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*Introduction: The expanded conception of security  
and institutions*

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## **Introduction:**

### **The expanded conception of security and institutions**

HITOSHI NASU and KIM RUBENSTEIN

#### **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.<sup>1</sup> 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

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<sup>1</sup> Hans Kelsen, *Collective Security under International Law* (United States Government Printing Office, Washington DC, 1957) 1 (defining security as ‘the protection of men against the use of force by other men’).

of freedom.<sup>2</sup> However, the development of international law and the institutionalisation of international public authorities have contributed to the increased normalcy or containment of extra-legal response 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.<sup>3</sup> The nuclear 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> Those changes

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<sup>2</sup> For discussion, see especially, Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191–210. See also concluding remarks by Thomas Pogge in this volume.

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

<sup>4</sup> 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, Chapter 9 by Kalman Robertson in this volume.

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

<sup>6</sup> 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).

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 Cooperation 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.

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.<sup>7</sup>

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’,<sup>8</sup> which by design or through

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<sup>7</sup> Ian Johnstone, ‘Law-Making through the Operational Activities of International Organizations’ (2008) 40 *George Washington International Law Review* 87, 122.

<sup>8</sup> Robert O. Keohane, *International Institutions and State Power* (Westview Press, Boulder, 1989) 3. Similarly, Robert Jervis, ‘Security Regime’ (1982) 36 *International Organization* 357, 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 Commission* Vol. II, Part Two, 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’).

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.<sup>9</sup> Although this broad definition may not be suited for empirical inquiry,<sup>10</sup> 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.<sup>11</sup> 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;

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<sup>9</sup> 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').

<sup>10</sup> 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) 194.

<sup>11</sup> See, e.g., Kelsen, above n. 1, 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, 1966); Kenneth Waltz, *Theory of International Politics* (Random House, New York, 1979).

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'.<sup>12</sup> However, the expansion of the security concept particularly after the end of the 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 (US) 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.<sup>13</sup> 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,<sup>14</sup> environmental security,<sup>15</sup> energy and resource security,<sup>16</sup> food security,<sup>17</sup> bio-security,<sup>18</sup> and health security.<sup>19</sup> The

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<sup>12</sup> 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) 1, 2.

<sup>13</sup> 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) 43, 55–57.

<sup>14</sup> See, e.g., V. Cable, 'What Is International Economic Security?' (1995) 71 *International Affairs* 305.

<sup>15</sup> 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, 2002).

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

UN Development Programme (UNDP) introduced the concept of human security into international policy discourse in its 1994 *Human Development Report*,<sup>20</sup> which has since been incorporated into key policy documents such as the 2000 UN Millennium Declaration.<sup>21</sup> 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.<sup>22</sup> The former UN Secretary-General's 2005 Report, *In Larger Freedom*, adds to the list poverty, deadly infectious disease, and

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<sup>17</sup> 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) 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.

<sup>18</sup> 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, 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.

<sup>19</sup> 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.

<sup>20</sup> United Nations Development Programme, *Human Development Report 1994* (United Nations, 1994) 22.

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

<sup>22</sup> 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), 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.



environmental degradation on the grounds that these can have equally catastrophic consequences.<sup>23</sup>

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).<sup>24</sup> One most notable example is the debate on various human security agendas in the Security Council.<sup>25</sup> 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 security.<sup>26</sup> In 2000, the Security Council discussed the impact of HIV/AIDS on peace and security in Africa under the Council

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

<sup>24</sup> 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) 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) 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) 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 and New York, 2007) 3, 5–16.

<sup>25</sup> 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.

<sup>26</sup> UN Doc S/PV.3046 (31 January 1992), especially the Presidential statement issued at the end of the proceedings at 143.

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

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,<sup>33</sup> provided for the first time a formal basis for the human rights agenda in the political discourse with the Soviet Union, which provided a foundation for its comprehensive security approach across politico-military, economic and ecological, and human dimensions.<sup>34</sup> 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

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<sup>27</sup> UN Doc S/PV.4087 (10 January 2000).

<sup>28</sup> Ibid. 2.

<sup>29</sup> UN Doc S/PV.4652 (3 December 2002); UN Doc S/PV.4736 (7 April 2003); UN Doc S/PV.5220 (30 June 2005).

