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Making Sense of Security

By J. Benton Heath[*]

Abstract

This Article theorizes "security" as a site of continuing struggle in the international system between competing approaches to identifying and responding to urgent threats. Rather than endorsing a single approach, this Article argues that a claim to "security" can imply any one of four approaches to law and policy, each of which has radically divergent implications for who is empowered by a security claim and how that power interacts with existing legal rules. By moving among these four approaches, security claims can disrupt established systems of knowledge-production and redescribe the world in new ways.

I. Introduction

In January 2021, as the Biden administration took office in the United States, many observers may have welcomed promises by top-level U.S. officials to treat "the climate crisis as the urgent national security threat it is."[1] It is no doubt comforting to once again have a U.S. administration that purports to take climate change seriously, but what does it mean to count this as a "security" issue? Perhaps the label simply signifies the seriousness of the threat, acting as a call to reinvigorate environmental institutions, such as by rejoining the Paris Agreement or strengthening domestic regulatory authority over greenhouse gas.[2] But the label could have more sweeping implications. By invoking the concept of security in connection with climate change, the United States could be heading down a path toward invoking emergency powers, perhaps as a basis for imposing economic sanctions on polluting nations or private entities.[3] More darkly, this policy could signal a new trajectory for the use of force

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[1] Jess Bidgood, *Biden Links Climate Change to National Security as He Taps John Kerry for Climate Czar Role*, Boston Globe (Nov. 24, 2020), *at* https://www.bostonglobe.com/2020/11/23/nation/john-kerry-join-biden-administration-national-security-council-official-dedicated-climate-change.

[2] *See, e.g.*, E.O. 14008, 86 Fed. Reg. 7619, 7619–23 (Jan. 27, 2021).

[3] *See* Daniel A. Farber, *Exceptional Circumstances: Immigration, Imports, the Coronavirus, and Climate Change as Emergencies*, 71 Hastings L.J. 1143, 1169–72 (2020); Mark P. Nevitt, *On Environmental, Climate Change, and National Security Law*, 44 Harv. Envt'l L. Rev. 321, 351–63 (2020).

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abroad, gesturing toward a future where "climate rogue states" are threatened with military force if they do not comply with environmental commitments.[4] Alternatively, we might hope that the label will draw attention to the differential impact of climate change on populations that already experience the greatest insecurity, thereby triggering calls for much more far-reaching reforms.[5] Each of these possibilities suggests a radically different trajectory for foreign policy and international law, yet each is contained within the notion of "security."

The foregoing example concerns U.S. foreign policy, but similar questions are emerging worldwide and at all levels of the international system. Several states and the UN Security Council have acknowledged the security implications of the climate crisis.[6] And the fallout from the COVID-19 pandemic is triggering calls to strengthen "global health security," a concept with a long history but ambiguous implications.[7] States are describing cyber-threats,[8] organized crime,[9] money laundering,[10] bribery,[11] human trafficking,[12] supply-chain issues,[13] foreign investment,[14] migration,[15] national culture,[16] and cultural property[17] as matters of security.[18] These developments are emerging alongside, rather than replacing, classical security narratives around great power competition.[19] At the same time, transnational actors continue to offer alternative visions of security that either complement or contest these state

[4] *See, e.g.*, Craig Martin, *Atmospheric Intervention?: The Climate Change Crisis and the* Jus ad Bellum *Regime*, 45 COLUM. J. ENVT'L L. 331 (2020); Stephen M. Walt, *Who Will Save the Amazon (and How)?*, FOR. POL'Y (Aug. 5, 2019), *at* https://foreignpolicy.com/2019/08/05/who-will-invade-brazil-to-save-the-amazon.

[5] *See, e.g.*, Olúfẹ́mi O. Táíwò, *Don't Treat Climate Change as a National Security Risk*, NEW REPUBLIC (Feb. 1, 2021), *at* https://newrepublic.com/article/161183/dont-treat-climate-change-national-security-risk (suggesting, *inter alia*, the reform of voting rights at international financial institutions, public ownership of utilities, and reparations).

[6] *See, e.g.*, Mark Nevitt, *Is Climate Change a Threat to International Peace and Security?*, 42 MICH. J. INT'L L. (2021).

[7] *E.g.*, Lawrence O. Gostin, Eric A. Friedman & Sarah Wetter, *How the Biden Administration Can Reinvigorate Global Health Security, Institutions, and Governance*, 115 AJIL UNBOUND 74 (2021); Clare Wenham, *The Oversecuritization of Global Health*, 95 INT'L AFF. 1093 (2021).

[8] *E.g.*, Lene Hansen & Helen Nissenbaum, *Digital Disaster, Cyber Security, and the Copenhagen School*, 53 INT'L STUD. Q. 1155 (2009).

[9] *See, e.g.*, Liz Campbell, *Organized Crime and National Security: A Dubious Connection*, 17 NEW CRIM. L. REV. 220 (2014).

[10] *See, e.g.*, PIERRE-HUGUES VERDIER, GLOBAL BANKS ON TRIAL: U.S. PROSECUTIONS AND THE REMAKING OF INTERNATIONAL FINANCE 110–46 (2020).

[11] *See, e.g.*, Deborah Samuel Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J. L. & POL'Y 63 (2018).

[12] *E.g.*, Arthur Rizer & Sheri R. Glaser, *Breach: The National Security Implications of Human Trafficking*, 17 WIDENER L. REV. 69 (2011).

[13] *E.g.*, Samuel Estreicher & Jonathan F. Harris, *Bringing Home the Supply Chain*, VERDICT (Apr. 15 2020).

[14] *See, e.g.*, Lizzie Knight & Tania Voon, *The Evolution of National Security at the Interface Between Domestic and International Investment Law and Policy: The Role of China*, 21 J. WORLD INV. & TRADE 104, 111–24 (2020).

[15] *See, e.g.*, Jaya Ramji-Nogales, *Migration Emergencies*, 68 HASTINGS L.J. 609, 619 (2017).

[16] *E.g.*, Congyan Cai, *Enforcing a New National Security?: China's National Security Law and International Law*, 10 J. E. ASIA & INT'L L. 65, 80–81 (2017).

[17] Nikita Lalwani, *State of the Art: How Cultural Property Became a National-Security Priority*, 130 YALE L.J. F. 78 (2020).

[18] OECD, *Security-Related Terms in International Investment Law and National Security Strategies*, at 11 (May 2009).

[19] *See* Henry Farrell & Abraham L. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44 INT'L SECURITY 42 (2019); Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. INT'L ECON. L. 655 (2019).

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policies. For example, a "second-generation human security" model makes pressing demands for "a very big allocation of resources, a far-reaching reform of global security capabilities, and a transformation in power structures."[20] And the transnational social movements declaring that Black Lives Matter point toward alternative imaginations of security based on divestment from policing and carceral systems, and investment in communities.[21] All of these developments carry a similar demand for security, as well as an ambiguity about how that demand will be met.

This Article develops and applies a novel typology for analyzing the descriptive and normative implications of security claims in international law and politics. Security, as others have noted, is a deeply indeterminate concept, whose power derives not only from its association with particular issues or threats, but from the way that it combines fundamental ambiguity with a sense of heightened urgency.[22]

This Article builds on this insight, arguing that actors take divergent approaches to security by issuing different—often implicit—answers to two questions: first, do experts hold a privileged position in identifying and describing security issues, and, if so, which experts' views are relevant; and, second, should security be protected through the extraordinary means we ordinarily associate with the national security state, such as emergency powers and secrecy? Traditional militarist approaches to national security offer affirmative answers to both questions: security is a matter of military, intelligence, or diplomatic expertise, and is pursued through military force, surveillance, and similar means.[23] But any combination of answers to these two questions is possible, and each leads to a radically different approach to security in world politics.[24] So treating climate change as a security issue might, for example, lead us to think of security policy in terms of scientific knowledge and risk analysis—putting regulators in the driver's seat and triggering, rather than circumventing, the ordinary rule-of-law requirements of the administrative state.[25]

Differing approaches to security, this Article argues, thus reflect a deeper struggle over *whose knowledge matters* when constructing and responding to the most pressing threats.[26]

[20] Christine Chinkin & Mary Kaldor, International Law and New Wars 564 (2017).

[21] Center for Popular Democracy, Law for Black Lives & Black Youth Project 100, Freedom to Thrive: Reimagining Safety and Security in Our Communities 4 (2017); *see also* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 452–53 (2018); Monica Bell, *Black Security and the Conundrum of Policing*, Just Security (July 15, 2020), *at* https://tinyurl.com/4xsbe254. On the transnational dimensions of these movements, see, for example, Policing the Planet: Why the Policing Crisis Led to Black Lives Matter (Jordan T. Camp & Christina Heatherton eds., 2016); Global Lockdown: Race, Gender, and the Prison-Industrial Complex (Julia Sudbury ed., 2005); Steven Gilliam & Rachel Gilmer, *What Does the Trans Pacific Partnership Mean for Black People?*, Ebony (June 8, 2015), *at* https://www.ebony.com/news/what-does-the-trans-pacific-partnership-mean-for-black-people-503.

