Introduction: the expanded conception of security and institutions

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1 Introduction

Security is a dynamic, context-dependent concept that is inevitably shaped by social conditions and practices. The socio-political perception of security threats influences our security policies relevant to political decisions about the design of social institutions specifically addressing those security concerns. Security is traditionally understood to be physical protection of national territory and its population from the destructive effects of warfare through military means.[1] Social institutions including but not limited to national governing institutions, inter-governmental institutions and the military are all devices developed through human history to collectively address traditional security threats.

Security is often considered to be an antithesis of the rule of law and civil liberty, justifying violation of rules and the restriction of freedom.[2] However, the development of international law and the institutionalisation of international public authorities have contributed to the increased normalcy or containment of extra-legal responses to security threats. For example, the Charter of the United Nations ('UN Charter') provides institutionalised mechanisms as the means of regulating the behaviour of sovereign states and conflict among them.[3] The nuclear

[1] Hans Kelsen, *Collective Security under International Law* (United States Government Printing Office, Washington, DC, 1957) p. 1 (defining security as 'the protection of men against the use of force by other men').

[2] For discussion, see especially, Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191. See also Concluding Remarks by Thomas Pogge.

[3] Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945), Art. 24.

non-proliferation regime establishes mechanisms for preventing the proliferation of nuclear weapons and facilitating the development of peaceful nuclear energy technology by institutionalising the asymmetric obligations between designated nuclear-weapon states and other non-nuclear-weapon states.[4]

Yet, towards the end of the Cold War the concept of security began to expand, which subsequently led to the proliferation of contemporary security issues such as economic security, environmental security, energy and resource security, health security and bio-security.[5] The conception of security also took a dramatic turn following the 2001 terrorist attacks on New York and Washington, blurring the traditional boundaries between international security and national security threats.[6] Those changes in the conception of security world-wide have tested the potential of existing institutions, such as the World Trade Organization (WTO), the World Health Organization (WHO), the International Maritime Organization (IMO), the Organization for Security and Co-operation in Europe (OSCE), the European Union (EU) and the Association of Southeast Asian Nations (ASEAN), to assume a new role in the changing security paradigms, both at international and domestic levels.

The greater diversity in the range of security threats and actors in the modern globalised world challenges our traditional understanding of security institutions with the need for re-evaluating the role, value and limits of institutions in their relationship with security and the law. While institutions evolve by finding the need or an opportunity to adjust themselves to meet new challenges, that may well result in changing the intricate balance between security and the law that has been sustained within current legal frameworks. It is this tension, both in public and international law contexts, arising from the institutional development to address contemporary security threats and the existing legal frameworks delimiting the institutional response to security that forms the subject of this volume.

[4] Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970). See also Kalman Robertson, Chapter 9.

[5] See generally, Jessica Tuchman Mathews, 'Redefining Security' (1989) 68(2) *Foreign Affairs* 162; Richard H. Ullman, 'Redefining Security' (1983) 8 *International Security* 129.

[6] See e.g., Miriam Gani and Penelope Matthew (eds.), *Fresh Perspectives on the 'War on Terror'* (ANU E-Press, Canberra, 2008); Dora Kostakopoulou, 'How to Do Things with Security Post 9/11' (2008) 28 *Oxford Journal of Legal Studies* 317; Benjamin J. Goold and Liora Lazarus (eds.), *Security and Human Rights* (Hart Publishing, Oxford/Portland, OR, 2007).

This fifth volume in the series connecting public and international law, engages with this tension from legal perspectives linking international law and public law, forming the underlying theme throughout the series. Both international law and public law have been central not only to the normative foundation for the formation, development and exercise of public authority to address security threats by institutionalised mechanisms, but also to the regulation and restriction of the exercise of such public authority. It is these legal perspectives and issues that commonly characterise the chapters in this volume, providing a variety of theoretical inquiries and case studies critically examining sociological, psychological, political and economic factors surrounding institutional evolution in response to contemporary security challenges. It is the intention of this volume to unravel intricate issues at the intersection of the tripartite relationship between public law and international law, security and institutions in light of the expansion of contemporary security threats.

