptive strategy. To come to such a conclusion, more empirical research is needed (*e.g.* interviews with the people responsible for taking the decision to refuse a permit for a ‘risky’ event). With this article, I merely attempted to start a theoretical discussion about the difference between the two concepts, without drawing any hasty conclusions about the Dutch approach towards OMGs as such. However, I do believe that this article provided enough reason to do more empirical research into the concept of ‘pre-emption’. I will elaborate somewhat more on why this is the case in the following discussion.

7 Discussion

Until now, the difference between pre-emptive strategies and prevention strategies seems to be only a matter of theoretical and abstract importance. However, I believe that accentuating this difference is not only theoretically interesting, but also important in a more practical way. I would like to take this opportunity to endorse what has been argued by Matthias Borgers. He stated that it is important to keep an eye on what one wants to achieve by implementing pre-emptive measures and also to pay more attention to the possible negative effects of such strategies.⁹⁸ In my opinion, it is possible to come to a greater realisation and understanding of the effects of certain crime policy strategies by making a clearer distinction between pre-emption and prevention. This article has revealed that prevention and pre-emptive strategies have different underlying rationales. Both strategies have different goals. For instance, the former Minister of Security and Justice, Mr. Opstelten, has pointed to the importance of not facilitating any OMG-related events as one of the eight guidelines to fight OMGs. This article has advocated the thesis that not providing a permit for an OMG-related event because of possible public disorder is not a prevention strategy per se. It is a pre-emptive strategy in the sense that it treats the uncertain future as certain by treating OMG members as being incapable of making rule-abiding decisions. In order words, it acts upon the presumption that the event will in fact cause a conflict between various OMGs. Initially, one could argue that not granting a permit to begin with is a far less expen-

98. M.J. Borgers, *De vlucht naar voren* (2007).

sive measure compared with, for example, the enforcement of more police surveillance around the event itself. However, this line of reasoning would nullify the idea that a stringent pre-emptive strategy might also have negative consequences not only for the organising party, but for the state agency as well. To cite a simple example, could the prohibition of all OMG-related events during a period result in a shift towards more illegal OMG events out of sight of the Police and the local government? Is it thus possible that such a pre-emptive logic is based on the false impression that it can indeed fully ‘control’ this risky situation beforehand, or do such measures simply result in other new uncertainties that are even more difficult to control? Although this article has been dominated by the case of OMGs, the discussed distinction undoubtedly fits within the broader context of how state agencies cope with the (uncertain) risk of dangers. For instance, how do local governments and the Police cope with ‘risky’ sport games (*i.e.* feared hooliganism), and how should we understand the (preventative) strategies put forward with respect to returning Syria fighters? Research has shown that the closing of all brothels located on the so-called ‘Zandpad’ in Utrecht in 2013 did not help much to *prevent* human trafficking.⁹⁹ Could this be the result of the local government’s attempt to foreclose and control the problem by means of pre-emption? By thinking about these types of questions I would like to argue in favour of making a clearer distinction between pre-emptive and prevention strategies as it helps to think about the effects, limitations and consequences of crime policies. All in all, although the pre-emption–prevention distinction seems to be a theoretical and somewhat simulated distinction at first, it can be an interesting distinction to consider for law enforcement agencies and (local) governments. It forces agencies to reconsider whether the chosen ‘preventative path’ effectively prevents the commitment of crimes, or whether it only pre-empts uncertain and, to some extent, generalised risks that are inherently impossible to eliminate.

99. D. Siegel, *Het Zandpad – closing brothels or closing eyes? Utrechtse sekswerkers na sluiting van het Zandpad* (2015).