

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

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Introduction

The last decade has seen the rise of health security on the international agenda which also brought about a transformation of the World Health Organization's (WHO's) role in global health governance. The WHO's growing autonomy in disease surveillance and its successful performance in containing the 2003 SARS outbreak launched a vivid debate as to whether we are witnessing the transition to a post-Westphalian order in global health. Especially the revised International Health Regulations (IHR) have been analyzed as a shift of public health authority to the supranational level (Fidler, 2004; Zacher and Keefe, 2008). In the meantime however, many scholars have questioned this shift, emphasizing that states retain ultimate control over the WHO's competencies and that state-level implementation remains crucial for enacting global health security (Davies, 2008; Kelle, 2007). In addition, the WHO's donor-driven and fragmented structure puts into question its organizational autonomy (Graham, 2013; author 1, 2013). Hence, scholars of global health security have come to assert that mechanisms of state control may prevent the 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 the WHO's decision-making during the crisis. For the first time in its history, the WHO had declared a so-called Public Health Emergency of International Concern (PHEIC). Assisted by a secret Emergency Committee, the Director-General issued pandemic alerts and

recommendations which pressured states to purchase large amounts of vaccines. Many states in fact ceded to this pressure (Deshman, 2011: 1095-1096). As the crisis passed and the outbreak turned out to be rather mild, journalists, state representatives and European parliamentarians criticized the intransparent procedures on which the WHO had based its decisions, and allegations of corporate capture were raised and discussed in various forums. Hence, in the wake of this international health emergency the WHO displayed competencies that were far more consequential than the vision of a toothless UN bureaucracy would have us assume.

How do these two faces of the WHO – dependent and state-driven versus discretionary and unaccountable – go together? In this essay we propose to analyze the WHO's emergency governance as a globalized variant of exceptionalism. Drawing on securitization research and legal theories of the exception, we argue that the 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, based on the language of global security, focal and centralized IOs emerge as authoritative actors whose decisions shape how emerging threats are governed. Same as the presentation of a problem as a threat to national security that amplifies executive discretion at the state level, the securitization of transboundary risks may also strengthen the supranational authority of IOs. What is more, other than emergency politics in constitutional democracies, global exceptionalist authority is not embedded in a system of institutional constraints or a critical public sphere and thus lacks the constitutional framework that controls emergency politics at the domestic level. To contain the potential emergency trap that this constellation entails, we hold that IO decisionism needs to be checked by constitutional constraints beyond the state. Transparency and institutional checks can inhibit an IO's capture by special interest and make its crisis decisions accountable to its global addressees.

Our analysis of the WHO's emergency powers sheds a 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 (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), we lay emphasis on 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 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. This approach has implications for discussions about desecuritization, too. It introduces containment as a constitutional complement or alternative to discursive de-securitization strategies (cf. Hansen, 2012).

To make these arguments, the article proceeds in four main steps. We first lay out how the constitutional perspective on securitization can be used for the analysis of IO emergency governance. The following three sections spell out the components of this argument and apply it to the WHO case. We analyze the WHO's empowerment through the securitization of infectious disease in the SARS crisis and then go on to describe the institutionalization of its emergency powers as a slippery slope leading to further securitization in the swine flu case. 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 United Nations Security Council or the European Union.

Securitization and the global governance of security

In its classic formulation by Ole Wæver, securitization has been problematized precisely because of the *raison d'état* that is inscribed into the concept of security (Wæver, 1995). Securitization is based on speech acts, usually by political elites, whereby political challenges and challengers are made into existential threats to the community, meaning: the state. Securitizing speech acts invoke '[u]rgency; 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 Buzan et al., 1998: 24).

As Michael C. Williams (2003) has pointed out, 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. Not only does the construction of existential threats to the political community reflect Carl Schmitt's vision of politics as based on a friend-enemy distinction (Huysmans, 1998; Schmitt 2007 [1932]). In addition, the 'extraordinary means' that securitization legitimizes echo the sovereign command of the exception for which Schmitt's theory of the state is notorious (Schmitt, 2005 [1922]). 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 a rich and multifaceted research program on the widening of security speech.¹ Scholars have scrutinized the construction of threats through speech acts (Balzacq, 2005; Salter, 2008) but also by other means such as visual representations (Williams, 2003; Hansen, 2011) or seemingly banal bureaucratic practices (Huysmans, 2011).

