

# WHO decides on the exception? Securitization and emergency governance in global health

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## Abstract

This article analyses the emergency governance of international organizations by combining securitization theory with legal theory on the state of exception. Our main argument is that where issues are securitized as global threats, exceptionalism can emerge at the level of supranational bodies, endowing them with the decisionist authority to define emergencies and guide political responses. We theorize the ‘emergency trap’, which is triggered when the emergency powers of international organizations reduce the obstacles to, and increase the incentives for, the securitization of further issues. Based on the idea that the emergency trap functions as an institutional driver of securitization, we also highlight the importance of the constitutional containment of emergency competencies as an alternative to discursive desecuritization strategies. We illustrate this security–emergency dynamic in a case study of the recent empowerment of the World Health Organization (WHO) in the governance of global health emergencies. The article shows how WHO’s exceptional response to the 2003 severe acute respiratory syndrome (SARS) crisis paved the way for an institutionalization of emergency powers within the organization and contributed to securitizing the 2009 swine influenza outbreak as a global pandemic. However, WHO’s crisis governance has also triggered internal and external processes of constitutional contention.

## Keywords

constitutional theory, Copenhagen School, exception, global health, international organizations, securitization, World Health Organization

## Introduction

Over the last decade, the issue of health security has risen on the international agenda. This has been accompanied by a transformation of the role of the World Health Organization (WHO) in

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global health governance. WHO's growing autonomy in disease surveillance and its successful performance in containing the 2003 severe acute respiratory syndrome (SARS) outbreak triggered an intense debate as to whether we may be witnessing the transition to a post-Westphalian order in global health. The revised International Health Regulations (IHR), in particular, have been viewed as marking a shift of public health authority to the supranational level (Fidler, 2004; Zacher and Keefe, 2008). Many scholars, however, have questioned claims that such a shift is taking place, emphasizing that states retain ultimate control over WHO's competencies and that state-level implementation remains crucial for enacting global health security (Davies, 2008; Kelle, 2007). In addition, WHO's donor-driven and fragmented structure raises questions about its organizational autonomy (Graham, 2013; Hanrieder, 2014). Hence, scholars of global health security have come to assert that mechanisms of state control may prevent WHO from effectively securing global public health (Kamradt-Scott, 2011).

On the other hand, the aftermath of the 2009 H1N1 ('swine flu') outbreak saw a highly critical debate about WHO's decisionmaking during the crisis. For the first time in its history, WHO had declared a so-called Public Health Emergency of International Concern (PHEIC). Assisted by a secret Emergency Committee, the organization's director-general issued pandemic alerts and recommendations that pressured states to purchase large amounts of vaccines – a pressure to which many states ceded (Deshman, 2011: 1095–1096). As the crisis passed and the severity of the outbreak was found to be rather mild, journalists, state representatives and European parliamentarians began to criticize the lack of transparent decisionmaking procedures within WHO, and allegations of corporate capture were raised and discussed in various forums. In the wake of this international health emergency, it was apparent that WHO had displayed competencies that were of far greater consequence than a vision of a toothless United Nations (UN) bureaucracy would have us assume.

How do these two faces of WHO – dependent and state-driven versus discretionary and unaccountable – fit together? In this article, we analyse WHO's emergency governance as a globalized variant of exceptionalism. Drawing on securitization research and legal theories of the exception, we argue that WHO's emergency governance is marked by a bureaucratic decisionism that can itself become a driver of securitization. Emergency governance by international organizations (IOs) is different from state-level exceptionalism in that it lacks direct enforcement capacities. However, the language of 'global security' facilitates the emergence of focal and centralized IOs as authoritative actors whose decisions shape how emerging threats are governed. Just as the presentation of a problem as a threat to national security amplifies executive discretion at the state level, so the securitization of transboundary risks may also strengthen the supranational authority of IOs. Further, unlike emergency politics in constitutional democracies, global exceptionalist authority is not embedded in a system of institutional constraints or a critical public sphere and therefore lacks the constitutional framework that regulates emergency politics at the domestic level. To contain the potential 'emergency trap' that this constellation entails, we contend that IO decisionism needs to be checked by constitutional constraints beyond the state. Transparency and institutional checks can inhibit the capture of IOs by special interests and make their crisis decisions accountable to their global audiences.

Our analysis of WHO's emergency powers sheds new light on the transformation of political authority in the wake of securitization. It contributes to the debate on the ambiguous effects of securitization in global health, which confers political priority on matters of disease and human vulnerability, but can also open the door to illiberal measures (see e.g. Elbe, 2006; Lo Yuk-ping and Thomas, 2010; McInnes and Rushton, 2013). While many authors have stressed how health securitization empowers states (e.g. Davies, 2008; Enemark, 2009; Kamradt-Scott and McInnes, 2012), here we emphasize the institutional side-effects of securitization at the IO level. In doing so, we seek to bring insights from constitutional theory to critical security studies and to discuss the

complex interplay between securitization and emergency governance. We highlight not only the slippery slope that IO emergency powers provide for further securitizations, but also discuss ways of institutionally containing global emergency politics. Such an approach also has implications for discussions about desecuritization, introducing containment as a constitutional complement or alternative to discursive desecuritization strategies (see Hansen, 2012).

To develop these arguments, the article proceeds in four main steps. First, we lay out how the constitutional perspective on securitization can be used for the analysis of IO emergency governance. The three following sections then spell out the components of this argument and apply them to the example of WHO. The analysis examines WHO's empowerment through the securitization of infectious disease in the SARS crisis and goes on to describe the institutionalization of WHO's emergency powers as a slippery slope that, in the case of the swine flu outbreak, led to further securitization. Finally, we reconceptualize desecuritization for the context of IO emergency politics. We conclude with a discussion of the analytical implications of our argument and map avenues for further research on global emergency politics in other IOs, such as the UN Security Council or the European Union (EU).