2 Defining security institutions

Institutions are not mere instruments of the creators, but are autonomous entities operating, to varying degrees, within an organisational structure and decision-making processes. Institutions seek to act in conformity with the norms that guide their operation, interpret and apply them, and often generate friction due to the inherent indeterminacy of norms. As Ian Johnstone observes, institutions engage, through operational activities, in legal argumentation with other stakeholders and contribute to cause indeterminate norms and soft law to 'harden' with shared understandings about what those norms truly mean in practice.[7]

For the purpose of this book, security institutions are defined broadly, drawing on the definition of institutions proposed by Robert O Keohane, as 'persistent and connected sets of rules, formal and informal, that prescribe behavioral roles, constrain activity, and shape expectations',[8]

[7] Ian Johnstone, 'Law-making through the Operational Activities of International Organizations' (2008) 40 *George Washington International Law Review* 87, 122.

[8] Robert O. Keohane, *International Institutions and State Power* (Westview Press, Boulder, CO, 1989) 3. Similarly, Robert Jervis, 'Security Regime' (1982) 36 *International Organization* 357. Compare this definition with the legal definition of international organisations adopted by the International Law Commission in Draft Articles on the Responsibility of International Organizations (2011) *Yearbook of International Law*

which by design or through operational activities, deal with public security issues arising in the global or cross-border environment. This definition is broad and flexible enough to allow for the normative inquiries this volume is designed for, without necessarily restricting the scope of inquiry to the relationship between their constituent members within institutions.[9] Although this broad definition may not be suited for empirical inquiry,[10] it allows us to conceive of institutions in various forms as independent and autonomous entities capable of adaptation and evolution in response to the changing security paradigms as a framework of normative inquiry.

Traditionally, the concept of security was narrowly confined in military terms with the primary focus on state protection from threats to national interests.[11] Therefore, national military forces have long been the dominant focus of security institutions. In comparison, there are only a handful of security institutions at the international level originally designed to address traditional security concerns, including the UN Security Council and the Nuclear Non-Proliferation Treaty (NPT) regime. Celeste Wallander, Helga Haftendorn and Robert Keohane accordingly defined 'security institutions' rather narrowly, with a military-oriented, state-centric view, as those 'designed to protect the territorial integrity of states from the adverse use of military force; to guard states' autonomy against the political effects of the threat of such force; and to prevent the emergence of situations that could endanger states' vital interests as they define them'.[12] However, the expansion of the security concept, particularly after the end of the

Commission vol. II, Part 2, Art. 2(a) (defining 'international organization' as 'an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality').

[9] Cf. John J. Mearsheimer, 'The False Promise of International Institutions' (1994–1995) 19(3) *International Security* 5, 8 (defining institutions as 'sets of rules that stipulate the ways in which states should cooperate and compete with each other').

[10] See Beth A. Simmons and Lisa L. Martin, 'International Organizations and Institutions' in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds.), *Handbook of International Relations* (SAGE Publications, London, 2002) p. 194.

[11] See e.g., Kelsen, *Collective Security under International Law*, above n. 1, p. 1; Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Alfred A. Knopf, New York, 1950); Thomas Shelling, *Arms and Influence* (Yale University Press, New Haven, CT, 1966); Kenneth Waltz, *Theory of International Politics* (Random House, New York, 1979).

[12] Celeste A. Wallander, Helga Haftendorn and Robert O. Keohane, 'Introduction' in Helga Haftendorn, Robert O. Keohane and Celeste A. Wallander (eds.), *Imperfect Unions: Security Institutions over Time and Space* (Oxford University Press, Oxford, 1999) pp. 1, 2.

Cold War and by a variety of institutions contributing to this expansion, indicates a greater scope for considering a wider variety of institutions to be security institutions.