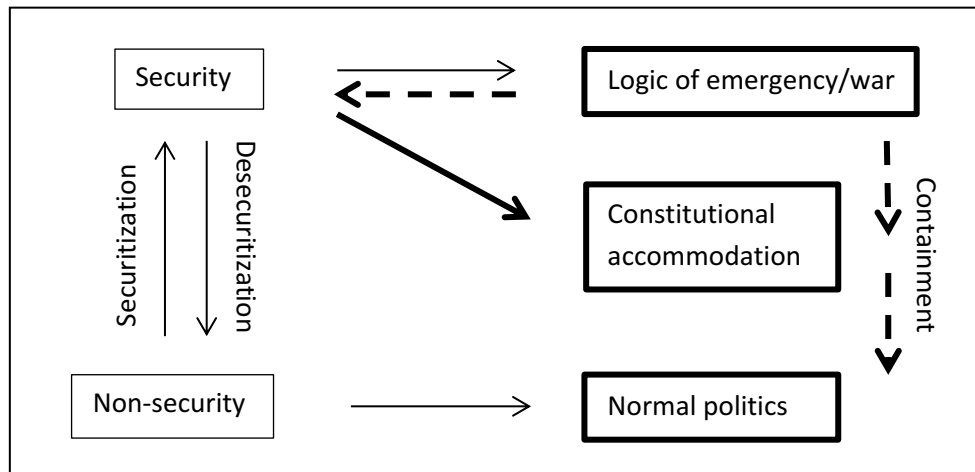
¹ For overviews see McDonald (2008) and the 2011 special issue of *Security Dialogue* (Gad and Petersen, 2011).

The complementary question has also been examined, namely how securitization can be avoided or reversed politically, i.e. 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 (Huysmans, 1998; Roe, 2004; Hansen, 2012). 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 looming Schmittian politics (McDonald, 2008; Waeber, 2011).

Yet the downside of this concentration on the (de-)construction of security problems has been that the threatening political scenario itself – exceptionalism – has found much less theoretical 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, that is, how security is governed, has rarely been addressed explicitly.² The broad idea of ‘extraordinary means’ and Schmittian politics is more often than not treated as a taken-for-granted implication of securitization (cf. McInnes and Rushton, 2013). Essentializing the nexus between securitization and exceptionalism may underline the critical thrust of the Copenhagen tradition but misses important insights into the dynamic interplay between securitization and emergency governance. We therefore suggest complementing the analytical focus on the (de-)constructivist dimension of securitization (left axis in figure 1) with an examination of the constitutional dimension of securitization, namely its implications for the constitution of political authority in the governance of emergencies (right axis in figure 1).

² But see Aradau (2004) for a discussion of the procedural and policy dimensions of exceptionalism. See also White (2013).

Figure 1: The constitutional dimension of securitization



This analytical move helps disentangling the notions of securitization and exceptionalism and thereby specifying the grammar of emergency that is implicit in the ‘grammar of security’ (Buzan et al., 1998: 33). Drawing on post-Schmittian discussions about exceptionalism in legal theory, we propose three theoretical contributions to securitization research which become visible only with an eye on its constitutional dimension.

First, by reconstructing the logic of emergency governance in general terms we contribute to disentangling exceptionalism from the ‘state’. While the securitization of national but also of international threats is mostly associated with a (re-)nationalization of the 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 hold that exceptionalism is located at different levels of political authority. As Roxanne Doty has shown, exceptionalism is a general figure that can also be invoked in the security practices of communities below the state (Doty, 2007). Our article complements this reconceptualization by analyzing how the politics of emergency is playing out beyond the state, i.e. 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 behavior in times of crises as well as for further securitizations.