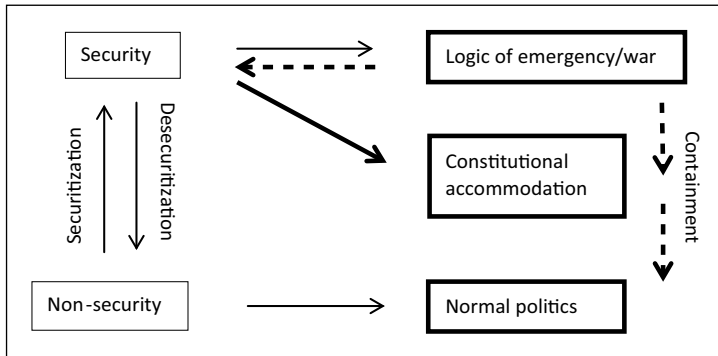
## Securitization and the global governance of security

In its classic formulation by Ole Wæver (1995), securitization is problematized precisely because of the *raison d'état* that is inscribed into the concept of security. Securitization is based on speech acts, usually by political elites, whereby political challenges and challengers are made into existential threats to the 'community' – in other words, the state. The securitization of speech acts invokes 'urgency; state power claiming the legitimate use of extraordinary means; a threat seen as potentially undercutting sovereignty, thereby preventing the political "we" from dealing with any other questions' (Wæver, 1995: 51). The politics of security is intrinsically linked to the state and the logic of 'war', where all concerns other than victory or defeat recede into the background (Wæver, 1995: 53–54; see also Buzan et al., 1998: 24).

As Michael C. Williams (2003) has noted, this conceptualization of security is implicitly underpinned by the writings of Carl Schmitt, the most influential and controversial legal theorist of the state of exception. The construction of existential threats to the political community does not just reflect Carl Schmitt's vision of politics as based on a friend–enemy distinction (Huysmans, 1998; Schmitt, [1932] 2007). In addition, the 'extraordinary means' that securitization legitimizes echo the sovereign command of the exception for which Schmitt's ([1922] 2005) theory of the state is notorious. The danger of 'security' as understood by the Copenhagen School is that it allows governments to suspend legal constraints and democratic principles in the name of security.

This critical view on securitization has fuelled rich and multifaceted research programmes on the widening of security speech.<sup>1</sup> Scholars have scrutinized, for example, the construction of threats through speech acts (Balzacq, 2005; Salter, 2008) as well as by other means, such as visual representations (Hansen, 2011; Williams, 2003) or seemingly banal bureaucratic practices (Huysmans, 2011). A complementary question has also been examined, namely, how securitization can be avoided or reversed politically – in other words, how *desecuritization* works. Given that the core of securitization is the production of friend–enemy antagonisms, desecuritization approaches have explored various strategies to overcome this conflictual dynamic (Hansen, 2012; Huysmans, 1998; Roe, 2004). Hence, the main focus of securitization research is on asking when and how issues come to be regarded as security problems – the political goal being to avoid 'securityness' and the associated looming Schmittian politics (McDonald, 2008; Wæver, 2011).

The downside of this concentration on the (de)construction of security problems, however, has been that the threatening political scenario itself – exceptionalism – has received far less theoretical



**Figure 1.** The constitutional dimension of securitization.

and empirical attention in securitization studies (Bright, 2012: 862–867; Guzzini, 2011: 331–332). The question of which legal and institutional transformations actually follow from securitization – in other words, how security is governed – has rarely been addressed explicitly.<sup>2</sup> The broad ideas of ‘extraordinary means’ and Schmittian politics are more often than not treated as taken-for-granted implications of securitization (see McInnes and Rushton, 2013). Essentializing the nexus between securitization and exceptionalism may be central to the critical thrust of the Copenhagen School tradition, but this means that important insights into the dynamic interplay between securitization and emergency governance are missed. We therefore suggest complementing the analytical focus on the (de)constructivist dimension of securitization (shown on the left axis in Figure 1) by an examination of the constitutional dimension of securitization, namely, its implications for the constitution of political authority in the governance of emergencies (shown on the right axis). This analytical shift helps to disentangle the notions of securitization and exceptionalism and thereby to specify the grammar of emergency implicit in the ‘grammar of security’ (Buzan et al., 1998: 33). Drawing on post-Schmittian discussions of exceptionalism in legal theory, we propose three theoretical contributions to securitization research that become visible only when we direct our gaze to the constitutional dimension of securitization.

*First*, by reconstructing the logic of emergency governance in general terms, we are able to contribute to disentangling exceptionalism from the ‘state’. While the securitization of national (but also international) threats is mostly associated with the (re)nationalization of emergency response mechanisms (Enemark, 2009; Kamradt-Scott and McInnes, 2012), we argue that the securitization of international problems may equally lead to the internationalization of emergency governance. Against the Schmittian fixation on state sovereignty, we contend that exceptionalism is located at different levels of political authority. As Roxanne Doty (2007) has shown, exceptionalism is a general figure that can also be invoked in the security practices of communities below the level of the state. Our article complements this reconceptualization by analysing how the politics of emergency is played out beyond the state – that is, at the level of international organizations. Where global security crises require rapid and centralized decisions, exceptionalist authority can also migrate to the supranational level of IOs and their executive organs. This empowerment consists chiefly in *decisionist* political authority to determine the existence of an emergency situation and to define the measures required to counter the threat without being constrained by law. Even though it is not backed up by direct enforcement capacities, IO decisionism sets the agenda for state behaviour in times of crisis, as well as for further securitizations.