Indeed the departure from the very narrow meaning and usage of security emerged even amidst the Cold War rivalry. For example, the nuclear arms race and in particular United States' President Reagan's new nuclear deterrence policy led to the idea of common security in the 1980s to promote confidence between states and the cause of disarmament.[13] The move towards an expanded notion of security has accelerated since the end of the Cold War, spawning a growth of security literature in the areas of economic security,[14] environmental security,[15] energy and resource security,[16] food security,[17] bio-security[18] and health security.[19] The UN Development Programme (UNDP) introduced the concept of human security into international policy discourse in its 1994 *Human Development Report*,[20] which has since been incorporated into

[13] Independent Commission on Disarmament and Security Issues, *Common Security: A Blueprint for Survival* (Simon and Schuster, New York, 1982); Independent Commission on Disarmament and Security Issues, *North-South: A Programme for Survival* (Pan Books, London, 1980). See also R. Väyryen, 'Multilateral Security: Common, Cooperative or Collective?' in M.G. Schechter (ed.), *Future Multilateralism: The Political and Social Framework* (United Nations University Press, Tokyo, 1999) pp. 43, 55–7.

[14] See e.g., V. Cable, 'What is International Economic Security?' (1995) 71 *International Affairs* 305.

[15] See e.g., Simon Dalby, *Security and Environmental Change* (Polity Press, Cambridge, 2009) especially ch. 2; Simon Dalby, *Environmental Security* (University of Minnesota Press, Minneapolis, MN, 2002).

[16] See e.g., Sam Raphael and Doug Stokes, 'Energy Security' in Alan Collins (ed.), *Contemporary Security Studies* (2nd edn, Oxford University Press, Oxford, 2010) p. 379.

[17] See e.g., Wael Allam, 'Food Supply Security, Sovereignty and International Peace and Security: Sovereignty as a Challenge to Food Supply Security' in Ahmed Mahiou and Francis Snyder (eds.), *Food Security and Food Safety* (Martinus Nijhoff, Leiden, 2006) p. 325; Melaku Geboye Desta, 'Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach' (2001) 35 *Journal of World Trade* 449.

[18] See e.g., David P. Fidler and Lawrence O. Gostin, *Biosecurity in the Global Age: Biological Weapons, Public Health, and the Rule of Law* (Stanford University Press, Stanford, CA, 2008); Mark Wheelis and Malcolm Dando, 'Neurobiology: A Case Study of the Imminent Militarization of Biology' (2005) 87 *International Review of the Red Cross* 553; David L. Heymann, 'The Evolving Infectious Disease Threat: Implications for National and Global Security' (2003) 4 *Journal of Human Development* 191.

[19] See e.g., David P. Fidler, 'From International Sanitary Conventions to Global Health Security: The New International Health Regulations' (2005) 4 *Chinese Journal of International Law* 325; Lincoln Chen and Vasant Narasimhan, 'Human Security and Global Health' (2003) 4 *Journal of Human Development* 181.

[20] United Nations Development Programme, *Human Development Report 1994* (United Nations, 1994) p. 22.

key policy documents such as the 2000 UN Millennium Declaration.[21] The UN Secretary-General's High-Level Panel identified economic and social threats and transnational organised crime, as well as inter-state conflict, internal conflict, terrorism and weapons of mass destruction as global security threats.[22] The former UN Secretary-General's 2005 Report, *In Larger Freedom*, adds to the list poverty, deadly infectious disease and environmental degradation, on the grounds that these can have equally catastrophic consequences.[23]

The expansion of the concept of security has been progressively, and yet often variably recognised as new security agendas by traditional security institutions such as the North Atlantic Treaty Organization (NATO).[24] One most notable example is the debate on various human security agendas in the Security Council.[25] It formally acknowledged an expanded notion of security when world leaders gathered in 1992, referring to a range of non-military sources of instability in the economic, social, humanitarian and ecological fields as threats to international peace and

[21] GA Res. 55/2 (8 September 2000). See also *Human Security: Report of the Secretary-General*, UN Doc. A/64/701 (8 March 2010).