[22] *See* Barry Buzan, People, States, and Fear 29–32 (rev. 2d ed. 2016) (citing W. B. Gallie, *Essentially Contested Concepts*, 56 Proc. Aristotelian Soc'y 167 (1956)); *cf.* Arnold Wolfers, *"National Security" as an Ambiguous Political Symbol*, 67 Pol. Sci. Q. 481, 481 (1952). *But see* David A. Baldwin, *The Concept of Security*, 23 Rev. Int'l Stud. 5, 12 (1997) (arguing that security is not "essentially contested" but rather "a confused or inadequately explicated concept").

[23] *See* Section IV.A *infra*.

[24] *See* Sections IV.B–D *infra*.

[25] *E.g.*, Maria Julia Trombetta, *Rethinking the Securitization of the Environment: Old Beliefs, New Insights*, *in* Securitization Theory 137, 142 (Thierry Balzacq ed., 2011). An entirely different, and more radical, set of consequences is suggested by Táíwò, *supra* note 5.

[26] An important precursor in this respect, in the field of U.S. national security, is Aziz Rana, *Who Decides on Security?*, 44 Conn. L. Rev. 1417 (2012); see also Cynthia Enloe, Globalization & Militarism 55 (2d ed. 2016). The connection between knowledge, politics, and power is a key ingredient of many critical theories to

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By using these variables to construct a typology, we can begin to disentangle the various approaches to security in international law and politics, and assess the desirability of each.

The typology developed here has four implications for the study of security in international law, which are by turns descriptive, normative, critical, and methodological. First, descriptively, this approach shifts our understanding of the security challenge to international institutions from one of conceptual uncertainty to one of epistemic authority and empowerment.[27] Recent international legal scholarship on security tends to privilege the conceptual dimension, suggesting that the fundamental challenge facing international regimes today comes from the expanding meaning of security and from the resulting uncertainty and scope for disagreement.[28] From this perspective, it appears critical that the international community achieve consensus on the right conception of security—that is, the conception that focuses our attention on truly the most dangerous threats and prioritizes them appropriately.[29] Once we reach this consensus, we might hope, then we can decide whether and under what circumstances an issue like climate change is "really" a matter of security rather than simply a matter of politics or policy.[30]

However, if security is understood as a continuing struggle over epistemic authority, this desire for conceptual clarity may undermine, rather than enhance, our ability to accurately describe what is happening with security. To continue with the example at the outset of this Article, the struggle over whether and how to define climate change as a security issue implicates actors with diverse agendas. For instance, militaries may embrace climate security for their own purposes and to shore up their own authority, while resisting more transformative efforts that would place environmental scientists and regulators, or affected populations, at the center of security policy.[31] Thus we might see militaries embracing the idea that climate change threatens national security, while taking steps to describe that threat narrowly in terms

which this Article is in some degree of debt. *See generally* ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1975); MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977–1978 (Michel Senellart ed., Graham Burchell trans., 2007); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

[27] *Cf.* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 849–51 (2021).

[28] *See, e.g.*, J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1024 (2020); Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STANFORD L. REV. 1097, 1103–04 (2020); Hitoshi Nasu, *The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System*, 3 AMSTERDAM L. F. 15 (2011); Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1577 (2011); Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AJIL 619, 622–23 (2005).

[29] *See, e.g.*, CHINKIN & KALDOR, *supra* note 20, at 25–34 (describing and defending a "second generation Human Security" model); Nigel D. White & Auden Davies-Bright, *The Concept of Security in International Law*, *in* OXFORD HANDBOOK OF INTERNATIONAL LAW AND GLOBAL SECURITY 19, 36 (Robin Geiss & Nils Melzer eds., 2021) [hereinafter GLOBAL SECURITY HANDBOOK] (emphasizing the importance of achieving consensus); Jutta Brunée & Stephen J. Toope, *Environmental Security and Freshwater Resources: Ecosystems Regime Building*, 91 AJIL 26, 27 (1997) (supporting an "expansive understanding of environmental security"). For legal scholarship that eschews any attempt to reach a consensus definition of security, and instead proposes potentially more promising managerial-style mechanisms to accommodate a plurality of perspectives, see Cai, *supra* note 16, at 77; Heath, *supra* note 28, at 1080–96; Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793, 810–12 (2020); Gregory Shaffer, *Governing the Interface of U.S.-China Relations*, 115 AJIL 622 (2021).

[30] *Cf.* Maryam Jamshidi, *The Climate Crisis Is a Human Security, Not a National Security, Issue*, 93 U. S. CAL. L. REV. POSTSCRIPT 36, 44 (2019).

[31] *See* Rita Floyd, *Global Climate Security Governance: A Case of Institutional and Ideational Fragmentation*, 15 CONF., SEC. & DEV. 119, 137–39 (2015).

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of military readiness and armed conflict.[32] Approaches that focus on associating climate change with certain security labels rather than others (such as human security versus national security) risk obscuring rather than illuminating the ways that these labels themselves have become a terrain of struggle among various actors and agendas.

Second, as a normative matter, the typology developed here provides an initial guide, though no easy answers, to thinking about where we should position ourselves in these struggles. Judgments about security in international law, this Article argues, are unavoidably context-dependent, strategic, and political. This fact is in large part a consequence of the structure of international law itself. When a demand for security is projected into international politics, it does not encounter a blank slate: the international legal order is to a great degree organized into functionally differentiated subsystems—from human rights to trade to environmental law—which embed diverging assumptions about whose knowledge matters most in formulating policy and about the appropriate logic of policymaking.[33] Security can be deployed to entrench those existing knowledge practices and defend against challengers, but the power of security today also lies in its capacity for disruption—its demand to substitute a wholly new set of routines. Thus, the same arguments on climate security that might be used to justify and expand the Security Council's power to authorize force against "climate rogue states"[34] could also be used to disrupt trade rules that treat climate regulations skeptically as potential restraints on trade.[35] This dynamic is why it is often difficult to formulate a single stance on how security claims should interact with international law: if security is a tool for entrenchment or disruption, then it matters whose knowledge we are privileging, and how. The typology developed here thus provides a vocabulary for assessing the desirability of any given demand for security.

Third, by understanding security in terms of knowledge and authority, this Article raises critical insights concerning the structure of international law and politics. A key theme here is the struggle by non-state actors—whether overpoliced communities, Indigenous groups, small-scale food producers, or communities living near the sites of extractive industry—to have their own knowledge about their security interests recognized and prioritized as authoritative.[36] Achieving such recognition is particularly difficult in an international legal system that has historically privileged diplomats acting through foreign offices, or, more recently, networked groups of trained and recognized experts on a wide array of global problems.[37] This disconnect raises critical insights regarding the extent to which international regimes—even those that claim to uphold a humanized vision of security—remain undemocratic, unresponsive, and inaccessible.[38]

[32] In this respect, compare White House, National Security Strategy 12 (2015) (describing the climate-security nexus to include armed conflict, natural disasters, refugee flows, and economic effects), with U.S. Dep't of Defense, Report on the National Security Implications of Climate-Related Risks and a Changing Climate 4–5 (July 2015) (describing the security implications largely in terms of its capacity to drive conflicts abroad, increase demand for military-assisted humanitarian aid, and force militaries to protect installations against sea level rise).

[33] Martti Koskenniemi, *The Fate of International Law: Between Technique and Politics*, 70 Mod. L. Rev. 1 (2007).

[34] Martin, *supra* note 4.

[35] *See* Section V.C *infra*.

[36] *See* Sections III.A.3., IV.D., V.D *infra*.

[37] *See, e.g.*, David Kennedy, A World of Struggle 1–20 (2018).

[38] *See* Part VI *infra*.

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Fourth and finally, this Article makes a methodological contribution by suggesting closer engagement between international law and critical security studies. International legal scholarship is steeped in three decades of dialogue with international relations scholars,[39] and international lawyers have drawn from both realist and constructivist traditions in security studies to interrogate a range of regimes and practices, from the use of force to cybersecurity.[40] But this interdisciplinary conversation has largely ignored or bypassed a range of critical traditions in security studies,[41] which for the past three decades have "re-conceptualized what security meant and how it mattered."[42] As late as 2015, it was possible to say that most mainstream international law scholarship approaches security "without much reflection on theory or method."[43] As international law is once again concerned with security, cross-disciplinary collaboration has the potential to enrich both disciplines by connecting critical security studies' extensive reflection on concepts, theories, and methods to international lawyers' deep knowledge of institutional structure and concern for the allocation of power and authority.