Thus, *second*, we conceptualize what we call the ‘emergency trap’ of global security. We argue that the securitization–exceptionalism link is not static but inherently dynamic, and that it creates self-reinforcing tendencies. When the legal and institutional consequences of securitization are taken seriously, it becomes clear that the logic of emergency is not just a transient mode of political decisionmaking, but also generates lasting institutional effects. In particular, exceptionalism is connected to an empowerment of the executive in the political system, extending its discretion to counter the portrayed security threat. Such institutional transformations make it easier to reactivate the language of security and emergency and thereby to securitize further issues. Thus, there is a tendency to perpetuate the securitization via the institutionalization of emergency politics. We will show that this trap is not only a national (autocratic) phenomenon, but that it can be triggered at the IO level owing to the relative lack of public control and institutional checks beyond the state.

*Third*, we suggest a constitutional alternative to the Copenhagen School’s approach to desecuritization. While the latter starts from the assumption that securitization means the end of politics and therefore suggests discursively scaling down the threat construction (e.g. Roe, 2004), our critical reconstruction of global emergency governance shows that the jump from securitization to exceptionalism itself is not essential but political, and therefore contestable. It can thus be subjected to constitutional checks on executive authorities. As the constitutionalist discussion of the state of exception teaches us, institutional checks can be installed to break the vicious circle between securitization and emergency governance (see e.g. Scheuermann, 2006). Unlike the strategy of discursive desecuritization (the undermining of threat constructions), this conception brings into play constitutional means of containing the effects of securitization, such as legal review and the separation of powers.

In the following section, we spell out each of these arguments in more detail and use them to make sense of WHO’s emergency governance in global health.

## **Global health emergencies and the empowerment of WHO**

How can securitization reshape political authority beyond the nation-state? In this section, we theorize how emergency politics is institutionalized at the IO level. We use our insights to make sense of how WHO’s handling of the SARS crisis catalysed the formation and institutionalization of decisionist authorities within that organization.

### *Global emergencies, global exceptionalism*

At the national level, a state of emergency is the legal order through which sovereign states respond to security crises. States of emergency constitute an exceptional type of government and follow a distinct logic. First, they are marked by the time pressure and urgency that security invokes. This implies that slow democratic procedures need to be bypassed when rapid reactions are needed (see Aradau, 2004). Second, given the unanticipated, ‘exceptional’ nature of existential threats, law has to recede in order to facilitate decisions aimed at re-establishing political order. As Carl Schmitt ([1922] 2005: 13) writes most pointedly, there ‘exists no rule that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists’. Assuming that security crises cannot be dealt with through democratic processes or based on *ex ante* legislation, the decisionism of a political sovereign is required.

While originally theorized for the nation-state, the emergency mode of politics can nowadays also be observed at the global level (Kreuder-Sonnen, 2012; Kreuder-Sonnen and Zangl, 2013). Security threats are increasingly seen as worldwide contingencies that do not respect national

boundaries, particularly within the discourse of globalization. Environmental disasters, terrorist attacks, financial breakdowns or globalized pandemics are some of the prototypical crisis scenarios in which high-speed decisionmaking and rapid political interventions are seen to be needed. A leading theorist of this 'planetary state of exception', sociologist Ulrich Beck (2009) claims that contemporary economic, ecological or other risks create a 'global community of threats' and a radical uncertainty regarding future catastrophes. This should lead the world to 'enforced enlightenment' – in other words, worldwide cooperation to combat global risks (Beck, 2009: 8, 47). Put another way, 'transboundary crises' demand transboundary responses (Boin and Rhinard, 2008: 7).

In global crisis situations where time pressure is high and rapid decisions are needed, turning to IOs is a natural choice because of both their centralization and their expertise. The centralization of governance competencies within IOs (Abbott and Snidal, 1998) allows for timely reactions to urgent threats. Indeed, the supranational authority of IOs (their ability to govern via majority or bureaucratic decisions) has grown considerably over the last century (Zürn et al., 2012). Their expert authority and perceived neutrality (Barnett and Finnemore, 2004: 24–25) also endow IOs with the legitimacy to take rapid decisions in the face of imminent threats. Hence, just as in the national context, a *global* politics of emergency can lead to an empowerment of the executive – in this case not of national governments, but of the executive organs within IOs.

Global emergency governance, however, is also structurally different from the prototypical state of exception at the domestic level. Most importantly, states can rely on their monopoly of force and thus resort to a police force, for example, to give effect to their emergency measures. By contrast, IO authority is (mostly) not backed by coercive power and therefore relies on the deference of member-states to IO measures. It is mainly based on the transfer of decisionist authority to IO bodies. The impact of IO decisions, however, especially in times of crisis and uncertainty, should not be underestimated. IO decisions and recommendations contribute to setting the international agenda and legitimize certain behaviours while also delegitimizing others. This process became evident in WHO's reactions to SARS and H1N1. In the following, we reconstruct how the organization's authority to combat global health threats with exceptional means was formed.

### *SARS and WHO's decisionist authority*

Although WHO is the focal international organization in global disease surveillance and control, its authority in this domain was rather limited until the 1990s (Hanrieder, forthcoming). Its original main legal instrument, the International Health Regulations (IHR), only covered a small and pre-defined set of 'quarantinable' diseases, such as cholera, plague and yellow fever. Moreover, under the old IHR, WHO could only become active and issue recommendations when states reported outbreaks – a duty that member-states often failed to comply with owing to concerns or fears about prestige or economic losses (Fidler, 2005: 335–336). This de facto national veto made the IHR a rather toothless instrument (Zacher and Keefe, 2008: 40–41).