[22] *A More Secure World: Our Shared Responsibility, Report of the United Nations Secretary-General's High-Level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2 December 2004) p. 23. For discussion, see G. Shafir, 'Legal and Institutional Responses to Contemporary Global Threats: An Introduction to the U.N. Secretary-General's High-Level Panel Report on Threats, Challenges and Change' (2007) 38 *California Western International Law Journal* 1, 6–14.

[23] Kofi A. Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All* (United Nations, New York, 2005) para. 78.

[24] For the transformation of NATO's security agendas, see e.g., Mats Berdal and David Ucko, 'Whither NATO' in Bruce D. Jones, Shepard Forman and Richard Gowan (eds.), *Cooperating for Peace and Security: Evolving Institutions and Arrangements in a Context of Changing U.S. Security Policy* (Cambridge University Press, Cambridge, 2010) p. 98; Frank Schimmelfennig, 'Transatlantic Relations, Multilateralism and the Transformation of NATO' in Dimitris Bourantonis, Kostas Ifantis and Panayotis Tsakonas (eds.), *Multilateralism and Security Institutions in an Era of Globalization* (Routledge, Abingdon, 2008) p. 183; James Sperling, 'Eurasian Security Governance: New Threats, Institutional Adaptations' in James Sperling, Sean Kay and S. Victor Papacosma (eds.), *Limiting Institutions? The Challenge of Eurasian Security Governance* (Manchester University Press, Manchester, 2003) pp. 3, 7–10. More generally, Emil J. Kirchner, 'Regional and Global Security: Changing Threats and Institutional Responses' in Emil J. Kirchner and James Sperling (eds.), *Global Security Governance: Competing Perceptions of Security in the 21st Century* (Routledge, London/New York, 2007) pp. 3, 5–16.

[25] For a detailed analysis of different views expressed by states in the Security Council, see Hitoshi Nasu, 'The Place of Human Security in Collective Security' (2013) 18 *Journal of Conflict and Security Law* 95.

security.[26] In 2000, the Security Council discussed the impact of HIV/AIDS on peace and security in Africa under the Council Presidency of US Vice-President Al-Gore,[27] which set a precedent for Security Council debate on a broader security agenda.[28] Subsequently, the Security Council discussed the issue of Africa's food security,[29] largely in respect of its 'incontrovertible link' to peace and security,[30] and the issue of climate change,[31] which caused a stark division among states as to what can or should be appropriately considered as a security issue.[32]

Other institutions have also been instrumental to this expansion of the concept of security. For example, the Conference on Security and Co-operation in Europe (CSCE; later renamed as the Organization for Security and Co-operation in Europe: OSCE), a unique product of Cold War politics established by the 1975 Helsinki Accords,[33] provided for the first time a formal basis for the human rights agenda in the political discourse with the Soviet Union, building a foundation for its comprehensive security approach across politico-military, economic and ecological, and human dimensions.[34] The IMO has addressed maritime security issues since 1985, following the *Achille Lauro* incident, against unlawful, deliberate acts of violence against ships and persons on board ships.[35] More recently, the WHO has embraced the idea of global public health security by expanding the scope of its activities to