<sup>30</sup> See especially, UN Doc S/PV.5220 (30 June 2005), 9 (Romania), 11 (the Philippines), 12 (Japan), 13 (China, Greece), 14 (Benin).

<sup>31</sup> 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).

<sup>32</sup> For an analysis of the debate, see, Nasu, above n. 25, 118–120; Shirley V. Scott, 'Securitising Climate Change: International Legal Implications and Obstacles' (2008) 21 *Cambridge Review of International Affairs* 603.

<sup>33</sup> Final Act of the Conference on Security and Co-operation in Europe, adopted 1 August 1975, 14 ILM 1292.

<sup>34</sup> 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.

board ships.<sup>35</sup> More recently, the WHO has embraced the idea of global public health security by expanding the scope of its activities to 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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

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<sup>35</sup> 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, Chapter 4 by Chie Kojima in this volume.

<sup>36</sup> Revision of the International Health Regulations, WHA Res 58.3 (23 May 2005) (hereinafter 2005 IHR), opened for signature 23 May 2005, 2509 UNTS 79 (entered into force 15 June 2007) (hereinafter 2005 IHR), Art. 1. For further analysis, see, Chapter 10 by Adam Kamradt-Scott in this volume.

<sup>37</sup> Geir Ulfstein, ‘Institutions and Competences’ in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009) 45, 46–55.

<sup>38</sup> See, Anne-Marie Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004) 36–64.

<sup>39</sup> See, Chapter 4 by Chie Kojima and Chapter 14 by Ottavio Quirico in this volume.

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.<sup>40</sup> 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.<sup>41</sup> 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,<sup>42</sup> but has also been playing a greater role to address ‘non-traditional security issues’, whilst being guided by the norm of comprehensive security.<sup>43</sup>

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 development may well be considered to

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<sup>40</sup> See, Chapter 3 by Anne McNaughton in this volume.

<sup>41</sup> See, Chapter 7 by Hitoshi Nasu in this volume.

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

<sup>43</sup> ASEAN Political-Security Community Blueprint, Section B, at <http://www.asean.org/archive/5187-18.pdf>. See generally, M. 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, 2008) 191; Mely Caballero-Anthony, ‘Revisioning Human Security in Southeast Asia’ (2004) 28(3) *Asian Perspective* 155.

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.<sup>44</sup> 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.

#### *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

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<sup>44</sup> 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.

institutional analysis in social sciences.<sup>45</sup> The rational choice theory may explain institutional evolution as a result of states attempting to further their own national interests.<sup>46</sup> Accordingly 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.<sup>47</sup> 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.<sup>48</sup> 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

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<sup>45</sup> Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalism' (1996) 44 *Political Studies* 936.

<sup>46</sup> 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 Jones, Forman and Gowan (eds.), above n. 24, 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').

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

<sup>48</sup> See, e.g., Orfeo Fioretos, 'Historical Institutionalism in International Relations' (2011) 65 *International Organization* 367–399; Sven Steinmo, Kathleen A. Thelen, and Frank Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press, Cambridge, 1992).

exogenous variables.<sup>49</sup> 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.

According to the ‘securitisation’ theory developed by the Copenhagen School, the discourse of security can be understood as a speech-act in the processes of constructing a shared understanding of what is considered a threat.<sup>50</sup> During these processes of securitisation, institutional evolution may well provide a means to regularise the response to a newly identified security threat, as seen in the development of UN collective security institutions such as the gradual expansion of peacekeeping operations and, more recently, ‘quasi-legislative’ resolutions adopted by the Security Council.<sup>51</sup> However, the security imperative is not the only factor influencing the direction of institutional evolution, but rather interacts with other factors, some of which may be desirable or undesirable from a normative perspective. What factors will or should interact with the security imperative in facilitating, or hindering, institutional evolution in response to contemporary security issues? Are there particular factors that should assist regularising collective responses to a security threat in institutional settings, rather than undermining or overriding existing institutional processes? Are there any normative considerations that should guide or restrain existing institutional processes,<sup>52</sup> through which the institutional competence can be expanded to respond to contemporary security issues?

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<sup>49</sup> 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, 305–309.

<sup>50</sup> Barry Buzan, O. Wæver and J. de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner, Boulder, 1998) 23–26.