This changed only during the 1990s, when concern about 'emerging' and 're-emerging' infectious diseases grew – first among US health authorities and increasingly also in global bodies such as WHO (Abraham, 2011; Kamradt-Scott, 2010: 77). As the HIV/AIDS pandemic continued to spread and global interconnectedness fuelled fears of rapid global contagion, attention shifted from known diseases to the unlimited potential threats residing in the microbial world (Weir and Mykhalovskiy, 2010: 61–62). At the same time, new communication technologies began to liberate WHO from the strictures of national veto, and facilitated the private and decentralized reporting of disease outbreaks. Unofficially, WHO began to draw on outbreak reports issued by Internet-based professional networks, using them for monitoring purposes in its Global Outbreak Alert and Response Network (see Fidler, 2005: 347). Officially, a debate was launched in the mid-1990s on

how to make the IHR a viable crisis response tool. The WHO Secretariat developed proposals to extend the coverage of the IHR to all possible 'public health emergencies of international concern' (WHO, 2002). However, given the complexity involved in finding *ex ante* regulations for unknown diseases, the reform debate made little progress until the start of the new millennium. Various techniques for determining which diseases posed an emergency threat proved inadequate and, likewise, any *ex ante* specifications of the recommendations that WHO could make in the event of an outbreak remained extremely vague (Burci and Vignes, 2004: 139). The breakthrough in these negotiations came only with the outbreak of SARS infections in 2002–2003 and WHO's exceptional decisions in its handling of the crisis.

SARS, at that point an unknown form of pneumonia, first emerged in China in November 2002 and spread toward 32 states within several months (Kamradt-Scott, 2011: 802). Though SARS was not highly contagious, there was a high probability that infection by the pathogen would lead to death (Doshi, 2009: 605). Despite the initial denials by the Chinese authorities, WHO was soon informed about the outbreak through non-state sources (Heymann and Rodier, 2004: 190). The WHO Secretariat activated its alert network to coordinate worldwide research and containment efforts, and in March 2003 issued its first global alert. Director-General Gro Harlem Brundtland publicly declared SARS to be a 'worldwide health threat' (WHO, 2003).

The measures that WHO took on the basis of this securitization are well reported and have been described as 'agency slack' given that they exceeded WHO's formal mandate in several respects (Cortell and Peterson, 2006). The WHO response was exceptional, first, because the organization publicly shamed states that did not comply with the recommendations and guidelines prepared by the organization (Loh et al., 2004). This authoritative behaviour broke with WHO's established practice of not publicly criticizing member-states. In particular, the Chinese government was strongly criticized for suppressing information on the outbreak in its territory (Kamradt-Scott, 2011: 804). Second, WHO issued explicit travel warnings, beginning in April 2003, for the most affected territories in China, Hong Kong and Canada, even though it had never received a mandate to take such measures (Fidler, 2004: 268). Fearing the economic consequences of these alerts, the affected states protested in public, but made parallel efforts to fulfil WHO's epidemiological criteria so that they could get the travel warnings lifted (Heymann and Rodier, 2004: 193–194).

This rupture with established practice has since been interpreted in different ways. Some considered it to be a rather narrow transgression (Smith, 2009); others viewed it as a major instance of organizational 'slack' (Cortell and Peterson, 2006). It has also been argued that WHO's response to SARS may have been legally justified on the basis of a teleological interpretation of the WHO Constitution (Kamradt-Scott, 2007). What is important for our argument is, first, that the WHO actions were indeed considered a rupture that required a re-regulation of the organization's emergency powers and zone of discretion (see Kamradt-Scott, 2011); and, second, that the SARS crisis became the blueprint for the revision of the IHR and thus marked a formative turning point in how emergency governance in international health was organized. Hence, the re-regulation actually institutionalized WHO's authority to decide on the exception.

As SARS was successfully contained by May 2003 and the number of casualties remained below 1000, the crisis was seen as a success story for WHO (Kamradt-Scott, 2011: 802). Its exceptional measures were recognized as effective emergency responses and as blueprints for the IHR revision process. The WHO Secretariat supported this interpretation in a series of publications issued in 2003 and 2004 in which it framed SARS as a prototypical new health threat: an unpredictable and highly dangerous disease that public health authorities should prepare for. In addition, it emphasized that WHO's response had been critical to identifying and containing the disease, and that the extension of the organization's competencies had been justified (WHO Intergovernmental Working Group for the Revision of the International Health Regulations,

2004). Indeed, WHO's member-states soon agreed on a codification of WHO's emergency powers in the revised IHR (Zacher and Keefe, 2008: 66).

The revised International Health Regulations (the 'IHR 2005') were adopted in 2005 and entered into force in 2007 (WHO, 2008). Rather than a limited list of known diseases, the new IHR cover all potential threats to international health. Member-states are now required to report disease outbreaks and 'health events' to WHO, and the organization can also draw on non-state sources to assess threats. The ultimate decision about whether health events constitute a 'Public Health Emergency of International Concern' (PHEIC) is delegated to the WHO director-general, who 'shall make the final determination on this matter' (Art. 49[5]). For determining the beginning and termination of a state of emergency, as well as WHO's 'temporary recommendations', the director-general shall take into account the views of an emergency committee whose members are selected by the director-general from the IHR expert roster (Arts 47–48). According to the revised IHR, the WHO Secretariat is the authority that decides on the exception and entitles the director-general to shift to a quasi-autocratic style of decisionmaking during a state of emergency. In the following section, we discuss how these authorities were activated during the first PHEIC, the swine flu pandemic, and how this illustrates the dynamic feedback of IO emergency powers on securitization.