Thus *secondly*, 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 creates self-reinforcing tendencies. In taking the legal and institutional consequences of securitization seriously, it becomes visible that the logic of emergency is not only a transient mode of political decision-making but also generates lasting institutional effects. Especially, exceptionalism is connected to an empowerment of the executive in the political system in order 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 state of security via the institutionalization of emergency politics. We will show that this trap is not only a national (autocratic) phenomenon but can be triggered at the IO level due to the relative lack of public control and institutional checks beyond the state.

Thirdly, 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 contestable and can thus be subjected to constitutional checks on sovereign 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 (e.g. Scheuermann, 2006). Other than the strategy of

discursive desecuritization, i.e. 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 we spell out each of these arguments in more detail and use them to make sense of the WHO's emergency governance in global health.

Global health emergencies and the empowerment of the WHO

How can securitization reshape political authority beyond the nation-state? In this section we conceptualize this link through an analytical transfer of emergency politics to the IO level. We use our insights to make sense of the formation and institutionalization of decisionist authorities in the WHO that were catalyzed by its handling of SARS.

Global emergencies, global exceptionalism

At the national level, the state of emergency is the legal order through which sovereign states respond to security crises. States of emergency constitute an exceptional type of government that follows a distinct logic. First, they are marked by the time pressure and urgency that security invokes. This implies the idea that slow democratic procedures need to be bypassed where 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 that reestablish political order. As Carl Schmitt has formulated 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' (Schmitt,

2005 [1922]: 13). Assuming that security crises cannot be dealt with through democratic process or based on *ex ante* legislation, they require the decisionism of a political sovereign.

The emergency mode of politics, while originally theorized for the nation state, can nowadays also be observed at the global level (author 2, 2012; author 2, 2013). Especially with the globalization discourse, security threats are increasingly seen as worldwide contingencies that do not respect national boundaries. Environmental disasters, terrorist attacks, financial breakdowns or globalized pandemics are some of the prototypical crisis scenarios where high-speed decision-making and rapid political interventions are asked for. A leading protagonist of this ‘planetary state of exception’, the sociologist Ulrich Beck (2009), claims that contemporary economic, ecologic or other risks create a ‘global community of threats’ and a radical uncertainty regarding future catastrophes. This should lead the world to ‘enforced enlightenment’, i.e. to worldwide cooperation in the combat of worldwide risks (Beck, 2009: 8, 47). Put differently, it is held that ‘transboundary crises’ demand transboundary responses (Boin and Rhinard, 2008: 7).

In global crisis situations where time pressure is high and rapid decisions are needed, a turn to IOs becomes a natural solution due to 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, i.e. their ability to govern via majority or bureaucratic decisions, has considerably grown over the last century (Zürn et al., 2012). In addition, their expert authority and perceived neutrality (Barnett and Finnemore, 2004: 24-25) endows IOs with the legitimacy to take rapid decisions in the face of imminent threats. Hence, just like 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.

However, global emergency governance 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 revert to a police force in order to give effect to their emergency measures. By contrast, IO authority is (mostly) not backed by coercive power and therefore relies on member states' deference to its measures. It mainly consists of the transfer of decisionist authority. The impact of IO decisions, especially in times of crisis and uncertainty, should not be underestimated though. IO decisions and recommendations contribute to setting the international agenda and legitimize certain behaviors while delegitimizing others. This will become evident in the WHO's reaction to SARS and H1N1, too. In the following we reconstruct the formation of its authority to combat global health threats with exceptional means.

SARS and the WHO's decisionist authority

Although the WHO is the focal international organization in global disease surveillance and control, its authority in this domain was rather limited until the 1990s (author 1, 2014). Its main legal instrument, the so-called International Health Regulations (IHR), only covered a small and predefined set of 'quarantinable' diseases such as cholera, plague, and yellow fever. Moreover, under the old IHR the WHO could only become active and issue recommendations when states reported outbreaks – a duty that member states often did not comply with due to prestige concerns or fears of economic losses (Fidler, 2005: 335-336). This factual national veto made the IHR a rather toothless instrument (Zacher and Keefe, 2008: 40-41).