<sup>51</sup> SC Res 1373 (28 September 2001); SC Res 1540 (28 April 2004). For further analysis, see, Chapter 6 by Anna Hood in this volume.

<sup>52</sup> Cf Ian Johnstone, ‘Normative Evaluation at the UN: Impact on Operational Activities’ in Jones, Forman and Gowan (eds.), above n. 24, 187.

In Chapter 1, Alexandra Walker considers the role of ‘conscious’ and ‘unconscious’ security in security institution building, drawing on psychological and sociological studies of ‘collective self’. From a sociological perspective, the ‘collective consciousness’ involves a collective narrative identity, which affects how collectives frame their security relationships, and allows the collective self to reflect on its values and goals and possibly to adapt or transform itself in response to the changing security environment. The ‘collective unconsciousness’, on the other hand, refers to the distorted sense of vulnerability that consists of all the psychic contents that individuals and collectives deem to be worthless which, when repressed, prompt the collective self to overcompensate the vulnerability by controlling all others and the security environment. Having identified that collective selves exist in a state of constant tension between their consciousness and unconscious security, Walker argues that it is optimal for the pursuit of security to be based upon conscious, rather than unconscious security. It is her finding that institutionalised self-reflective decision-making processes can facilitate a collective self to habitually process its unconscious material and thus help realising conscious security.

Bina D’Costa turns the focus to gender justice in Chapter 2, which often becomes a politicised issue concerning the roles and rights of women in counterproductive ways in post-conflict security institution building. Drawing on experiences of peacebuilding efforts in Pakistan and Afghanistan, D’Costa considers whether normative considerations such as gender justice ought to steer or contain existing institutional processes, through which institutional capability is strengthened to address contemporary security issues. In particular, this chapter examines the evolution of ‘anti-state local security institutions’, which are often labelled as ‘terrorist organisations’ or ‘militant groups’ in mainstream political discourse, and the role these institutions play in sustaining and reinforcing gender bias. Thus, D’Costa argues, notwithstanding the



gender mainstreaming rhetoric and gender justice norm accepted internationally, women's vulnerability and insecurity increases in times of conflicts not only from the actions of the religious forces but also from 'progressive', 'secular' and 'humanitarian' interventions.

In Chapter 3, Anne McNaughton focuses on the EU as a 'sui generis legal system' and its evolution under the Common Foreign and Security Policy. Because of the way in which the competences of the EU and its member states are carefully articulated and delineated, any institutional evolution challenges the demarcation of competences in light of the jurisprudence underpinning that process. While this is difficult to conceive from the more traditional public and international law perspectives, McNaughton suggests that the concept of 'de-centred regulation' from the regulation literature can better explain how the rule of law in Europe has transcended the state and 'de-centred' security regulation through institutional evolution. Viewed from this perspective, it becomes clear that the EU's institutional evolution in respect of its Common Foreign and Security Policy has not been guided by any centralised security response by the EU institutions, but has rather been a carefully negotiated response to concerns about centralisation of powers to the EU institutions. As McNaughton observes, the de-centralised security regulation in Europe is a critical factor that has allowed the EU to respond flexibly to new security threats in ways that do not undermine the carefully delineated and articulated institutional relationship between the EU and its member states.

Chapter 4 by Chie Kojima broadens the scope of inquiry into the maritime domain, with the focus on the evolving role of the IMO in building international maritime security institutions. The IMO has contributed to the building of maritime security institutions not only by assisting its member states to establish cooperative frameworks, but also by providing forums in which public and private actors can form their shared policies. Kojima

demonstrates the institutionalising role of the IMO with many examples of public and private initiatives taken against piracy and armed robbery at sea off the coast of Somalia and in the Gulf of Aden. In her view, this presents a unique case where the security notion is linked to private interests, which has necessitated the IMO playing a central role in facilitating multiple processes in which all the interested actors – both public and private – participate in order to achieve the common goal of protecting maritime security.