The Article proceeds in five parts. Part II situates the problem of security in international law, showing how security makes conflicting demands to either expand or preempt international legal rules. Part III sets out the core descriptive argument, showing how these demands become the terrain for deeper struggles over whose knowledge is relevant to constructing and pursuing security interests. This analysis produces two variables relating to the role of knowledge in any theory of security—that is, the *identification* of security issues, and the *logic* by which those issues are addressed—which can be used to categorize and evaluate competing approaches to security. Part IV uses these two variables to construct this Article's core analytical contribution: a four-part typology of approaches to security-knowledge, grounded in current debates in policy, law, and theory. Part V turns to a set of case studies in international economic law, demonstrating how conflicts among these approaches help explain current

[39] *See generally* Jeffrey L. Dunoff & Mark A. Pollack, *International Law and International Relations: Introducing an Interdisciplinary Dialogue*, *in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 3 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) [hereinafter INTERDISCIPLINARY PERSPECTIVES]; Emilie Hafner-Burton, David G. Victor & Yonatan Lupu, *Political Science and International Law: The State of the Field*, 106 AJIL 47 (2012); Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1998); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989).

[40] *See, e.g.*, JUTTA BRUNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 271–349 (2010); Martha Finnemore & Duncan B. Hollis, *Constructing Norms for Global Cybersecurity*, 110 AJIL 425 (2016); Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AJIL 107 (2006).

[41] For exceptions, see CHINKIN & CHARLESWORTH, *supra* note 20, at 508–17; Hitoshi Nasu, *The Global Security Agenda: Securitization of Everything?*, *in* GLOBAL SECURITY HANDBOOK, *supra* note 29, at 37; Wouter G. Werner, *International Law: Between Legalism and Securitization*, *in* SECURITY: DIALOGUE ACROSS DISCIPLINES 196, 196 (Philippe Bourbeau ed., 2015); Barbara von Tigerstrom, *International Law and the Concept of Human Security*, *in* THE CHALLENGE OF CONFLICT: INTERNATIONAL LAW RESPONDS (Ustina Dolgopol & Justin G. Gardam eds., 2006); Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 293 (1993).

[42] Chris Hendershot & David Mutimer, *Critical Security Studies*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL SECURITY 60 (Alexandra Gheciu & William C. Wohlforth eds., 2018) [hereinafter HANDBOOK OF INT'L SECURITY].

[43] Werner, *supra* note 41, at 196.

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dynamics in the securitization of economic law. Part VI concludes by drawing out the implications of this study for further research on international law and security.

It should be noted that this Article was substantively complete prior to Russia's invasion of Ukraine in February 2022. The Article does not, and cannot, purport to "make sense" of this unfolding tragedy. But the analysis developed here may offer a preliminary vocabulary for thinking about what we must prioritize—and whom we must empower—in whatever comes next.

II. International Law and Security Claims

Security makes claims on international law, though the precise nature and effect of such claims is almost always ambiguous. In itself, this does not distinguish security from any other deeply held value, but security occupies a special place in today's controversies owing to the intensity of security demands, and their problematic relationship with preexisting legal structures. National security, for example, is frequently described as law's vanishing point, wherein some or all of law's demands simply cannot be observed.[44] The UN Charter enables the Security Council to "decree" new law to preserve or restore international peace and security, described as the *sine qua non* of functioning government.[45] The concept of human security, though closely connected with human rights law and in principle less at odds with legality, is said to have the potential to "become a new organizing principle of international relations," which reconceptualizes the territorial integrity of states and poses far-reaching challenges to international law.[46] At a high level of generality, a commonality among all these approaches is a sense of intensity or paramount importance, coupled with a demand to do *something* with existing legal arrangements—either to extend them or overcome them. It is useful to take each of these dimensions in turn.

First, security is a generative condition in international law—a basis for the creation or extension of legal institutions. This generative dimension is perhaps as old as the interstate system itself, providing a rationale to cede authority to a sovereign.[47] As Anthony Anghie points out, this conception of sovereignty emerged in the context of European colonization of the Americas, in a process that involved construing Spanish incursions as benign and Indian resistance as hostile, thereby justifying a limitless war of conquest.[48] As colonial control deepened, the purported needs of security justified the further extension of sovereign power through borders, blacklisting, detention, dispossession, and warfare.[49] Following decolonization, many former colonies traded formal sovereignty for more attenuated forms of control, either via economic sanctions or continued military presence justified on security grounds, or via state contracts and economic treaties

[44] *See, e.g.*, Robert H. Bork, *The Limits of "International Law*,*"* NAT'L INTEREST, at 3, 7 (1989/1990) (arguing, with respect to the U.S.-Nicaragua ICJ judgment, "if the U.S. is a fugitive from justice for rejecting the judgment of a biased court over matters vital to its security, then a large majority of the world's nations are in flight").

[45] Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 574 (1998).

[46] Gerd Oberleitner, *Human Security: A Challenge to International Law?*, 11 GLOB. GOVERNANCE 185, 198 (2005).

[47] *See, e.g.*, Jeremy Waldron, *Safety and Security*, 85 NEB. L. REV. 454, 456 (2011).

[48] ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 13–31 (2004).

[49] *See, e.g.*, JOHN REYNOLDS, EMPIRE, EMERGENCY, AND INTERNATIONAL LAW 68–108 (2017); Kerem Nisancioglu, *Racial Sovereignty*, 26 EUR. J. INT'L REL. 39, 48–55 (2020); Yael Berda, *Managing Dangerous Populations: How Colonial Emergency Laws Shaped Citizenship*, 51 SECURITY DIALOGUE 557 (2020).

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meant to establish the security of foreign investments.[50] International legal doctrines sometimes facilitate these forms of indirect control, and at other times exert counter-pressure.[51]

Security's generative capacity is also at the foundation of efforts to create and expand the powers of international institutions. Security lies at the foundation of the modern UN system,[52] and the UN Security Council enjoys broad authority under the Charter to take binding action for the maintenance or restoration of international peace and security.[53] This authority is a holy grail for actors seeking to leverage the international system because it enables the Council to take measures up to and including the use of force, which have legally binding effects and supersede all other inconsistent obligations.[54] Where the Security Council fails to act, regional organizations, such as the Economic Community of West African States, may become sites of innovation in this area.[55] Security can also provide a policy basis for creating new institutions and endowing them with exceptional powers, such as the power to arrest and prosecute individuals for crimes under international law,[56] or the power to take emergency action in the name of global health security.[57] And international human rights law affords a right to security that could support alternative security practices.[58]

Second, "security" can signify the limited reach of a specific international agreement or a set of international rules.[59] Some international rules may include express carve-outs for matters of security, for situations of emergency, or for other extreme circumstances.[60] Many human

[50] *See* Frantz Fanon, The Wretched of the Earth 52–62, n. 9 (1961) (Richard Philcox trans., 2005).

[51] For variations on counter-pressure, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 ICJ Rep. 95 (Feb. 25); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 ICJ Rep. 136, 193 (July 9). For an argument that these formal vindications of Third World sovereignty nonetheless mask the ways in which international legal doctrines facilitate "the stubborn persistence of colonial-era bonds tying together First and Third World peoples in an informal but very real empire," see E. Tendayi Achiume, *Migration as Decolonization*, 71 Stan. L. Rev. 1509, 1539–47 (2020).

[52] *See* Hans Kelsen, Collective Security 39 (1957).

[53] UN Charter, Arts. 39–42.

[54] *See id.* Arts. 24–25, 42, 48, 103. For the same reasons, the extension of Security Council power through legislation can be criticized as a new form of colonial-style imperialism, where the concept of security, now internationalized, justifies the extension of western sovereign power against alleged terrorists, armed groups, or so-called rogue states. Anghie, *supra* note 48, at 273–09.

[55] *See, e.g.*, Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, Dec. 10, 1999, *reprinted in* 5 J. Conflict & Sec. L. 231 (2000).

[56] Draft Code of Offences Against the Peace and Security of Mankind, Art. 1, 1954 (II) Y.B. Int'l L. Comm'n 134.

[57] *See* Section V.B *infra*.

[58] *E.g.*, Liora Lazarus, *Mapping the Right to Security*, *in* Security and Human Rights 325, 326 (Benjamin J. Goold & Liora Lazarus eds., 2007) (noting a lack of research on the scope of this right).

[59] Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221, 259 (2020); Bork, *supra* note 44.