[26] UN Doc. S/PV.3046 (31 January 1992), especially the Presidential statement issued at the end of the proceedings at p. 143.
[27] UN Doc. S/PV.4087 (10 January 2000). [28] *Ibid.* p. 2.
[29] UN Doc. S/PV.4652 (3 December 2002); UN Doc. S/PV.4736 (7 April 2003); UN Doc. S/PV.5220 (30 June 2005).
[30] See especially, UN Doc. S/PV.5220 (30 June 2005), 9 (Romania), 11 (the Philippines), 12 (Japan), 13 (China, Greece), 14 (Benin).
[31] UN S/PV.5663 and S/PV.5663 (Resumption 1) (17 April 2007); UN S/PV.6587 and S/PV.6587 (Resumption 1) (20 July 2011).
[32] For an analysis of the debate, see Nasu, 'The Place of Human Security in Collective Security', above n. 25, 118–20; Shirley V. Scott, 'Securitising Climate Change: International Legal Implications and Obstacles' (2008) 21 *Cambridge Review of International Affairs* 603.
[33] Final Act of the Conference on Security and Co-operation in Europe, adopted 1 August 1975, 14 ILM 1292.
[34] For details, see e.g., Antonio Ortiz, 'Neither Fox nor Hedgehog: NATO's Comprehensive Approach and the OSCE's Concept of Security' (2008) 4 *Security and Human Rights* 284.
[35] See generally e.g., Martmut Hesse and Nicolaos L. Charalambous, 'New Security Measures for the International Shipping Community' (2004) 3(2) *World Maritime University Journal of Maritime Affairs* 123, 124. For further analysis, see Chie Kojima, Chapter 4.

encompass 'illness or medical condition, irrespective of origin or source, that presents or could present significant harm to humans' in the 2005 International Health Regulation.[36]

The form of institutions has also diversified, ranging from formal international organisations established by treaties to expert bodies usually for supervising and monitoring compliance with treaty obligations, such as the International Atomic Energy Agency (IAEA), and even to non-treaty based institutions such as OSCE.[37] Domestic government institutions have been building trans-governmental networks to coordinate policy implementation and respond effectively to challenges posed by transnational security issues, such as terrorism, illicit trafficking of weapons of mass destruction-related materials, human trafficking and piracy.[38] In addition, international non-governmental organisations and private entities have also become increasingly drawn into security policy-making and implementation, as can be found in the counter-piracy and cyber security initiatives.[39]

There are also institutions not originally designed to address security issues, adapting to incorporate them through operational activities. For example, the EU has developed civil and military crisis management operations through institutional evolution of its Common Foreign and Security Policy.[40] The Economic Community of Western African States (ECOWAS), established to facilitate economic development of its member states, has engaged in peacekeeping operations, notably in Liberia in the 1990s.[41] ASEAN was established as the political platform with dual functions to maintain the regional stability and to ensure the internal stability and security of the government in each member state,[42] but has also been playing a greater role to address

[36] Revision of the International Health Regulations, WHA Res. 58.3 (23 May 2005) ('2005 IHR'), opened for signature 23 May 2005, 2509 UNTS 79 (entered into force 15 June 2007), Art. 1. For further analysis, see Adam Kamradt-Scott, Chapter 10.

[37] Geir Ulfstein, 'Institutions and Competences' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009) pp. 45, 46–55.

[38] See Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton, NJ, 2004) pp. 36–64.

[39] See Chie Kojima, Chapter 4 and Ottavio Quirico, Chapter 14.

[40] See Anne McNaughton, Chapter 3.

[41] See Hitoshi Nasu, Chapter 7.

[42] Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Routledge, London, 2001) p. 57; P. Saipiroon, *ASEAN Governments' Attitudes Towards Regional Security 1975–1979* (Institute of Asian Studies, Bangkok, 1982) pp. 5–7.

'non-traditional security issues', whilst being guided by the norm of comprehensive security.[43]

The expansion of the concept of security, together with institutional evolution in a variety of forms, has arguably led to the expanded role for inter-governmental institutions, international expert bodies, domestic government institutions and even private institutions to address a wide range of contemporary security issues that states are facing. The greater role of security institutions through their institutional evolution may well be considered to be the result of a natural progression of institutional activities in response to changing security paradigms. However, institutional evolution does not take place in a political, legal and historical vacuum, but is an inevitable process of adaptation for survival according to the changes in the surrounding security environment.[44] That process may well involve normative influences, challenging the existing institutional rules, raising issues of legitimacy and accountability, and causing collision with other institutions. Thus, institutional evolution, when it is promoted by the security imperative, requires legal inquiries into its effects within the existing legal frameworks, which is facilitated by drawing from the connections between public and international law.