### 3.2 Security institutions and the rule of law

The second theme looks at the relationship between security and the rule of law in international and domestic institutional settings. It is an established principle of international institutional law that the competence of international institutions is not unlimited but is restricted by the provisions of the constitutive instrument, in terms both of form and substance.<sup>53</sup> On the other hand, international institutions' constitutive instruments are often considered as their constitutional documents requiring a teleological approach to interpretation through subsequent practice of the institutions themselves.<sup>54</sup> Domestic security institutions, which are often governed and directed by the executive arm of the government, may have more liberty in institutional development, but the growth

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<sup>53</sup> See generally, C. F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge University Press, Cambridge, 2nd edn, 2005) 194–196; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet and Maxwell, London, 5th edn, 2001) 292–293.

<sup>54</sup> See, e.g., Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, Leiden, 2009) 129–136; Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing, Oxford/Portland, OR, 2007) 113–123.

of public law in the latter half of the twentieth century has led to greater legal restrictions and judicial oversight of their activities.<sup>55</sup>

In the case of security institutions, however, the security imperative appears to have prompted some commentators to observe that institutions may derogate from certain norms or stretch the interpretation of indeterminate norms through operational activities. Such derogation or expansive interpretation raises questions concerning the legal limits of their activities.<sup>56</sup> For example, the strong assertion of national security, especially after the 9/11 terrorist attacks in New York, led to a larger space devoid of the rule of law control over counter-terrorism and counter-insurgency operations, giving rise to a debate over the role and limits of legal institutions in dealing with security issues.<sup>57</sup> In a similar vein, the Security Council has started exercising ‘legislative’ or ‘judicial’ powers under Articles 25 and 103 of the UN Charter in dealing with global terrorism threats even at the expense of human rights protection.<sup>58</sup> It is debatable whether this development is to be seen favourably or as the emergence of hegemonic international law that needs to be constrained.<sup>59</sup> In any event, there is a perceived danger that ‘many repressive states

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<sup>55</sup> See generally, Mark Aronson, Bruce D. Dyer, and Matthew Groves, *Judicial Review of Administrative Action* (Thomson, Sydney, 4th edn, 2008); P. Craig, *Administrative Law* (Sweet and Maxwell, London, 4th edn, 1999); S. A. de Smith, H. Woolf and J. Jowell, *Judicial Review of Administrative Action* (Sweet and Maxwell, London, 5th edn, 1995); H. W. R. Wade and C. Forsyth, *Administrative Law* (Oxford University Press, Oxford, 8th edn, 2000).

<sup>56</sup> See generally, Goold and Lazarus (eds.), above n 6.

<sup>57</sup> For discussion, see, e.g., David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, Cambridge, 2006) 42–53.

<sup>58</sup> See, e.g., SC Res 1373 (28 September 2001); SC Res 1333 (19 December 2000); SC Res 1267 (15 October 1999).

<sup>59</sup> For discussion, see, e.g., José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press, Oxford, 2005) 199–217.

might see a Security Council resolution as an excuse to clamp down on dissidents under the guide that they are terrorists'.<sup>60</sup>

While each institution has its own legal framework within which its authority and institutional competence is defined, there are underlying questions common to security institutions. To what extent and in what way should the law respond to the security imperative facilitating institutional evolution? Should there be an international rule of law restraining institutional responses to contemporary security issues? Could domestic public law jurisprudence assist in developing such an international rule of law governing institutions? Conversely, how does the security imperative influence security institutions in shaping their legal response or in revisiting their institutional powers and competence?

The starting point in exploring these questions must be located in the traditional sources of international law, as Imogen Saunders attempts to do in Chapter 5 with the focus on the general principles of law provided in Article 38(1)(c) of the Statute of the International Court of Justice.<sup>61</sup> The application of the general principles of law has the potential to extend the idea of the rule of law to the conduct of international security institutions, by virtue of its ability to derive binding norms of international law through analogy from domestic legal principles of a horizontal generality across different legal systems, including public law principles. On that basis, Saunders considers three aspects of public law principles – the principle of formal legality, constitutional interpretive principles, and certain administrative principles such as due process, access to remedies, accountability, transparency and judicial review – as potential candidates of the general principles of

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<sup>60</sup> Nigel D. White, 'The Security Council, the Security Imperative and International Law' in Matthew Happold (ed.), *International Law in a Multipolar World* (Routledge, London and New York, 2012) 4, 15.