[60] The notions of "security" and "emergency" are conceptually distinct in important ways. "Emergency" tends to denote a time-bound and intense situation, whereas "security" refers only to issue type, and may or may not include all emergency situations. Natural disasters, for example, are emergency situations that may or may not be understood to give rise to security concerns. Likewise, issues of state or personal security arise in all times, and not simply in moments of emergency. This conceptual distinction is reflected in some legal instruments, such as human rights treaties, which include time-bound derogations clauses for situations of public emergency, as well as subject-matter-specific limitations or exceptions clauses for security and other policy concerns. *See* notes 61–62 *infra*. It may also be desirable to insist on strict separation by, for example, seeking institutional mechanisms to ensure that declared emergencies remain time-limited. *See, e.g.*, Bruce Ackerman, Before the Next attack 80–83 (2006). Nevertheless, these unassailable analytical distinctions tend to break down and blur in political practice. Declared emergencies can stretch and persist over time, such that the emergency becomes another word for a semi-permanent security situation. *See, e.g.*, Oren Gross & Finnoula Ní Aoláin, Law in Times of

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rights treaties, for example, permit states to derogate from obligations in time of national emergency,[61] and some treaties contain additional carve-outs for security measures,[62] or impose potentially countervailing individual duties with respect to security.[63] Exceptions and carve-outs also appear in treaties relating to trade and investment,[64] digital commerce,[65] regional integration,[66] transnational law enforcement,[67] global health,[68] the law of the sea,[69] and nuclear non-proliferation.[70] At the drafting stage, states may attempt to design rules that provide flexibility for security measures,[71] and this perceived need for flexibility may generate demands for deference or for restrictive interpretations of the rules even when there is no express exception available.[72] The customary international law of state responsibility, while it does not speak of "security," permits states to deviate from their obligations for reasons of self-defense, *force majeure*, or because doing so is necessary to safeguard an "essential

CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 174–80 (2006). Likewise, governments tend to claim the special privileges and deference associated with emergency powers even in normal times for "security" issues, and the expansion of this concept allows this extraordinary power to cover an increasingly large slice of ordinary life. *See, e.g.*, *id.* at 214–20. This intertwined relationship between security and emergency can be found in practice under instruments such as the UN Charter, where provisions that were initially used only with respect to specific conflicts and crises have been adapted to issue semi-permanent global legislation. *See, e.g.*, Paul C. Szasz, *The Security Council Starts Legislating*, 96 AJIL 901 (2002). The relationship between security and emergency is arguably tightest when "security" is understood in primarily military terms. *See* Section IV.A *infra*. As we will see later, there are competing discourses of security that might drive some separation between this concept and notions of crisis and emergency powers, and this separation may be desirable. *See* Sections IV.B, D *infra*. Nevertheless, at the outset it is useful to treat these two concepts together, since they give rise to the same concern that an ever-wider array of issues will be securitized and thus subject to extraordinary state power.

[61] *E.g.*, International Covenant on Civil and Political Rights, Art. 4, Dec. 16, 1966, 993 UNTS 3 [hereinafter ICCPR]; American Convention on Human Rights, Art. 27, Nov. 22, 1969, 1144 UNTS 123; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15, Nov. 4, 1950 [hereinafter ECHR].

[62] *E.g.*, ICCPR, *supra* note 61, Arts. 8(3)(c)(iii), 12(3), 13, 14(1), 19(3)(b), 21, 22(2). Security considerations may also enter into the analysis of non-derogable rights. *See, e.g.*, *id.* Art. 6(1) (no one shall "arbitrarily" be deprived of life).

[63] African (Banjul) Charter on Human and Peoples' Rights, Art. 29(3), June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 ILM 58 (imposing a duty "[n]ot to compromise the security of the State").

[64] *E.g.*, General Agreement on Tariffs and Trade, Art. XXI, Oct. 30, 1947, 55 UNTS 188 [hereinafter GATT 1947]; General Agreement on Trade in Services, Art. XIV*bis*, Apr. 15, 1994, 1869 UNTS 183; Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 73, April 15, 1994, 1869 UNTS 299 [hereinafter TRIPS]. For a survey of investment treaty models, see generally UN CONF. ON TRADE & DEV. [UNCTAD], THE PROTECTION OF NATIONAL SECURITY IN INTERNATIONAL INVESTMENT AGREEMENTS (2009).

[65] Agreement Concerning Digital Trade, U.S.-Japan, Art. 4, Oct. 7, 2019, *at* https://tinyurl.com/yyaakzsf.

[66] *E.g.*, Treaty on European Union (Consolidated Version), Art. 4(2), Oct. 26, 2012, OJEU C 326/13; Treaty on the Functioning of the European Union, Art. 346(1)(b), Oct. 26, 2012, OJEU C 326/47.

[67] Treaty on Mutual Legal Assistance in Criminal Matters, UK-U.S., Art. 3(1)(a), Jan. 6, 1994; Mutual Assistance in Criminal Matters (Djib. v. Fr.), Judgment, 2008 ICJ 177, 226 (June 4).

[68] International Health Regulations (2005), Art. 1(1), May 23, 2005, 2509 UNTS 79 (defining "health measure," a term on which the application of key provisions depends, to "not include law enforcement or security measures").

[69] UN Law of the Sea Convention, Arts. 25(3), 52, 302, Dec. 10, 1982, 450 UNTS 11.

[70] Treaty on the Non-proliferation of Nuclear Weapons, Art. X(1), July 1, 1968, 729 UNTS 161.

[71] Laurence R. Helfer, *Flexibility in International Agreements*, *in* INTERDISCIPLINARY PERSPECTIVES, *supra* note 39, at 175, 191.

[72] Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 925–27, n. 122 (2006).

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interest."[73] The concept of security may also limit international agreements in more indirect ways, such as by constraining the powers of international organizations.[74]

These twin pressures to expand and contract cause considerable anxiety among international lawyers. The possibility that states will escape treaty obligations via security exceptions, or expand the powers of the Security Council by reference to new kinds of security interests, is frequently treated as a threat to the international rule of law.[75] Considerable scholarly effort is spent on how to limit the potential breadth of security exceptions through conditions on access, standards of judicial review, time limitations, or compensation requirements, either as a matter of treaty design or interpretation.[76] The extension of Security Council power into generally applicable legislation related to counter-terrorism activities revived an analogous set of inquiries into what, if any, inherent limits exist on the Council's Chapter VII power.[77]

These important legal arguments should not be expected to settle longstanding questions regarding the relationship between international legality and security interests. To be sure, treaties can attempt to offer more precise definitions of security, and treaty drafters and interpreters can impose procedural conditions on the concept's invocation.[78] But there are strong reasons to think that at least some ambiguity around security is a feature, not a bug, of legal orders.[79] The label "security" is thus likely to remain a site of struggle, both within and among states, over who gets to define the most important interests of the day and how those interests are to be pursued.[80] The deliberate open-endedness of security at the conceptual level will also make it difficult to resolve these struggles definitively through interpretation, by, for example, settling on a single "ordinary meaning" of the term in legal disputes.[81] As the rules of treaty interpretation are themselves open-ended,[82] conflicts over interpretation often replicate, rather than resolve, political conflicts over who gets to define security and how.[83]

[73] Responsibility of States for Internationally Wrongful Acts, Arts. 21, 23–25, 27, GA Res. 56/83, UN Doc. A/RES/56/83 (Jan. 28, 2002); *cf.* Draft Articles on the Responsibility of International Organizations, Art. 25, *in* Report of the Int'l L. Comm'n, 63d Sess., UN Doc. A/66/10 (2011).

[74] *See* Section III.A.2 *infra*.

[75] *See, e.g.*, Simon Chesterman, *"I'll Take Manhattan": The International Rule of Law and the United Nations Security Council*, 1 HAGUE J. RULE L. 67 (2009).

[76] *See, e.g.*, Stephan Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK Y.B. UN L. 61 (2009); Helfer, *supra* note 71.

[77] *E.g.*, ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 352–54 (2004).

[78] *See, e.g.*, UNCTAD, *supra* note 64, at 72–110 (surveying techniques in economic treaties).

[79] *See, e.g.*, Edward C. Luck, *A Council for All Seasons: The Creation of the Security Council and Its Relevance Today*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, at 61 (Vaughan Lowe, Adam Roberts, Jennifer Welsh & Dominik Zaum eds., 2010).

[80] *See, e.g.*, Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT'L L. 109 (2020).

[81] *Cf.* Liora Lazarus, *The Right to Security: Securing Rights or Securitizing Rights?*, *in* EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS 87, 87–88 (Rob Dickinson, Elena Katselli, Colin Murray & Ole W. Pedersen eds., 2013) (noting that controversy over "what security *is*" spills over into efforts to define a "right to security").