This only changed over the 1990s as concern about 'emerging' and 'reemerging' infectious diseases was growing – first among US health authorities and increasingly also in global bodies such as the 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 Mykhalovsky, 2010: 61–62). At the same time, new communication technologies began to liberate the WHO from the national veto, as they facilitated the private and decentralized reporting of disease outbreaks. Thus unofficially, the WHO began to draw on outbreak reports issued by internet-based professional networks and used them for monitoring purposes in its Global Outbreak Alert and Response Network (GOARN; 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 toward 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 remained stuck until the new millennium. Various techniques for determining which disease posed an emergency threat proved inadequate, and likewise any *ex ante* specification of the recommendations the WHO could make in case of an outbreak remained extremely vague (Burci and Vignes, 2004: 139). The breakthrough in these negotiations only came with the emergence of SARS in 2002/3 and the WHO’s exceptional decisions in its handling of the crisis.

SARS, a so far 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, those infected had a rather high probability of being killed by the new pathogen (Doshi, 2009: 605). Despite the initial denial by Chinese authorities the 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 a first global alert. Director-General Gro Harlem Brundtland publicly declared SARS a ‘worldwide health threat’ (WHO 2003).

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

This rupture with established practice has been interpreted differently. Some considered it to be a rather narrow transgression (Smith, 2010), others viewed it as a major instance of ‘slack’ (Cortell and Peterson, 2006). It has also been argued that the WHO response to SARS may legally be justified with 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 requiring a re- regulation of its emergency powers and zone of discretion (see Kamradt-Scott, 2011). Secondly, 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 the 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 became a lasting success story for the 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 between 2003 and 2004 where it framed SARS as the prototypical new health threat: an unpredictable and highly dangerous disease that public health authorities should prepare for. In addition, it was emphasized that the WHO's response had been critical for identifying and containing the disease, i.e. that an extension of its competencies was justified (WHO Working Group for the Revision of the International Health Regulations, 2004). Indeed, the WHO's member states soon agreed on a codification of the WHO's emergency powers (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. States are required to report disease outbreaks and 'health events' to the WHO, yet the organization can also draw on non-state sources to assess the threat. The ultimate decision whether health events constitute a 'Public Health Emergency of International Concern' (PHEIC) is delegated to the Director-General who 'shall make the final determination on this matter' (Art. 49 (5)). For determining the beginning and termination of the state of emergency as well as the WHO's 'temporary recommendations' the Director-General shall take into account the views of an Emergency Committee that the DG selects from the IHR expert roster (Art. 47-48). Hence, the revised IHR institute the WHO secretariat as the authority that decides on the exception and entitles the DG to shift into a quasi-autocratic style of decision-making during the state of emergency. In the following section we discuss how these authorities were activated in the first PHEIC, the swine flu pandemic, which illustrates the dynamic feedback of IO emergency powers on securitization.

Re-activating emergency powers: securitization in the swine flu case

The revision of the IHR was only the momentary endpoint of the securitization-emergency interplay in global health. Emergency powers are inherently dynamic, creating incentives for their perpetuation on the one hand while provoking resistance on the other (see below). In this section we focus on the first aspect, 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) 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, they note, 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 becomes the rule (Gross and Ní Aoláin, 2006: 230). This has a further implication, namely that enduring exceptionalism also reduces the obstacles 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 in the classic ‘security trap’ of the Copenhagen school (C.A.S.E.

Collective, 2006: 460) where the quest for security can lead to the identification of ever more insecurities that societies seek to control, the institution of emergency powers does not simply put an end to a security crisis. It increases the pressure on executives to become active and respond 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 IO executives to extend their reach and authority. Thereby, emergency provisions can become a slippery slope toward 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 miniscule (see Gross and Ní Aoláin, 2006: 404). As we will discuss in more detail below, there are significantly fewer checks and balances to IO authority than in constitutional democracies (see Klabbers, 2007: 161-162). That the tendency of exceptionalism to become self-perpetuating also applies in IOs has become evident in the WHO's response to the H1N1 outbreak.