<sup>61</sup> Opened for signature 26 June 1945, 1 UNTS 993 (entered into force 24 October 1945).

law in order to examine their applicability to international security institutions. Saunders concludes by arguing that the use of these public law principles can and will confer legitimacy on the conduct of international security institutions that conform to those requirements – a question which is further elaborated upon in the next part of this volume.

The fact that security institutions such as the UN Security Council essentially deals with security threats may mean that their ‘legislative’ activity is a form of emergency law-making that is analogous to the law that is produced by domestic executives in times of crisis. This is the proposition that Anna Hood explores in Chapter 6, with the focus on the Security Council’s ‘legislative’ activity. In many respects, the Security Council’s ‘legislative’ resolutions share the same characteristics as domestic emergency legislation,<sup>62</sup> and this provides the basis for the application of Carl Schmitt’s theory on the state of exception to explain the nature of the Security Council’s ‘legislative’ activities. However, there are several normative considerations in emergency law theories which, as Hood examines, could find useful application to enhance the Security Council’s compliance with the rule of law. Hood reaches the conclusion that while none of these normative considerations is actionable with respect to the Security Council’s legislative practice, the emergency law perspective still provides a useful way of re-examining the underlying assumptions of emergency law-making in different institutional settings.

Security imperatives may prompt other types of institutions to evolve and push their boundaries, posing challenges to existing legal arrangements. Chapter 7 by Hitoshi Nasu examines the evolution of African institutions in the 1990s to the early 2000s as case studies, in which irregularities in the decision-making for deployment of peacekeeping forces arguably meant that the

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<sup>62</sup> The ‘legislation’ for the purpose of Chapter 6 is widely defined to include those that create or modify international legal obligations.

institutions acted *ultra vires*. The fact that the African institutions applied the doctrinal framework of traditional peacekeeping was significant and instrumental to compensatory institutional evolution, which according to Nasu, has contributed to facilitating general support of their member states for the out-of-competence regional actions. Nasu concludes that even though institutional evolutions, triggered by security imperatives, often pose challenges to the basic principles of international institutional law, the rhetoric and formula of peacekeeping as an ‘institution’ has assisted in producing a general agreement within a regional organisation in the form of an ‘emergency amendment’ to its constitutive instrument, muting the issue of validity. One of the potential ramifications of this finding is that the traditional peacekeeping ‘institution’ can play a valuable role when an international or regional institution which is not originally mandated to deal with peace and security issues, finds the need to expand its institutional competence in dealing with pressing security threats.

In Chapter 8, Solon Solomon brings this issue of institutional evolution to Israel’s border security which involves both public (domestic) and international institutions. Solomon examines how public and international institutions have approached Israel’s national border security in respect of its border with Egypt, the 1967 armistice lines in the West Bank, and the Gaza boundary after the Israeli disengagement from Gaza Strip in 2005. Through his thorough analysis, it becomes clear that institutional settings, decision-making procedures and political conditions surrounding each institution influence the way in which the relationship between security and the law is viewed within the parameters of international law. This leads to his finding that the relationship between security and law is not pre-determined, and that a security imperative is not a monolithic concern shared by different institutions in the same way. This inevitably creates tension as to what extent security concerns should be taken into account in the

application of the law and under what circumstances security concerns can override the pre-existing legal arrangements.

### 3.3 *Security institutions and legitimacy*

The third theme examines the impact of securitisation on the legitimacy and accountability of institutions. Institutions cannot function without the exercise of their power conferred by the legitimate source of authority – be they a democratically elected government or with state consent. When institutions evolve through their operational activities, however, their exercise of power is inevitably one step away from the source of legitimacy. Thus, the delegation of powers to international institutions has often been suspected to undermine the separation of powers within states,<sup>63</sup> to the extent that institutional decisions by-pass domestic procedures (often involving democratic processes) for legitimising the delegation of powers,<sup>64</sup> which has raised an issue of institutional legitimacy. This issue of institutional legitimacy is not unique to international institutions, but has also been studied elsewhere in the domestic context, particularly in relation to the accountability of regulatory agencies as the fourth branch of government.<sup>65</sup>

Legitimacy is a highly contested concept and is variously understood in different contexts of international law. Anthony D’Amato describes it simply as a space between international law and international politics by illuminating the existence of such a space in the de facto recognition of a government and the process

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<sup>63</sup> Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, Oxford, 2005) 15.