[82] *See, e.g.*, Andrea Bianchi, *The Game of Interpretation in International Law: The Players, the Cards and Why the Game Is Worth the Candle*, *in* INTERPRETATION IN INTERNATIONAL LAW 34, 44 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015); Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organization*, 38 YALE J. INT'L L. 289, 291 (2013).

[83] If an authoritative interpreter does settle on a meaning of security—such as through a binding judicial opinion—then the problem of security's ambiguity reappears as a political one, in the sense that the losing side may be moved to challenge the interpreter's authority. Perhaps in recognition of this fact, international courts

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III. Security-Knowledge in International Law and Politics

The foregoing discussion showed how the concept of security places demanding but ambiguous claims on international legal institutions. As a legal matter, such claims will have to be resolved by states, courts, and other actors according to the ordinary rules that apply to the interpretation and performance of international legal obligations.[84] Nevertheless, as discussed above, bona fide conflicts over interpretation may simply reproduce the ambiguity of security in any given institutional setting, and interpreters will have to make choices among multiple available meanings—choices that have political implications. This Part advances the Article's descriptive argument that, by cashing out and resolving security claims in this way, international legal institutions are implicated in deeper struggles over the role of knowledge in security policy.

International legal institutions shape understandings about whose knowledge matters in security policy in two ways. First, their decisions generate expectations about the kinds of expertise that are qualified to *identify* security issues. Second, legal instruments and decisions shape understandings about the sort of *logic* we expect security policy to follow. While this is not the only way to think about the stakes of security decisions, the focus on epistemic authority is particularly helpful for reflecting on the consequences of legal decisions and is likely to lead to more incisive analysis than focusing on competing conceptual definitions of security.

A. Knowledge of Security: Competence to Identify Security Threats

International law implicates the knowledge practices of security, in the first instance, by shaping expectations about whose knowledge matters for identifying potential threats. To illustrate how such choices work, consider President Trump's declaration that migration was creating a national emergency and security crisis at the southern border, which was made to obtain funding for a border wall, justify extreme and inhumane conditions of confinement, and threaten tariffs against Mexico.[85] If this measure were addressed in an international institution—such as a human rights treaty body or (if tariffs had been imposed) under a trade treaty—what kind of reasons should the United States have been expected to give in support of its policies?

It turns out there are several answers to this question, all of which appeared in the discourse reacting to the administration's policies. One response is to draw on the knowledge of former government officials and other experts in "national security and homeland security issues" to evaluate the supposed threat.[86] Perhaps this focus on national and homeland security is skewed, and we should instead center expertise on immigration itself.[87] Maybe our

often take pains to avoid reaching definitive conclusions on the concept's scope, preserving the role of security as a site of contestation. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ Rep. 14, 117 (June 27) (noting only that the concept of "essential security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past").

[84] In treaty regimes, see Vienna Convention on the Law of Treaties, Arts. 26, 31, May 23, 1969, 1155 UNTS 331.

[85] *See, e.g.*, Presidential Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); Border Security and Immigration Enforcement Improvements, EO 13767 of Jan. 25, 2017, 82 Fed. Reg. 8793 (Jan. 30, 2017). This proclamation blurs the concepts of security and emergency in ways described in note 60 *supra*.

[86] *See* Joint Declaration of Former Government Officials (2019), *available at* https://cdn.cnn.com/cnn/2019/images/02/25/2019-2-21.final.national.emergency.decl.pdf.

[87] *See, e.g.*, Jill Colvin & Colleen Long, *Trump Struggles with a Growing Problem on the Border*, Assoc. Press (Apr. 6, 2019), *at* https://apnews.com/article/aabc13ab07604b39b09710f08bc42a4f.

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search for specialized knowledge about the supposed crisis should cause us to privilege the knowledge of those specially affected, such as the migrants themselves and local communities.[88] Or maybe this whole search is silly—any one of us can know that there is no emergency at the southern border, as surely as we can know the meaning of the word itself.[89] The debate over U.S. immigration policy involved references to all of these forms of expertise.

This slippage—from privileging national security experts to embracing wider forms of expertise—represents a spectrum of approaches to identifying security threats (see Figure 1 below). At one end of this spectrum is a relatively narrow cadre of elite security experts, often composed of current and former government officials who "have held the highest security clearances, and . . . participated in the highest levels of policy deliberations."[90] A broader approach would emphasize a wider range of scientific expertise, such as public health or climate science. At the other end of the spectrum is a view that privileges knowledge of laypeople, on the ground that affected persons are best-placed to know their own security interests. Through various interpretive moves, legal institutions likewise shape expectations about which type of knowledge is most valuable in identifying and constructing security interests. The following examples demonstrate these dynamics at work in international law and politics.

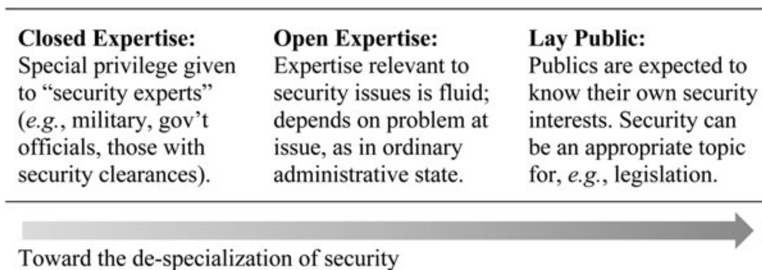

FIGURE 1. Identifying Security Threats

1. Maintaining Closure: Drug Trafficking and Critical Infrastructure

In many regimes, there may be a strong preference *against* broadening expertise about security, and not merely to protect the special status of supposed security experts. A particularly salient example comes from the international human rights system's confrontations with the securitization of drug trafficking.[91] Some human rights treaties provide that states may deviate from specific obligations for "compelling reasons of national security," such as the obligation to permit

[88] *See, e.g.*, Simon Romero, Manny Fernandez, Jose A. Del Real & Azam Ahmed, *No Crisis Here, Say Neighbors Close to Mexico*, N.Y. TIMES (Jan. 8, 2019), *at* https://www.nytimes.com/2019/01/08/us/border-wall-crisis-mexico-usa.html; *cf.* Jennifer Medina, *Latinos Seek Voice in Black-and-White Dialogue*, N.Y. TIMES (July 3, 2020), *at* https://www.nytimes.com/2020/07/03/us/politics/latinos-police-racism-black-lives-matter.html.

[89] Colby Itkowitz, *Can the Border Really Be Called an "Emergency"? Not According to the Dictionary*, WASH. POST (Feb. 15, 2019), *at* https://www.washingtonpost.com/politics/2019/02/15/can-border-really-be-called-an-emergency-not-according-dictionary.

[90] Joint Declaration, *supra* note 86, para. 1.

[91] *See generally* Damon Barrett & Manfred Nowak, *The United Nations and Drug Policy: Towards a Human Rights-Based Approach*, *in* THE DIVERSITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF PROFESSOR KALLIOPI K. KOUFA 449 (Aristotle Constantinides & Nikos Zaikos eds., 2009).

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aliens subject to expulsion proceedings to challenge that expulsion.[92] One question concerning the expulsion of aliens is whether a state can rely on the security carve-out in cases where the alien in question is accused of drug trafficking.[93] Today, drug trafficking is widely considered a national security issue in policy statements and international instruments.[94] Thus, when a treaty uses a term like "national security," it is difficult to argue that the ordinary meaning of this term per se excludes anti-trafficking efforts.[95] Whether this security interest ought to be recognized as a legal matter is another issue, and something courts and treaty bodies have been understandably reluctant to embrace.[96]

The European Court of Human Rights (ECtHR) confronted this question in *C.G. and Others v. Bulgaria*.[97] In that case, the applicant, a Turkish national who had resided in Bulgaria since 1992, was in 2005 summarily expelled without an opportunity to contest or obtain a lawyer on the ground he posed "a serious threat to national security."[98] The government's evidence, provided to a reviewing Bulgarian court in a secret file, purportedly showed that the applicant was "member of a criminal gang dealing in illicit narcotic drugs," though no specific facts were alleged in the public record.[99] The ECtHR's analysis focused on the Bulgarian courts' application of the 1998 Aliens Act, which required the expulsion of aliens whose presence in the country "creates a serious threat to national security or public order."[100] In this respect, the Court said:

> It can hardly be said, on any reasonable definition of the term, that the acts alleged against the first applicant—as grave as they may be, regard being had to the devastating effects drugs have on people's lives—were capable of impinging on the national security of Bulgaria . . . .[101]

While this statement appears at first glance to limit the conceptual scope of national security in a way that excludes drug trafficking, a deeper look at the case reveals that the decision's focus is instead on what kind of story the state was expected to tell. Indeed, the Court in this case expressly avoided any effort to interpret the term "national security" under Article 8(2) of

[92] ICCPR, *supra* note 61, Art. 13. The ECHR system deals with these expulsion cases frequently as an infringement of the right to respect for private and family life under Article 8, which has a similar limitation for measures "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." William A. Schabas, The European Convention on Human Rights: A Commentary 394–98 (2015) (noting that ECHR caselaw is "replete with examples" of expulsion cases under Article 8). The ECHR was more closely harmonized with the ICCPR through Protocol No. 7, Art. 1, Nov. 11, 1984. *Id.* at 1126.