The first Public Health Emergency of International Concern

The first cases of Swine Influenza A/H1N1 were observed in Mexico in March 2009. By mid-April, Mexico confirmed more than sixty H1N1-related deaths, and first outbreaks were reported from the United States. According to the WHO, this new influenza strain was highly concerning not only due to its transboundary spread, but also because of its novelty that consisted in an atypical rate of young adult victims and, most importantly, its association with

animals.³ On April 25, WHO Director-General Margaret Chan invoked the International Health Regulations and declared H1N1 a Public Health Emergency of International Concern (PHEIC) thus establishing a considerable amount of discretion for the emergency actions of the WHO executive. Like all subsequent WHO recommendations, her decision was based on advice by the Emergency Committee that Chan had convened under the IHR. To protect the 16 Committee members from outside influence, with the exception of the chair their names were kept secret by the WHO, and the Director-General took ultimate responsibility for the WHO's emergency response (Cohen and Carter, 2010: 1278). This response consisted in publishing updates and 'temporary recommendations' and, most importantly, assessing whether swine flu posed an existential threat to global health.

In fact, until June 2009 H1N1 was not fully securitized but declared a *potential* threat for global health security, meaning a potential 'pandemic'. As Margaret Chan stated in front of the United Nations General Assembly on May 4, pandemic flu was an utmost 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.'⁴

Yet based on the WHO's pandemic warning system, by May 2009 H1N1 was still in phase 5 (imminent pandemic), not the pandemic stadium of phase 6 (pandemic). This was due, first, to the fact that the disease had not yet spread beyond the American continent and was thus limited to one of the six WHO regions. Second, the established definition of pandemic flu also entailed the criterion that it caused 'enormous numbers of deaths and illness.' This only changed in early May when the severity criterion was discretely removed from the WHO website and 'pandemic' redefined – without any form of public discussion – to signify the global dispersion of a disease (Cohen, 2009). The redefinition allowed the WHO to fully securitize the H1N1 outbreak and

³ See WHO website http://www.who.int/csr/don/2009_04_24/en/index.html [accessed March 19, 2013].

⁴ See WHO website http://www.who.int/dg/speeches/2009/influenza_a_h1n1_situation_20090504/en/index.html [accessed March 19, 2013].

declare it a pandemic on June 11, although in terms of severity it did not exceed other seasonal influenzas (Deshman, 2011: 1097).⁵ Based on this move, the WHO activated its pandemic preparedness plans and made 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 the 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 were not uncontested among public health professionals who questioned the severity of the outbreak (Garske et al. 2009), yet in a climate of high insecurity and uncertainty such skeptical voices had little impact. Health officials and media looked to Geneva where the WHO issued regular updates and policy guidance. While developing countries could not afford to order the recommended vaccines, most of the wealthier states followed the WHO's advice.⁶ In the aftermath of the pandemic, the majority of European governments reported that the WHO pandemic alert had been critical for their decision to order vaccines (Deshman, 2011: 1096).⁷ In addition, 22 European governments had signed advance purchase agreements with pharmaceutical companies that were contingent on the declaration of a pandemic. 11 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 (ibid). Only once the crisis had passed critical voices became dominant who questioned the WHO's decision-making. Yet during the emergency, such a debate did not take place and

⁵ Peter Doshi 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' (Doshi, 2009: 603).

⁶ We thank an anonymous reviewer for pointing to this stratified impact of the WHO's advice. The direct effect of influenza securitization was thus limited to affluent countries which can buy and stockpile large amounts pharmaceuticals. Indirectly, however, it also harms developing countries by shortening the supply of vaccines and antivirals (Elbe, 2010). The WHO's securitizing moves can thus deteriorate 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 yielded that 17 out of 27 European governments considered the WHO pandemic alert the second major trigger of their decision to purchase vaccine – second only after the criterion 'scientific assessments', which again may have been shaped by WHO assessments (Deshman, 2011: 1096).

most governments ceded to the pressure to purchase costly medicines without being able to assess the benefit and safety of this medication.

In sum, the WHO's first official health emergency (PHEIC) demonstrates that IO emergency powers bestow international organizations considerable discretion and authority in times of global crisis. During the emergency, the 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. The WHO's decisions were taken in an extremely intransparent process that facilitated securitization by evading public scrutiny. Only once the Director-General decided in August 2010 that H1N1 had entered the post-pandemic period did the WHO publish the names of the experts constituting the Emergency Committee. It turned out that many Committee members had close ties to pharmaceutical companies that directly benefited from the crisis, which led to allegations of conflict of interest against the WHO (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 post-H1N1 efforts to tame the WHO's exceptionalism by constitutional means.