<sup>64</sup> Neils Blokker, ‘Beyond “Dili”’: On the Powers and Practice of International Organizations’ in Gerard Kreijen *et al* (eds.), *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2002) 299, 307–308.

<sup>65</sup> See, Martin Shapiro, *Who Guards the Guardians?: Judicial Control of Administration* (University of Georgia Press, Athens, 1988).

of forming customary international law.<sup>66</sup> Similarly, in the context of military action, legitimacy is used for different purposes. The 2004 High-Level Panel Report, *A More Secure World*, developed guidelines for enhancing the legitimacy of the Security Council's lawful military enforcement action under the UN Charter.<sup>67</sup> A contrasting, more controversial use of legitimacy was made during NATO's intervention in Kosovo by the supporters, acknowledging that the action was unlawful without Security Council authorisation and yet arguing that it was still legitimate.<sup>68</sup> In the seminal work on legitimacy in international law, Thomas Franck defines it as a 'property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that [it] operates in accordance with generally accepted principles of right process'.<sup>69</sup>

However, when the concept is used in institutional settings, it addresses the normative force (or a 'pull') of institutional activity, which often relates to the notion of accountability. Ian Hurd, for example, understands institutional legitimacy as a subjective quality and relational concept, defined by an actor's normative belief or perception that a rule of law ought to be obeyed.<sup>70</sup>

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<sup>66</sup> Anthony D'Amato, 'On the Legitimacy of International Institutions' in Rüdiger Wolfrum and Volker Röben (eds.), *Legitimacy in International Law* (Springer, Heidelberg, 2008) 83, 83–86.

<sup>67</sup> *A More Secure World*, above n. 22, 66–67.

<sup>68</sup> See, e.g., Anthea Roberts, 'Legality vs Legitimacy: Can Uses of Force be Illegal But Justified?' in Philip Alston and Euan MacDonald (eds.), *Human Rights, Intervention, and the Use of Force* (Oxford University Press, Oxford, 2008) 179.

<sup>69</sup> Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, Oxford, 1990) 24.

<sup>70</sup> Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press, Princeton, 2007) 7. It is close to a sociological understanding of organisational legitimacy. See, Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571.



Similarly, Allen Buchanan and Robert Keohane define it by reference to certain ‘*epistemic virtues*’ that facilitate the ongoing critical revision of the institutional goals, through interaction with the agents and organisations outside the institution.<sup>71</sup>

General discussion about global administrative law and public law perspectives towards the exercise of public authority by international institutions often involves recommendations for greater public participation in institutional decision-making, strict procedural requirements, substantive judicial review, and a combination thereof, as a way of enhancing institutional legitimacy.<sup>72</sup> The question relevant to the context of security institutions is, however: to what extent those ideas may or may not help security institutions in enhancing the legitimacy of their institutional evolution through operational activities? Does the security imperative prevailing over many aspects of current international and transnational relations require or allow existing international institutions to take their own path, even though it is not explicitly provided for in the constitutive instrument that governs their activities, to facilitate flexible and prompt response? Is there any role that international law can play in enhancing or undermining institutional legitimacy in the process of institutional evolution in response to the emergence of contemporary security issues?

Chapter 9 by Kalman Robertson examines the thesis that challenges to the legitimacy of the International Atomic Energy Agency (IAEA) have been maintained through the development of its legal authority to administer comprehensive safeguards

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<sup>71</sup> Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’ (2006) 20 *Ethics & International Affairs* 405, 406.

<sup>72</sup> See generally, Armin von Bogdandy *et al* (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, Heidelberg, 2010); Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

agreements under the Nuclear Non-Proliferation Treaty at least as far as non-nuclear-weapon states are concerned. Challenges have been posed due to the increased tensions between military and peaceful uses of nuclear technologies as these are relied upon to address increasingly serious energy security concerns around the world, following a series of findings of non-compliance in the last twenty years. Through detailed analysis of the IAEA's institutional evolution, particularly in comparison with other monitoring institutions, Robertson finds that its normative foundation lies with the epistemic virtues exhibited through generating reliable information on state behaviour, operating transparently, and providing information for on-going deliberation, rather than greater public participation in or substantive judicial review of its activities.