[93] Paul M. Taylor, A Commentary on the International Covenant on Civil & Political Rights 366 (2020).

[94] *See, e.g.*, Emily Crick, *Drugs as an Existential Threat: An Analysis of the International Securitization of Drugs*, 23 Int'l J. Drug Pol'y 407, 409–12 (2012).

[95] See, for example, scholarship linking the Security Council's power with efforts to combat drug trafficking. Stefan Talmon, *The Security Council as World Legislature*, 99 AJIL 175, 181, 183 (2005); Kristen E. Boon, *Coining a New Jurisdiction*, 41 Vand. J. Transnat'l L. 991, 1012–13 (2008) (similar).

[96] *See, e.g.*, Pierre Giry v. Dominican Republic, Comm. No. 193/1985, § 5.5 (CCPR July 20, 1990).

[97] C.G. & Others v. Bulgaria, App. No.1365/07, para. 43 (Eur. Ct. H.R. 2008).

[98] *Id.*, para. 6.

[99] *Id.*, para. 14 (quoting judgment of the Plovdiv Regional Court dated Mar. 8, 2006).

[100] *Id.*, paras. 18, 37–50.

[101] *Id.*, para. 43.

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the European Convention.[102] Instead, the Court focused all of its analysis on whether the expulsion had been "in accordance with law," which the ECtHR has previously interpreted to require adherence to basic rule-of-law values like clarity and non-arbitrariness.[103] In other words, the Court was concerned not with whether drug trafficking fell within national security in the abstract, but with the fact-specific question of whether, in the context of this case, the applicant would have been on notice that the acts alleged by the state could trigger the national security provision in Bulgaria's 1998 Alien Act.[104] In this respect, the ECtHR emphasized that "the only fact" serving as a basis for the state's national security assessment was C.G.'s alleged involvement with a drug trafficking ring, and this showing fell short of the "specific facts" needed to show that the applicant presented a national security risk.[105]

The judgment does not say exactly what "specific facts" Bulgaria should have been expected to show, but it does offer some clues. First, it will not be sufficient to establish that the person subject to expulsion proceedings broke the law: "run-of-the-mill criminal activities" are distinguished from those that threaten national security.[106] Second, it is not going to be enough that drugs or drug trafficking have "devastating effects . . . on people's lives."[107] The state, in other words, could lard its expulsion orders with reams of testimony by law enforcement, public health professionals, and social scientists attesting to the illegality, dangers, and social impacts of drug trafficking, and it would likely make little difference. The Court indicated, however, that it might afford more deference where there are "serious potential consequences for the safety of the community."[108] While the Court does not expressly say so, a state in Bulgaria's position would likely have been on much stronger legal footing if it had connected C.G.'s alleged drug trafficking activity to traditional military narratives about state security by adducing facts and testimony about impacts on regional stability, ties to non-state armed groups, or to international terrorism.[109] Although the ECtHR itself muddies the waters by talking about the "natural meaning" or "reasonable definition[s]" of security, this reading suggests the decision is less about whether drug trafficking is "in" or "out" of the security box than it is about *how* drug trafficking should be made to fit inside that box and, thus, *who* is sufficiently knowledgeable to make that fit.

None of these moves is particularly controversial in this context, and the point of this exercise is not to undermine the *C.G.* judgment. The criminalization of drugs is itself a challenge to human rights, and the securitization of the same is more dangerous.[110] On the contrary, a key point of this investigation is to show that, while opening security to a wider range of inputs and expertise may seem desirable, doing so has variable consequences in a fragmented and multilevel system, and many times closure is to be preferred. Still, the decision effectively

[102] *Id.*, para. 49.
[103] *Id.*, para. 39.
[104] *See id.*
[105] *Id.*, paras. 43, 47.
[106] *Id.*, para. 45.
[107] *Id.*, para. 43.
[108] *Id.*, para. 45.
[109] *Cf.* Phil Williams, *Transnational Criminal Organisations and International Security*, 36 SURVIVAL 96, 108–09 (1994) (identifying cases where drug trafficking presented serious threats to state security in a traditional sense).
[110] *See, e.g.*, Barrett & Nowak, *supra* note 91.

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leaves the door open to the securitization of drug trafficking by military or internal security officials, and in that way reinforces traditional militarized notions of security.[111]

There are instances, however, where acts of epistemic closure are more troubling, or at least more contentious. In 2013 and 2014, two investors in an Indian multimedia company brought separate cases alleging that India violated its obligations under bilateral investment treaties by causing its state-owned enterprise to annul a contract for a satellite telecommunications spectrum.[112] For some years, the Indian armed forces had expressed concern that that the excessive lease of this particular spectrum—the "S-Band"—to commercial operators would impede national defense operations.[113] As an interagency process reviewed and ultimately annulled the satellite contract, the purported need for S-Band was broadened to include not just military and internal security needs, but also other "strategic" and "societal" needs, including railways, disaster management, tele-education, telehealth, and rural communication.[114] The ultimate decision annulling the contract cited both military and these broader strategic and societal needs.[115] In defense of its decision, India invoked the "essential security" exceptions in the relevant investment treaties.[116] Both cases were thus confronted with the question of whether and under what circumstances the protection of critical infrastructure can give rise to concerns under security clauses in investment treaties—an increasingly salient and thorny issue.[117]

The tribunals' decisions avoided ruling definitively on this question, while seeming to establish a strong presumption against including civilian infrastructure under the treaties' security provisions. Both tribunals accepted in principle that military and internal security needs could be covered by the treaty provision, and both agreed that the other, more traditionally civilian uses were not covered.[118] The *Deutsche Telekom* tribunal, in particular, relied on the above-quoted language from *C.G. v. Bulgaria*, suggesting that to include issues such as disaster management, rural communication, railways, and tele-health would "distort[ ] the natural meaning" of the term "essential security interests."[119] The tribunal added that the security clause could not be interpreted to include just any public interest, lest it swallow the treaty's

[111] The approach of *C.G. v. Bulgaria* was followed in a number of other subsequent cases, with varying credulity about the nature of the security threat. *See, e.g.*, Kaushal & Others v. Bulgaria, App. No. 1537/08, Judgment, para. 28 (Sept. 2, 2010) (accepting that the applicant's alleged participation in "extremist groups" presented a national security threat, and not deciding whether "human trafficking" was also such a threat).

[112] *See* DeutscheTelekom AG v. India, PCA Case No. 2014-10, Interim Award, paras. 183–291 (Perm. Ct. Arb. Dec. 13, 2017); CC/Devas v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, paras. 211–374 (Perm. Ct. Arb. July 25, 2016). Disclosure: The author was affiliated with Curtis, Mallet-Prevost, which represents India in these cases, during a period that overlapped with their pendency. The author did not advise on those cases, and the opinions expressed here are the author's own.

[113] *See, e.g.*, *DeutscheTelekom*, Interim Award, *supra* note 112, paras. 72–74.

[114] *See, e.g.*, *CC/Devas*, Award on Jurisdiction and Merits, *supra* note 112, para. 360.

[115] *DeutscheTelekom*, Interim Award, *supra* note 112, para. 361.

[116] *See* Agreement for the Promotion and Protection of Investments, Mauritius-India, Art. 11(3), Sept. 4, 1998; Treaty for the Promotion and Protection of Investments, Ger.-India, Art. 12, July 10, 1995, 2071 UNTS 121.

[117] *See, e.g.*, OECD, *supra* note 18, at 14; Knight & Voon, *supra* note 14, at 117–19.

[118] *DeutscheTelekom*, Interim Award, *supra* note 112, para. 281; *see also CC/Devas*, Award on Jurisdiction and Merits, *supra* note 112, paras. 354–56. The *DeutscheTelekom* tribunal went on to find that, under the circumstances, the exception could not apply even to the military uses of the spectrum, while a majority of the *CC/Devas* tribunal determined that the exception applied to those uses.

[119] *DeutscheTelekom*, Interim Award, *supra* note 112, paras. 235–36, 281 (quoting *C.G. & Others v. Bulgaria*).