## **Reactivating emergency powers: Securitization and the swine flu outbreak**

The revision of the IHR was only a momentary endpoint of a securitization–emergency interplay in the arena of global health. Emergency powers are inherently dynamic, creating incentives for their perpetuation on the one hand while provoking resistance on the other (see later). In this section, we focus on the first aspect of this dynamic – the 'emergency trap' that contributed to the securitization and governance of the 'swine flu' outbreak in 2009.

### *The slippery slope of global exceptionalism*

In the tradition of Harold Lasswell (1941), many social scientists and legal scholars have pondered over the so-called ratchet effect of emergency powers in national polities. Aaron Friedberg (2002: 240) summarizes the position of these scholars: 'Once undertaken ... emergency increases in the size of central government bureaucracies, the bulk of the revenues they extract, and the range of activities they seek to control are rarely completely reversed.' Hence, once seized, emergency powers tend to be institutionalized *ex post*, perpetuating the increased authority of the executive. Arguably, emergencies thus involve the danger that exceptional authority will become the rule (Gross and Ní Aoláin, 2006: 230). This has a further implication, namely, that enduring exceptionalism also reduces the obstacles to, and increases the institutional incentives for, further securitizations. As Rasler and Thompson (1989: 123–124) note, the emergency empowerment of executive agencies also widens the opportunity to invoke security-related justifications for future bureaucratic expansions.

The 'autocratic tendencies' inherent in the institutionalization of exceptional powers have been intensely studied at the national level (Questiaux, 1982: 31). These trends point to what we refer to as an institutional 'emergency trap', the dynamic feedback of emergency powers on securitization. Just like the classic 'security trap' theorized by the Copenhagen School (see *c.a.s.e. collective*, 2006: 460), in which the quest for security can lead to the identification of ever more insecurities that societies seek to control, so the institution of emergency powers does not simply put an end to a security crisis. Rather, it can increase the pressure on executives to become active and respond in



situations where a looming problem may be viewed as an existential threat. At the same time, it reduces institutional obstacles to further securitizations and creates incentives for executives to extend their reach and authority. Emergency provisions can thereby become a slippery slope toward yet further securitization.

International organizations are especially vulnerable in this regard because they are not embedded in state-like democratic institutions. Even though public scrutiny of international institutions seems to increase with the institutions' political authority (Zürn et al., 2012), mechanisms of societal influence and their capacity to act as an effective corrective on IO politics remain relatively minuscule (see Gross and Ní Aoláin, 2006: 404). As we will discuss in more detail, there are significantly fewer checks and balances on IO authority than there are in constitutional democracies (see Klabbers, 2007: 161–162). That the tendency of exceptionalism to become self-perpetuating also applies to IOs has become evident in WHO's response to the H1N1 outbreak.

### *The first Public Health Emergency of International Concern (PHEIC)*

The first cases of Swine Influenza A/H1N1 were observed in Mexico in March 2009. By mid-April, Mexico had confirmed more than 60 H1N1-related deaths, and outbreaks were also reported in the USA. According to WHO, this new influenza strain was a major cause for concern not only because of its transboundary spread, but also because of its extraordinary characteristics, such as an atypically high mortality rate among young adults.<sup>3</sup> On 25 April 2009, WHO Director-General Margaret Chan invoked the IHR and declared the H1N1 virus to be a Public Health Emergency of International Concern (PHEIC), thereby establishing a considerable amount of discretion for the emergency actions of the WHO executive. Like all subsequent WHO recommendations, Chan's decision was based on advice from the WHO Emergency Committee, which Chan had convened in accordance with the terms of the IHR. In order to protect the committee from outside influence, the identities of its members were kept secret by WHO (with the exception of the chair), and the director-general took ultimate responsibility for WHO's emergency response (Cohen and Carter, 2010: 1278). This consisted of publishing updates and 'temporary recommendations' and, most importantly, assessments of whether swine flu posed an existential threat to global health.

In fact, until June 2009 H1N1 was not fully securitized but was declared a *potential* threat to global health security, meaning it was seen as a potential 'pandemic'. As Chan declared at a meeting of the UN General Assembly on 4 May 2009, pandemic flu was a major threat to humankind: 'Influenza pandemics [imply] that nearly everyone in the world is susceptible to infection. It is this almost universal vulnerability to infection that makes influenza pandemics so disruptive.'<sup>4</sup>

Yet, according to WHO's pandemic warning system, by May 2009 the H1N1 outbreak was still in Phase 5 (imminent pandemic) and not Phase 6 (pandemic). This lower-level rating was due, first, to the fact that the disease had not yet spread beyond the American continent and was thus limited to only one of the six WHO regions. Second, WHO's established criteria for an outbreak to be defined as a pandemic specified that it should cause 'enormous numbers of deaths and illness'. This definition was changed in early May, when the criterion of severity was discretely removed from the WHO website and the concept of the 'pandemic' was redefined – without any form of public discussion – to signify the global dispersion of a disease (Cohen, 2009). The redefinition allowed WHO to fully securitize the H1N1 outbreak and declare it a pandemic on 11 June 2009, although in terms of severity the H1N1 flu did not exceed other seasonal influenza outbreaks (Deshman, 2011: 1097).<sup>5</sup> This, in turn, allowed WHO to activate its pandemic preparedness plans and to make the recommendations that it had prepared for the outbreak of a pandemic flu over the preceding decade (Cohen, 2009; Doshi, 2009; Fidler, 2009: 767–768).