Constitutional constraints and the management of global emergencies

The new emergency authorities of the WHO show how IO emergency politics is fuelled by and in turn can reinforce securitization at the global level. Yet, same as the construction of a security threat, we hold that 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 therefore argue that constitutional containment is a useful complement to the Copenhagen School's take on desecuritization and a viable strategy to delimit emergency politics in the WHO.

A constitutionalist alternative to desecuritization

Given the specter of exceptionalism coming with security, research in the tradition of the Copenhagen School has mostly focused on averting the securitizations that facilitate emergency measures (cf. Waever, 2000: 253-254; Roe, 2008). It is claimed that a securitizing move which 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 (Huysmans, 1995: 65-67; 1998; Roe, 2004: 285-287; Hansen, 2012: 542-545).⁸ This conception of securitization and desecuritization has pointed out several ways back to normal politics. However, it also reproduces the categorical belief that there are but two possible political forms: 'Non-security' – associated with normal politics, and 'Security' – associated with the logic of war (see figure 1). This perspective is constraining because non-security not always is an option: On the 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 due to 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 to let the logic of war unfold.

⁸ See Aradau (2004) for critical remarks on this approach to desecuritization.

The alternative we want to propose is based on the assumption that there is little reason to accept that speaking security necessarily has to result in all-out emergency measures. Paul Roe (2004: 292-293) has convincingly argued 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 especially foresee the taming of sovereign power through constitutional containment (cf. Gross, 2003; Ferejohn and Pasquino, 2004; Dyzenhaus, 2006; 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. It nevertheless holds that the basic pillars of the constitution need to be protected and that the legal order should therefore have mechanisms ready to keep the emergency within these constitutional confines (Gross, 2003: 1043-1044; Ackermann, 2004; Tushnet, 2005). Thus from the perspective of legal theory, 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. But it is also a complement to desecuritization because it counteracts the tendencies of the emergency trap outlined above, i.e. 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 initiation, Schmittian decisionism whereby the sovereign itself 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 an IO organ can decide on emergency measures. Regarding their scope, 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 the literature on an emerging Global Administrative Law (GAL) argues, basic principles of domestic administrative law and thereby mechanisms of political and judicial review can and should be integrated within the international legal system to increase IO accountability (cf. Kingsbury et al., 2005).⁹ Accountability can take the form of political review whereby an inter-state assembly or executive board watches over IO emergency powers. Legal review in turn can be achieved either by a legal counsel or internal review panel that assesses the lawfulness of IO actions. In addition, inter-institutional processes of steering and control can contribute to reviewing 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 a positive feedback for desecuritization efforts as it opens the possibility for discursively contesting the securitizing moves by IOs.

Constitutional containment in the WHO

These types of constitutional checks can also be applied to the WHO, and have in part already been tapped in the management of its emergency powers. *Ex ante* checks on the WHO's emergency powers mainly regard the scope of measures that the Director-General can

⁹ Empirically, it can be observed that today there is a steady albeit uneven trend towards the introduction of accountability mechanisms in IOs which are designed to constrain their exercise of authority especially vis-à-vis individuals (cf. Heupel, 2013; Heupel et al., forthcoming 2014).

recommend during a PHEIC. Indeed, regarding the scope of regulations, the very existence of the IHR can be considered as an instrument to contain emergency measures to the necessary minimum in order to prevent interference with trade and human liberty (see Zacher and Keefe, 2008: 6-8). This is reflected in IHR formulations that urge the DG to recommend only necessary and evidence-based measures, and, more importantly, the emphasis that the IHR place on human rights protection (Art. 3, 32, Art. 45). On the other hand, *ex ante* checks on the WHO's initiation of emergencies are rather limited.¹⁰ As outlined above, the ultimate discretion over determining the state of emergency and deciding on the measures to be recommended lies with the Director-General. This creates an incentive for the WHO to securitize health issues by declaring them a PHEIC. A functional separation of the decision over PHEICs and the decision over emergency measures is a constitutional check that has not been considered yet.