3 Themes and structure of the volume

These institutional developments in response to the changing security environment and the emergence of non-traditional security challenges raise a number of normative and legal questions at the intersection of public and international law, security and institutions. Consequently, this volume is divided into four parts, each examining different aspects of the tension between institutional development and the legal frameworks dealing with contemporary security threats.

[43] ASEAN Political-Security Community Blueprint, Section B, available at www.asean.org/archive/5187-18.pdf. See generally, Mely Caballero-Anthony, 'Challenging Change: Nontraditional Security, Democracy and Regionalism' in Donald K. Emmerson (ed.), *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* (Walter H. Shorenstein Asia-Pacific Research Center, Stanford, CA, 2008) p. 191; Mely Caballero-Anthony, 'Revisioning Human Security in Southeast Asia' (2004) 28(3) *Asian Perspective* 155.

[44] See Cheryl Shanks, Harold K. Jacobson and Jeffrey H. Kaplan, 'Inertia and Change in the Constellation of International Governmental Organizations, 1981–1992' (1995) 50 *International Organization* 593.

3.1 *Security and institutional evolution*

The first theme concerns the theoretical underpinning of institutional evolution in the context of changing security paradigms. Different theories have developed different types of institutional analysis in social sciences.[45] The rational choice theory may explain institutional evolution as a result of states attempting to further their own national interests.[46] According to neoliberal institutionalism, institutionalisation is subject to the degree of shared expectations of participatory behaviour, specificity of codified institutional rules, and differentiated functions and responsibilities among its participants.[47] Historical institutionalism, on the other hand, conceives institutional evolution as being affected by various factors, including personal preferences and rules, which can only be explained in a historical and comparative context.[48] The revolutionary theory, which has more recently emerged in literature, attempts to understand institutional evolution as a more dynamic process due to the interdependence and complex interaction of endogenous and exogenous variables.[49] The relevant inquiry for the purpose of this volume is how the concept of security influences institutional evolution in general or in a specific context.

[45] Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalism' (1996) 44 *Political Studies* 936.

[46] See e.g., Barbara Koremenos, Charles Lipson and Duncan Snidal, 'The Rational Design of International Institutions' (2005) 55 *International Organization* 761; David A. Lake, 'Beyond Anarchy: The Importance of Security Institutions' (2001) 26 *International Security* 129, 157. Cf. Richard Gowan and Bruce D. Jones, 'Conclusion: International Institutions and the Problems of Adaptation' in Bruce D. Jones, Shepard Forman and Richard Gowan (eds.), *Cooperating for Peace and Security: Evolving Institutions and Arrangements in a Context of Changing U.S. Security Policy* (Cambridge University Press, Cambridge, 2010) pp. 311, 314 and 319 (observing that 'there is no necessary correlation between balance of power in international politics and the structure, or even the behavior, of international institutions' and that 'real shifts in the balance of power do not necessarily create institutional adaptation').

[47] Celeste A. Wallander and Robert O. Keohane, 'Risk, Threat, and Security Institutions' in Helga Haftendorn, Robert O. Keohane and Celeste A. Wallender (eds.), *Imperfect Unions: Security Institutions over Time and Space* (Oxford University Press, Oxford, 1999) pp. 21, 24.

[48] See e.g., Orfeo Fioretos, 'Historical Institutionalism in International Relations' (2011) 65 *International Organization* 367; Sven Steinmo, Kathleen A. Thelen and Frank Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press, Cambridge, 1992).

[49] See Mark Blyth, Geoffrey M. Hodgson, Orion Lewis and Sven Steinmo, 'Introduction to the Special Issue on the Evolution of Institutions' (2011) 7 *Journal of Institutional Economics* 299, 305–9.