Among the recommendations issued by WHO, the most consequential were those advising countries to order vaccines and antiviral medicines (Cohen and Carter, 2010: 1277; Deshman, 2011: 1095–1096). These recommendations did not go uncontested among public health professionals, some of whom questioned the severity of the outbreak (Garske et al., 2009), but in a climate of high insecurity and uncertainty such sceptical voices had little impact. Health officials and the media looked to Geneva, where WHO issued regular updates and policy guidance. While developing countries could not afford to order the recommended vaccines, most of the wealthier states followed WHO's advice.<sup>6</sup> In the aftermath of the pandemic, the majority of European governments reported that the WHO pandemic alert had been critical to their decision to order vaccines (Deshman, 2011: 1096).<sup>7</sup> In addition, 22 European governments had signed advance purchase agreements with pharmaceutical companies that were contingent on the declaration of a pandemic. Eleven of these agreements were directly activated by the WHO pandemic alert, forcing governments to purchase and stockpile large amounts of vaccines that they ultimately would not use (Deshman, 2011: 1096). Only once the crisis had passed did critical voices questioning WHO's decisionmaking become dominant. During the emergency, however, such debate did not take place and most governments ceded to the pressure to purchase costly medicines without being able to assess their benefits and safety.

In summary, WHO's first official health emergency (PHEIC) demonstrated that IO emergency powers bestow considerable discretion and authority upon international organizations in times of global crisis. During the emergency, WHO autonomously redefined the term 'global pandemic' and was able to exert considerable authority through its recommendations. The swine flu case illustrates that IO emergency powers are not only products but also drivers of securitization. WHO's decisions were part of an extremely opaque process that facilitated securitization through an evasion of public scrutiny. Only after the WHO director-general had decided in August 2010 that the H1N1 virus had entered the post-pandemic period did WHO publish the names of the experts who were on its emergency committee. Many of the committee members, it was then discovered, had close ties to pharmaceutical companies that had benefited directly from the crisis, which led to allegations against WHO of conflicts of interest (Cohen and Carter, 2010). These procedural concerns raise the important question of how IO emergency governance can be contained and committed to transparent and accountable working methods. In the following section, we propose a constitutionalist alternative to desecuritization and discuss the post-H1N1 efforts to tame WHO's exceptionalism by constitutional means.

## **Constitutional constraints and the management of global emergencies**

WHO's new emergency authorities show how IO emergency politics is fuelled by and, in turn, can reinforce securitization at the global level. Yet, we hold that just like the construction of a security threat, the exercise and locking in of emergency powers is neither necessary nor irreversible. In fact, the degree of decisionism institutionalized in IOs may be determined and contained by constitutional mechanisms of political balancing and legal constraint. We argue therefore that constitutional containment is a useful complement to the Copenhagen School's interpretation of desecuritization and a viable strategy for delimiting WHO's emergency politics.

### *A constitutionalist alternative to desecuritization*

Given the spectre of exceptionalism that comes with security, research in the tradition of the Copenhagen School has focused mostly on averting securitizations that facilitate emergency

measures (see Roe, 2008; Wæver, 2000: 253–254). It has been claimed that a securitizing move that shifts an issue from normal politics into the realm of the exception needs to be countered by an explicit *desecuritizing* move that shifts the issue back to the normal by discursively undermining the threat construction (Hansen, 2012: 542–545; Huysmans, 1995: 65–67; 1998; Roe, 2004: 285–287).<sup>8</sup> Such a conception of securitization and desecuritization presents several ways back to normal politics. However, it also reproduces the categorical belief that there are only two possible political forms: ‘non-security’ (associated with normal politics) and ‘security’ (associated with the logic of war) (see Figure 1). This perspective is conceptually constraining because non-security is not always an option: on one hand, desecuritizing moves may simply not be successful because desecuritizers lack discursive authority or because their discursive strategies do not resonate with the relevant audiences (see Buzan et al., 1998: 26). On the other hand, non-security may be undesirable owing to the negative side-effects that desecuritization can produce – for example, by undermining legitimate claims to protect vulnerable groups (Roe, 2004). Without an alternative to desecuritization, this would mean letting the logic of war unfold.

The alternative we propose here is based on the assumption that there is little reason to accept that speaking about security concerns necessarily leads to the use of full emergency measures. Paul Roe (2004: 292–293) has argued convincingly that securitized issues can be *managed*. While the language of security remains present, its effects can be mitigated (see also Tjalve, 2011). As the debate on the state of exception among legal theorists shows, there are different ways of *constitutionally* dealing with emergencies that foresee particularly the taming of sovereign power through constitutional containment (see Dyzenhaus, 2006; Ferejohn and Pasquino, 2004; Gross, 2003; Scheuermann, 2006). For example, what has been termed the ‘accommodation model’ of exceptionalism is based on the understanding that it would be unrealistic to think that the existing constitutional order could remain completely untouched during times of crisis. Nevertheless, the basic pillars of the constitution need to be protected and the legal order should therefore have mechanisms ready to keep an emergency within these constitutional confines (Ackermann, 2004; Gross, 2003: 1043–1044; Tushnet, 2005). Thus, from a legal theory perspective, one important alternative and complement to desecuritization is constitutional accommodation (see Figure 1). It is an alternative insofar as it mitigates the effects of securitizations that cannot be avoided. However, it is also complementary to discursive desecuritization because it counteracts the tendencies of the emergency trap outlined earlier – in other words, it removes or mitigates a precondition for further securitizations (see also White, 2013: 14–15 for the inverse approach).