As is the case with the evolution of the IAEA, international law has also been instrumental to the evolution of the WHO as a global public health security institution, as Adam Kamradt-Scott discusses in Chapter 10. In recent years, two international agreements have been adopted with a view to expanding the WHO's legal authority to strengthen global response capacity in combating infectious disease outbreaks and other adverse health events: the 2005 International Health Regulations (IHR 2005);<sup>73</sup> and the 2011 Pandemic Influenza Preparedness Framework (PIPF).<sup>74</sup> The 2005 IHR has altered the nature of the regulations from one of reactive border controls to proactive risk management and disease containment. The 2011 PIPF has served to re-shape an established WHO technical cooperation network into a new public-private partnership. By exploring this institutional evolution of the WHO through the securitisation of public health issues, Kamradt-Scott identifies the central role that international law has played in

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<sup>73</sup> 2005 IHR, above n. 36.

<sup>74</sup> Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits, WHA Res 64.5 (24 May 2011).

enhancing its institutional legitimacy, however, at the same time warns that global health security is likely to remain elusive and may result in undermining its institutional legitimacy unless states take necessary action to cooperate with the WHO.

A contrasting observation is made by See Seng Tan in Chapter 11, in which Tan examines Southeast Asia's embryonic efforts to settle disputes with an institutional approach. The adoption of the ASEAN Charter in 2007, and the recourse to legal means for dispute settlement by several Southeast Asian states, can be seen as a slow but gradual shift towards a greater acceptance of institutionalised means of dispute settlement in the region. Tan reviews actual state practice in trade and territorial disputes and demonstrates the persistent ambivalence in Southeast Asian states' attitudes towards an institutionalised approach to dispute settlement. This is, Tan argues, due to the consideration shared by ASEAN states that keeping ASEAN as a consensus-based organisation is as significant as keeping an instrumental and strategic choice for individual member states. Indeed, Tan finds paradoxical institutionalising the 'ASEAN Way' in the ASEAN Charter as it has the potential to undermine the legitimacy of ASEAN by depriving it of the benefits of flexible consensus it once enjoyed.

### *3.4 Security institutions and regime collision*

The fourth theme focuses on the impact of securitisation by institutions on their interaction or collision with external factors such as competing institutions and legal frameworks. Institutional evolution necessarily takes place within meta-institutional frameworks in which other institutions and interests are influenced by the changes that one institution makes to its own activities. In international law, such interactions and collisions have been

studied as an issue of regime conflict.<sup>75</sup> The UN International Law Commission's work on fragmentation of international law goes some way to address this issue by identifying technical legal methodologies that resolve a conflict of laws.<sup>76</sup> However, these legal methodologies may not be capable of addressing the underlying tension between different normative foundations as well as legal structures, when these interactions and collisions arise from institutional evolution in response to contemporary security challenges.

As Andreas Fischer-Lescano and Gunther Teubner argue, international legal norm collisions 'educ[e] from the underlying conflicts between the "policies" pursued by different international organisations and regulatory regimes'.<sup>77</sup> These interactions and collisions can also be explained in terms of the specific purposes and the institutional design features that underpin each regime, whether they are embedded in the constitutive instrument or are loosely shared by the major decision-makers as can be seen in the investment treaty arbitration regime.<sup>78</sup> As a result, institutions, international and domestic alike, are increasingly facing the challenge that they have to internalise conflicting norms,

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<sup>75</sup> See especially, Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press, Oxford, 2014); Margaret A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, Cambridge, 2012); Tomer Broude and Yuval Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing, Oxford/Portland OR, 2011).

<sup>76</sup> Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682 (13 April 2006)

<sup>77</sup> Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1003.

<sup>78</sup> See especially, Steven R. Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 *American Journal of International Law* 475, 484–521.

obligations and interests, and account for their implementation to other relevant institutions.<sup>79</sup> How and to what extent can existing legal obligations prevent security institutions from effectively respond to contemporary security issues? Is it possible through the process of institutional evolution to accommodate competing norms or interests in creating an effective regime to address a particular security issue?