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requirement that states parties pay compensation for takings in the "public interest."[120] The tribunal thus determined that the interests at stake must "go to the core . . . of state security" and "protect something of higher value than any 'public interest'"—a function that it apparently associated with the military and national defense.[121] Indeed, both decisions are notably solicitous of the military and internal security agencies' definitions of their own security goals.[122]

The awards thus leave unclear the relationship between investment treaties and state laws designed to protect critical infrastructure and dual-use technology.[123] There are at least two possible readings of the decisions going forward. First, if the tribunals' seemingly reflexive exclusion of civilian technology and infrastructure from the scope of "essential security interests" is read with maximum force, then the protection of those features could be entirely excluded from such clauses unless the relevant treaty is amended.[124] This would spell trouble for the many states that rely on similarly worded clauses to screen and control investments in a wide range of civilian projects deemed to be security-sensitive.[125] The second option is to focus on the lack of evidentiary support given by India to establish the security-sensitivity of the non-military interests, and to use these cases to suggest that such interests are not per se excluded but are subject to a higher burden of justification than the military's concerns.[126] Again, as in *C.G. v. Bulgaria*, the best strategy for triggering the treaties' security clauses would likely be to show how the protection of such interests goes to the "core" of state security—likely by deploying military or military-adjacent expertise.[127] A consequence is that the best way to obtain greater flexibility internationally is to increase the authority of the military and defense establishment over industrial policy domestically.[128] In both cases, the integrity of the treaty regime is preserved at the cost of reaffirming the primacy of military and defense officials in defining what issues have a "higher value than [just] any public interest."[129]

[120] *Id.*, para. 236. As has been noted elsewhere, this rationale is entirely sensible and consistent with the principles of treaty interpretation, but it tells us only that a line must be drawn, not where to draw it. Heath, *supra* note 28, at 1045.

[121] *See id.*, paras. 236, 281.

[122] *See id.*, para. 281; *CC/Devas*, Award on Jurisdiction and Merits, *supra* note 112, para. 354. Even the dissenting arbitrator in the *CC/Devas* case suggested that, had the spectrum been expressly reserved for use by the military or defense ministry, that would likely have triggered the security exception. *See* CC/Devas v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, Dissenting Opinion of David R. Haigh Q.C., para. 82 (Perm. Ct. Arb. July 25, 2016).

[123] Ridhi Kabra, *Return of the Inconsistent Application of the "Essential Security Interest" Clause in Investment Treaty Arbitration*, 34 ICSID REV. 723, 742 (2019).

[124] In this respect, the recent India Model bilateral investment treaty includes a security exception for critical infrastructure. Model Text for the Indian Bilateral Investment Treaty (2015), Art. 33.

[125] *See, e.g.*, Knight & Voon, *supra* note 14, at 130–36. In the United States, security-sensitive projects and sectors have in recent years included wind power, semiconductors, and a dating app. *See* JAMES K. JACKSON, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS), CONG. RES. SERV., No. RL33388 (Feb. 14, 2020, Feb 26, 2020). For an argument that India should adopt a similar law, see Pratik Datta, *India Needs National Security Screening of FDI*, INDIAN EXPRESS (Mar. 13, 2021), *at* https://tinyurl.com/87n8vxa8.

[126] *See* Section V.A., *infra*, for a similar approach.

[127] *See* note 122 *supra*.

[128] This may already be happening, in which case this jurisprudential development may be seen as ratifying existing trends rather than sparking new ones. *See, e.g.*, Linda Weiss, *Re-emergence of Great Power Conflict and US Economic Statecraft*, 20 WORLD TRADE REV. 152, 155–59 (2021) (observing that China's rise has led to a resurgence of involvement by the U.S. national security establishment in economic statecraft).

[129] *DeutscheTelekom*, Interim Award, *supra* note 112, para. 236 (internal quotation marks omitted).

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2. *The Struggle for Wider Expertise: Nuclear Weapons*

Questions about the proper scope of security-knowledge do not just appear at the margins, as in drug trafficking or infrastructure cases, but plague even the assumed "core" instances of military and defense matters. Consider the question of nuclear weapons and deterrence—perhaps the *sine qua non* of twentieth century national and international security policy.

The dominant mode for framing nuclear weapons since 1945 has been in adversarial terms, focusing on the threat posed by the actors in possession of those weapons, their incentives and motivations.[130] As Emmanuel Adler documents, American policy on nuclear deterrence in the 1960s came increasingly under the influence of an "epistemic community" of civilian strategists and nuclear scientists, along with their partners in government, who advocated for arms control.[131] These experts' ideas about nuclear policy, premised on concepts drawn from game theory,[132] shaped U.S. national security policy and international legal regimes for decades.[133] As understandings about nuclear policy shifted to a greater concern with proliferation and "rogue" actors,[134] the shape of the legal regime shifted, including with a turn to multilateral sanctions under Security Council authority.[135] These approaches represented new sets of cultural understandings, and opportunities for new forms of knowledge-creation.[136]

There is, however, another way to describe the danger posed by nuclear weapons, and that is to focus on the explosion itself, rather than the government wielding it. By this logic, it is the very *existence* of nuclear weapons, rather than the possibility of surprise attack or the supposedly unsteady hand of a rogue state, that is destabilizing.[137] An accidental detonation of a nuclear device, for example, poses an equivalent danger to the launch of a nuclear weapon.[138] The relative absence of such concerns in academic and policy circles, as compared with the focus on deterrence and proliferation, suggests a privileging of certain forms of expertise and knowledge-creation, and opens the possibility that other forms of knowledge could be applied to identify and frame the nuclear security threat differently.

This question—who has the competence to identify security threats—emerged as a critical issue in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case. In that case, the World Health Assembly (WHA) requested an advisory opinion from the International Court of Justice (ICJ) on whether the use of nuclear weapons in armed conflict would violate obligations under "international law, including the [World Health Organization (WHO)]

[130] JUTTA WELDES, CONSTRUCTING NATIONAL INTERESTS: THE UNITED STATES AND THE CUBAN MISSILE CRISIS 1–2 (1999); Alexander Wendt, *Constructing International Politics*, 20 INT'L SECURITY 71, 73–74 (1995).

[131] Emmanuel Adler, *The Emergence of Cooperation: National Epistemic Communities and the International Evolution of the Idea of Nuclear Arms Control*, 46 INT'L ORG. 101 (1992).

[132] *See, e.g.*, THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 207–20 (1960).

[133] Adler, *supra* note 131, at 132, 135.

[134] *See generally* Keith Krause & Andrew Latham, *Constructing Non-proliferation and Arms Control: The Norms of Western Practice*, 19 CONTEMP. SECURITY POL'Y 23 (1998).

[135] *E.g.*, SC Res. 1540 (Apr. 28, 2004). For a connection between this resolution and the shifting episteme of U.S. security policy, see William Walker, *Nuclear Enlightenment and Counter-Enlightenment*, 83 INT'L AFF. 431, 445–46 (2007).

[136] *See* Krause & Latham, *supra* note 134, at 35–45.

[137] *See generally* Anthony Burke, *Nuclear Reason: At the Limits of Strategy*, 23 INT'L REL. 506 (2009).

[138] HUGH GUSTERSON, PEOPLE OF THE BOMB: PORTRAITS OF AMERICA'S NUCLEAR COMPLEX 26 (2004).

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Constitution."[139] The WHA is the plenary body of the World Health Organization, which has as its objective "the attainment by all peoples of the highest possible level of health."[140] Member states' delegations "should be chosen from among persons most qualified by their technical competence in the field of health, preferably representing the national health administration."[141] The WHA resolution requesting an advisory opinion accordingly stressed the connection between health and the use of nuclear weapons, suggesting these fell within the WHO's competence.[142] The resolution specifically borrows language from public health to discuss the nuclear weapons threat, stating that "primary prevention is the only appropriate means to deal with the health and environmental effects of the use of nuclear weapons," and that this required clarification of their legal status.[143]

This request was immediately controversial.[144] The ICJ in 1995 decided it could not address the substance of the request, finding that the legality of nuclear weapons was not "within the scope" of the WHO's activities.[145] The Court took particular aim at the "primary prevention" rationale, finding that, while the WHO might assist in averting nuclear war by disseminating information on its adverse health effects, the "political steps by which this threat can be removed" were clearly above the organization's pay grade.[146] While the WHO has "wide" responsibilities in "sphere of public 'health,'" there was "no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of the specialized agencies."[147]

Judge Weeramantry, in dissent, criticized the Court's conclusion that the "WHO's function is confined to health, pure and simple, and it strays into unauthorized fields when it enters the area of peace and security."[148] His dissent emphasizes the overlap between matters of health and international security, and can be read as a strong statement of the broad approach to security that was emerging in international politics at the time.[149] "I cannot subscribe," Judge Weeramantry writes, to the view that the preeminent body in global health should sit idly by "for the technical reason that it would be trespassing upon the exclusive preserve of the Security Council, who are the sole custodians of peace and security."[150]

[139] WHA Res. 46.60, para. 1 (May 14, 1993).