Such confines can be both *ex ante* and *ex post* constitutional checks on discretionary powers. *Ex ante*, both the initiation and the scope of emergency measures can be constrained. Regarding the initiation of emergency rule, Schmittian decisionism – according to which the sovereign themselves determines the exception – can be countered by functionally separating the decision on the presence or absence of an emergency and the decision on the means to overcome it. This is seen as a fundamental precondition for keeping emergency rule ‘constitutional’ (Rossiter, 1948: 299–300). At the IO level, this could mean that a member-state body or other subcommittee is entitled to formally invoke the state of exception and that only then can an IO organ decide on emergency measures. The range of available emergency measures can be circumscribed so that the sovereign’s discretion does not trespass on elementary rules and rights even in the state of emergency.

In addition, IO emergency powers can be contained *ex post* with the help of accountability mechanisms. As scholars in the literature on emerging global administrative law argue, basic principles of domestic administrative law – and thereby mechanisms of political and judicial review – can and should be instituted within the international legal system to increase IO accountability (see Kingsbury et al., 2005).<sup>9</sup> Accountability can take the form of political review, whereby an interstate assembly or executive board watches over IO emergency powers. Legal review, in turn, can be

achieved by either a legal counsel or an internal review panel to assess the lawfulness of the actions of IOs. In addition, inter-institutional processes of steering and control can contribute to the review of an IO's deployment of emergency competencies (Kingsbury and Casini, 2009: 337). An important side-effect of accountability mechanisms is that they enhance the transparency and public scrutiny of IO activities. This may also prove to be positive feedback for desecuritization efforts by opening the possibility of discursively contesting the securitizing moves of IOs.

### *Constitutional containment in WHO*

These types of constitutional checks can also be applied to WHO, and have in part already been tapped in the management of its emergency powers. *Ex ante* checks on WHO's emergency powers mainly regard the scope of measures that the director-general can recommend during a PHEIC. Indeed, in terms of the scope of the emergency regulations, the existence of the IHR could be regarded as an instrument that can contain the emergency measures to the minimum required level and thereby prevent interference with trade and human liberty (see Zacher and Keefe, 2008: 6–8). This is reflected in IHR formulations that urge the WHO director-general, for example, to recommend only necessary and evidence-based measures and, more importantly, to emphasize the protection of human rights (Arts 3, 32, 45). However, *ex ante* checks on WHO's initiation of emergencies are rather limited.<sup>10</sup> As noted above, the ultimate discretion to determine the state of emergency and to decide on the measures to be recommended lies with the director-general. This, it can be argued, creates an incentive for WHO to securitize health issues by declaring a PHEIC. A functional separation of the decision to declare PHEICs and the decision over emergency measures is a possible constitutional check that does not yet appear to have been considered.

Instead, the constitutional containment of WHO's emergency powers has mainly been carried out via mechanisms of *ex post* review. Critics of WHO's 2009 emergency governance used the strategy of external horizontal review to press for constitutional checks on the organization's discretion. In the aftermath of the first PHEIC, for instance, the Parliamentary Assembly of the Council of Europe emerged as a horizontal check on WHO's executive discretion (see Dushman, 2011). Early in 2010, the Parliamentary Assembly initiated a public inquiry into WHO's response to the H1N1 crisis, culminating in the release of a highly critical report entitled 'The Handling of the H1N1 Pandemic: More Transparency Needed' (Parliamentary Assembly of the Council of Europe, 2010). This was followed by the adoption of Resolution 1749 (2010)<sup>11</sup> by the Parliamentary Assembly, which noted the grave shortcomings in the decisionmaking procedures at WHO during the handling of the H1N1 crisis and called upon the organization to review its terms of reference 'with a view to ensuring the utmost transparency and the highest level of democratic accountability regarding public health decisions' (Para. 6.1).

The public pressure emanating from the Parliamentary Assembly has also affected the work of WHO's internal review body, the IHR Review Committee, which, like the Emergency Committee, consisted of members of the WHO expert roster appointed by the director-general.<sup>12</sup> The Review Committee held a series of public sessions, including hearings of external critics. In its report, the committee asserted that there was no direct evidence of industry influence on WHO decisions, but nevertheless admonished the inadequate way in which the WHO dealt with the conflicts of interest among its experts. The committee also criticized the WHO decision to keep secret the names of the members of its Emergency Committee and recommended more transparent procedures for committee appointments and working methods. WHO's failure to dispel suspicions of arbitrary redefinition in relation to the adjustment of the criteria for defining a pandemic was also criticized, although the Review Committee suggested that the *ad hoc* changes made by WHO were in line with the 'intended' definition of a pandemic (WHO, 2011: xx–xxiii).<sup>13</sup> In 2012, the World Health

Assembly endorsed the findings of the WHO investigation and requested that the director-general report on the implementation of the Review Committee's recommendations (Deshman, 2011: 1099). These recommendations are expected to shape WHO's next handling of a PHEIC.

The emerging public debate about and review of WHO's emergency powers show that the emergency game is not unidirectional. Indeed, the invocation of crisis and security may be productive of exceptionalist IO authority. However, the emergency impetus may equally be channelled and contained by properly designed constitutional structures. The outcome of speaking security is not a carved-in-stone regularity. It can be manipulated and contained.