Instead, the constitutional containment of the WHO's emergency powers has mainly been carried out via mechanisms of *ex post* review. Critics of the 2009 emergency governance thus used the strategy of external horizontal review to press for constitutional checks on the WHO's discretion. In fact, in the aftermath of the first PHEIC, the Parliamentary Assembly of the Council of Europe has emerged as a horizontal check on the WHO's executive discretion (cf. Deshman, 2011). In early 2010, the Assembly initiated a public inquiry into the WHO's H1N1 response which led to the release of a highly critical report entitled 'The handling of the H1N1 pandemic: more transparency needed' (Council of Europe – Parliamentary Assembly, 2010). It was followed by the adoption of Resolution 1749 (2010)¹¹ in which the Assembly notes grave shortcomings in the decision-making procedures at the WHO when handling H1N1 and calls upon the organization to review its terms of reference 'with a view to ensuring the utmost

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 it is the ultimate discretion of the Director-General to declare a PHEIC and decide on countermeasures, this is at best a very weak constraint.

¹¹ Assembly debate on 24 June 2010 (26th Sitting).

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 the WHO's internal review body, the IHR Review Committee that like the Emergency Committee consists of members of the WHO Roster of experts and is appointed by the Director-General (IHR (2005) Art. 50 - 53). The Committee held a series of public sessions including hearings of critical external parties. In its report the Committee asserted that there was no direct evidence for industry influence on WHO decisions, but nevertheless admonished the WHO's inadequate dealing with conflicts of interests of WHO experts. It also criticized the WHO decision to keep secret the names of the Emergency Committee members and recommended more transparent procedures for the Committee's appointment and working methods. Regarding the adjustment of pandemic criteria, the WHO's failure to dispel suspicions of arbitrary redefinition was criticized, although the Review Committee suggested that the ad hoc changes made by the WHO were in line with the 'intended' definition of a pandemic (WHO, 2011, xx-xxiii).¹² In 2012, the World Health Assembly endorsed the findings of the WHO investigation and requested the Director-General to report on the implementation of the Committee's recommendations (Deshman, 2011: 1099). These recommendations can be expected to shape the WHO's next handling of a PHEIC.

The emerging public debate about and review of the WHO's emergency powers shows that the emergency game is not unidirectional. Indeed, the invocation of crisis and security may be productive of exceptionalist IO authority. But the emergency impetus may equally well be channeled through and contained by properly designed constitutional structures. Hence, the

¹² A revised preparedness guideline for pandemic influenza that takes into account the experience of the H1N1 outbreak was published in 2013 (WHO, 2013).

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 was made to enable 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 suggested explicating the connection of 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, but rather on its effects on political authority in the governance of global emergencies. We have used this perspective to make sense of the WHO's changing role in the governance of global health over the past decade.

Our analysis of the 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 in the H1N1 case, or be it capture by powerful states who 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 on the influence of powerful states and interest

groups in global politics. The normative project of de-securitization here ties into the normative project of global health equity.

While we developed our theoretical arguments in close connection to the empirical observations in the WHO case, it is our hunch that this type of global securitization and associated forms of global exceptionalism are a more general phenomenon across IOs (see also author 2, 2013). Suffice it to hint at 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 UNSC showed heavily exceptionalist traits when it started blacklisting individuals depriving them of their right to a fair hearing and at the same time arrogated the function of world legislature (cf. author 2, 2012; Joyner, 2012). The 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 ECB's self-authorization to act as lender of last resort in apparent violation of EU treaties, or the troika's ample discretion in monitoring the implementation of the European emergency measures (cf. Ruffert, 2011; White, 2013). Against this background, we suggest that there is room and 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 that have yet to explore the full potential of their mutual engagement. While in this article we attempted to demonstrate the value-added for the Copenhagen agenda to integrate 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 lacks an appropriate understanding (or even a discussion) of how emergencies are discursively produced irrespective of the factual circumstances. Similarly, there is no treatment of the question of how the proposed constitutional solutions for emergency governance may have effects on the (de-)stabilization of

security discourses that underlie the emergency situation. Here, legal theorists could learn from the Copenhagen School.

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