These questions are examined in Chapters 12 and 13 with the focus on two different types of food security problems – long-term, chronic food security issues by Dilan Thampapillai, and short-term, acute food security issues by Michael Ewing-Chow, Melanie Vilarasau Slade and Liu Gehuan. Thampapillai identifies the causes of chronic food insecurity as a form of market failure facilitated by the rules of international intellectual property law, as primarily embodied in the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>80</sup> While acknowledging that food insecurity is not a problem solely created by the post-TRIPS legal environment, Thampapillai argues that the legal rules on intellectual property play a significant role in supporting and encouraging those market forces that adversely impact upon the access, availability and affordability of food, and in causing significant disruptions to the traditional farming practices of farmers in the Global South. International responses, orchestrated by the Food and Agricultural Organization (FAO), to the food security problem in the context of agriculture, comprising the movement towards farmer's rights and the right to food, have offered some useful solutions to the crisis. After examining the legal frameworks relevant to food security, Thampapillai provides three critiques of FAO's response to the problem of food security

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<sup>79</sup> Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law' in Christine Parker *et al* (eds.), *Regulating Law* (Oxford University Press, Oxford, 2004) 246, 247.

<sup>80</sup> Opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995).

with the finding that the regime conflict deprives FAO of a useful role in norm creation, effective administration of food security, and reconciliation of ‘norm collision’ to overcome a property-type policy response.

Chapter 13 by Ewing-Chow, Slade and Gehuan considers short-term, acute food security crises in the context of Asia, with the focus on the ASEAN Plus Three Emergency Rice Reserve (APTERR) and its relationship with international trade law. APTERR is an institutional response to an acute food security crisis in 2008, which has created a mechanism whereby its member states maintain a rice reserve which can be released in times of emergency for the benefit of the populations of regional states. When this short-term food security institution emerged, as Ewing-Chow, Slade and Gehuan examines, several legal issues were identified in relation to international trade law rules particularly in terms of the restriction on the origin of the rice and the way in which the rice was to be released and distributed. In the end, international trade law rules assisted in shaping APTERR rather than causing a collision and, in the authors’ view, even facilitated the institution building to achieve a certain level of detail to avoid a potential collision, which is beneficial in ensuring an effective implementation of the regime.

The final chapter by Ottavio Quirico deals with cyber security institutions with a specific focus on the role of private cyber security providers, and their interactions with the international and domestic rules governing the use of force. Cyber security is at the nascent stage of development and its institution building is primarily led by private cyber security providers. However, unlike state authorities, those private actors do not possess legal authority to use armed force beyond the scope of self-defence, for the purpose of law enforcement or military operations. This legal restriction existing under the relevant rules of international and domestic law poses challenges to the operation of

private cyber security institutions, depending on how the notion of ‘use of force’ or ‘lethal force’ is interpreted when cyber methods are used. Quirico argues that the existing rules of international and domestic law applies to cyber security operations, which prohibits private actors from engaging in cyber security counter-measures beyond the scope of self-defence or, in the situation of an armed conflict, will make them lawful targets as civilians directly participating in hostilities. In his view, these legal consequences might prevent private cyber security institutions from effectively responding to cyber security threats.

#### 4. Conclusion

This volume’s four parts, in examining different aspects of the tensions between institutional development and the public and international law frameworks dealing with contemporary security threats, provide new and important ways of thinking about these pressing issues. Until this series of books developed, international and public law issues had mainly overlapped in discussions on how international law is implemented domestically.<sup>81</sup> The scholarship emerging in the area of global administrative law has also been developing principles relevant to both public and international law,<sup>82</sup> yet these publications contained only a subset of the

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<sup>81</sup> The first volume of this series, Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* appeared in 2009. Before that time, see, eg, Hilary Charlesworth *et al* (eds.), *The Fluid State: International Law and National Legal Systems* (Federation Press, Sydney, 2005); and Yuval Shany, *Regulating Jurisdictional Relations Between National and International Courts* (Oxford University Press, Oxford, 2007).

<sup>82</sup> See, e.g., Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23; Alexander Somek, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) 20 *European Journal of International Law* 985; Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *European Journal of International Law*

concepts underpinning this book. By concentrating on legal perspectives on security institutions, this volume has added to this series contributions by broadening our understanding of how public and international law intersects in harnessing, regulating, legitimising and shaping institutional responses to contemporary security threats as the notion of security expands.

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187; Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247; Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68(15) *Law and Contemporary Problems* 15; David Dyzenhaus (ed.), *The Unity of Public Law* (Hart Publishing, Oxford/Portland OR, 2004).