## **Conclusion**

In this article, we have sought to demonstrate the utility of breaking up the concept of securitization and untying the institutional consequences from the act of speaking security. This de-essentializing move enables a new perspective on the legal–constitutional dimension of securitization: in contrast to accepting the looming exceptional politics as a feared but given implication of securitization, we have suggested instead an explication of the connection between securitization and exceptionalism as a dynamic and contestable relationship. Our focus was therefore less on the construction and deconstruction of political problems in terms of security, and more on the effects of securitization on political authority in the governance of global emergencies. We have used this perspective to make sense of WHO's changing role in the governance of global health over the past decade.

Our analysis of WHO's role in health security has revealed the intricate interaction between IO emergency governance and securitization. Crises exacerbate the transparency and accountability deficit of IOs, triggering an emergency trap that facilitates further securitization. Importantly, however, IO decisionism is not the same as all-out IO autonomy. In fact, the discretionary zone of emergency politics also establishes a zone of informality that is particularly vulnerable to capture – be it corporate capture that many suspected was the case during the H1N1 crisis, or capture by powerful states that attempt to exploit discretionary zones to their benefit (Davies, 2008; Stone, 2011). Hence, a constitutional containment of IO emergency powers does not merely establish checks on IO authority, but also impacts on the influence of powerful states and interest groups in global politics. The normative project of desecuritization thus ties into the normative project of global health equity.

While we developed our theoretical arguments in close connection with the empirical observations related to the example of WHO, it is our hunch that this type of global securitization and associated forms of global exceptionalism are generally more common phenomena across IOs (see also Kreuder-Sonnen and Zangl, 2013). Suffice it to mention the UN Security Council's role in counter-terrorism after 9/11 or the European institutions' governance of the current financial crisis in the Eurozone: the UN Security Council displayed heavily exceptionalist traits when it blacklisted individuals and deprived them of their right to a fair hearing and at the same time arrogated to itself the function of world legislature (see Joyner, 2012; Kreuder-Sonnen, 2012), while European crisis politics is interspersed with elements of autocratic governance at all possible levels, be it the (German-led) European Council's imposition of severe conditionalities, the European Central Bank's self-authorization to act as lender of last resort in apparent violation of EU treaties, or the ample discretion of the so-called troika (consisting of the European Commission, the European Central Bank and the International Monetary Fund) in monitoring the implementation of the European emergency measures (see Ruffert, 2011; White, 2013). Against this background, we suggest that there is the space and the need for further research on the relationship between securitization and exceptionalism in the crisis politics of international organizations.

More generally, we hold that the Copenhagen School's approach to securitization and the legal–constitutional theory on the state of exception are two complementary research strands, and that the full potential of their mutual engagement has yet to be explored. While we have attempted in this article to demonstrate the value added for the Copenhagen School agenda of integrating insights from legal theory, the fertilization should also work the other way round. For example, the legal–philosophical debate surrounding the state of exception still fails to provide an adequate understanding (or even a discussion) of how emergencies are produced discursively irrespective of the factual circumstances. Similarly, there is no consideration of the question of how the proposed constitutional solutions for emergency governance may have effects on the (de)stabilization of security discourses that underlie an emergency situation. In this regard, legal theorists could learn much from the Copenhagen School.

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### Notes

1. For overviews, see McDonald (2008) and the 2011 special issue of *Security Dialogue* (Gad and Petersen, 2011).
2. But see Aradau (2004) for a discussion of the procedural and policy dimensions of exceptionalism. See also White (2013).
3. See the WHO website at [http://www.who.int/csr/don/2009\\_04\\_24/en/index.html](http://www.who.int/csr/don/2009_04_24/en/index.html) (accessed 19 March 2013).
4. See the WHO website at [http://www.who.int/dg/speeches/2009/influenza\\_a\\_h1n1\\_situation\\_20090504/en/index.html](http://www.who.int/dg/speeches/2009/influenza_a_h1n1_situation_20090504/en/index.html) (accessed 19 March 2013).
5. Peter Doshi (2009: 603) stated in the *British Medical Journal* that 'since the emergence of novel A/H1N1, descriptions of pandemic flu (both its causes and its effect) have changed to such a degree that the difference between seasonal flu and pandemic flu is now unclear'.
6. We thank an anonymous reviewer for pointing to this stratified impact of WHO's advice. The direct effect of influenza securitization was thus limited to affluent countries that could buy and stockpile large amounts of pharmaceuticals. Indirectly, however, it also harmed developing countries by shortening the supply of vaccines and antivirals (Elbe, 2010). WHO's securitizing moves can thus be seen as contributing to the exacerbation of global health inequalities.
7. Though ex post justifications need to be interpreted with some caution, it is noteworthy that a survey by the Health Protection Agency indicated that 17 out of 27 European governments considered the WHO pandemic alert to be the second major trigger of their decision to purchase vaccines – second only to the 'scientific assessments' criterion, which may also have been shaped by WHO assessments (Deshman, 2011: 1096).
8. See Aradau (2004) for critical commentary on this approach to desecuritization.
9. Empirically, a steady, albeit uneven, trend can be observed towards the introduction of accountability mechanisms in IOs that are designed to constrain their exercise of authority especially vis-a-vis

individuals (see Heupel, 2013; Heupel et al., forthcoming).

10. Adam Kamradt-Scott (2011: 810–811) argues that the director-general's obligation under the new IHR to consult with concerned states and the Emergency Committee is already a significant check. However, as declaring a PHEIC and deciding on countermeasures are ultimately at the discretion of the director-general, this is at best a very weak constraint.
11. Assembly debate on 24 June 2010 (26th Sitting).
12. See Articles 50–53 of IHR (2005).
13. A revised preparedness guideline for pandemic influenza that takes into account the experience of the H1N1 outbreak was published in 2013 (WHO, 2013).

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