[140] WHO Const., Art. 1.

[141] *Id.* Art. 11. This expectation is honored at least formally, though larger states bring to bear expertise from across departments. *See, e.g.*, List of Delegates and Other Participants, at 67, Seventy-Second World Health Assembly, WHO Doc. A72/Div.1/Rev.1 (May 31, 2019) (including "advisers" from USAID, Health and Human Services, the U.S. Trade Representative, the Patent and Trademark Office, the Food and Drug Administration, among others).

[142] WHA Res. 46.60, *supra* note 139, pmbl. (citing prior statements on the health effects of nuclear weapons).

[143] *Id.*

[144] *See, e.g.*, Nicholas Rostow, *The World Health Organization, the International Court of Justice, and Nuclear Weapons*, 20 YALE J. INT'L L. 151, 154–63 (1995).

[145] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 ICJ Rep. 66, 84 (July 8).

[146] *Id.* at 78 (quoting WHO MANAGEMENT GROUP, EFFECTS OF NUCLEAR WAR ON HEALTH AND HEALTH SERVICES 3 (1987)).

[147] *Id.* at 80.

[148] *Id.* at 133–37 (Weeramantry, J., dissenting).

[149] *See id.* at 133 ("The linkage in its own Constitution . . . between health on the one hand, and peace and security on the other, renders the argument unavailable that the two concerns are incompatible with each other. Indeed the greater the threat to global health, the greater would be the overlap with peace and security.").

[150] *Id.* at 137.

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The divergence between the Court majority and its dissenters thus reveals yet another dimension to this well-known opinion.[151] There was no doubt that a great deal of legal and diplomatic practice existed with respect to the proliferation and use of nuclear weapons.[152] The underlying policy question in the WHA case was whether an organization, whose delegations are composed of health ministers and whose secretariat is staffed by public health experts, should have anything to say about how to meet the defining security threat of the century. The Court answered that it did not, suggesting that the WHO's role was limited to addressing the health-related fallout of nuclear war. But an alternative approach was possible, and the WHO's embrace of a concept and legal framework for "global health security" in the 2000s suggests that times may have already changed.[153]

3. The Lay Public: "New Wars" and Food Crises

In many international legal fora where security claims play out, there are only limited opportunities for those most directly affected to define their own security interests. States are ordinarily represented internationally by their executive branches, which have incentives to define security interests in their own terms, sometimes to the exclusion of other domestic authorities. While international parliamentary institutions, consisting of either directly elected representatives or delegates from national legislatures, are relatively common in today's international organizations, these institutions generally lack significant power to shape policy or bind either member states or international organizations themselves.[154] The representation of non-specialist, non-state interests in global government, to the extent it exists, is most often accomplished through various mechanisms for NGO, civil society, or "multi-stakeholder" participation.[155] Nevertheless, there are some areas where international legal regimes have enabled lay publics to struggle over and potentially define their own security interests.

First, Christine Chinkin and Mary Kaldor note some halting progress in international law and practice toward prioritizing local knowledge and "local ownership" in the formation of peace agreements.[156] Historically, peacebuilding had been a top-down affair, which can privilege the perspective of governments, interested third states, and transnational experts to the exclusion of local communities.[157] As Séverine Autesserre writes, these top-down projects often replicated colonial dynamics, even as the international experts involved in the peacebuilding process would have emphatically denied doing so.[158] The early twenty-first century,

[151] Today, the WHA *Nuclear Weapons* opinion is discussed as a strong statement of the "principle of speciality" among international organizations. *See* Jan Klabbers, *Global Governance Before the ICJ: Re-reading the* WHA Opinion, 13 MAX PLANCK UN Y.B. 1 (2009).

[152] *E.g.*, *Legality of the Threat or Use of Nuclear Weapons, supra* note 145, at 226, 248–53.

[153] *E.g.*, JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW 214 (2016).

[154] *See generally* Jofre Rocabert, Frank Schimmelfennig, Loriana Crasnic & Thomas Winzen, *The Rise of International Parliamentary Institutions: Purpose and Legitimation*, 14 REV. INT'L ORGS. 607 (2018).

[155] *See* Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108 AJIL 211 (2014); David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT'L L. 595 (2010).

[156] CHINKIN & KALDOR, *supra* note 20, at 386–94.

[157] *See generally* SÉVERINE AUTESSERRE, THE TROUBLE WITH THE CONGO (2010).

[158] *Id.* at 97–98.

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however, has witnessed a "local turn" in the scholarship and practice of peacebuilding.[159] This is reflected in several key normative statements at the United Nations, which emphasize the formal or informal participation of civil society groups, and particularly women, in the peacemaking process.[160] Implementation of the local turn is, in many observers' views, spotty at best, but Chinkin and Kaldor do note some promising precedents in the 2004–2005 peace process in Darfur and the 2003 Liberian peace deal, where civil society organizations and women's groups played a formal role in the peace process.[161] These precedents echo struggles in other areas, such as disaster response, where there is both a normative imperative and a series of practical and political obstacles to centering the role of local communities in restoring peace and security following a period of crisis.[162]

A second site for innovation and lay participation can be found in the area of food security.[163] While "food security" has its own logic and conceptual framework, it also interacts in complex ways with other national, global, and human security discourses.[164] The Committee on World Food Security, as extensively reformed in 2009 following the global food price spike that began two years earlier, has emerged as a "unique space," which enables those most directly affected by food insecurity to "have direct influence in global policy coordination."[165] Pursuant to the 2009 reforms, civil society organizations and NGOs were empowered to establish their own mechanism for facilitating consultation and participation in the body;[166] most strikingly, as Michael Fakhri observes, this new "Civil Society Mechanism" has privileged the voices of social movements and peasants' groups over international NGOs.[167] While the Committee's place, and civil society's role, in global food policy is contested and far from secure, there appears to be broad agreement that the participation of civil society organizations "served to expand debate, introduce new perspectives and therefore shift the direction of global food security policy."[168] The Committee's engagement with civil

[159] *See* Hanna Leonardsson & Gustav Rudd, *The "Local Turn" in Peacebuilding: A Literature Review of Effective and Emancipatory Local Peacebuilding*, 36 THIRD WORLD Q. 825 (2015).

[160] Report of the Secretary-General, Peacebuilding in the Aftermath of Conflict, para. 35, UN Doc. A/67/499*, S/2012/746 (Oct. 8, 2012); Challenge of Sustaining Peace: Report of the Advisory Group of Experts on the Review of the Peacebuilding Architecture, para. 44, UN Doc. A/69/968–S/2015/490 (June 30, 2015).

[161] CHINKIN & KALDOR, *supra* note 20, at 389–91.

[162] *See* J. Benton Heath, *Managing the "Republic of NGOs": Accountability and Legitimation Problems Facing the UN Cluster System*, 47 VAND. J. TRANSNAT'L L. 239, 289–93 (2014).

[163] I am grateful to Amy J. Cohen for pointing me in this direction.

[164] *See, e.g.*, Stephen John Stedman, *Food and Security*, *in* THE EVOLVING SPHERE OF FOOD SECURITY (Rosamond L. Naylor ed., 2014). In this field, even the label "food security" is contested. Many civil society leaders reject the label because of its perceived capture by the neoliberal policies of the Washington Consensus, preferring instead the label of "food sovereignty." *See, e.g.*, Jefferson Boyer, *Food Security, Food Sovereignty, and Local Challenges for Transnational Agrarian Movements*, 37 J. PEASANT STUD. 319, 324–31 (2010). But it is also possible to characterize food sovereignty as an alternative approach to, rather than a substitute for, food security—one which emphasizes local control over food and agricultural systems. *Cf.* La Via Campesina, *The Solution to Food Insecurity Is Food Sovereignty* (Apr. 28, 2020), *at* https://tinyurl.com/2p4zhtca.

[165] Michael Fakhri, *Third World Sovereignty, Indigenous Sovereignty, and Food Sovereignty: Living with Sovereignty Despite the Map*, 9 TRANSNAT'L LEGAL THEORY 218, 245 (2018).

[166] Reform of the Committee on World Food Security, para. 16, FAO Doc. CFS:2009/2 Rev. 2 (Oct. 2009).

[167] Fakhri, *supra* note 165, at 245.

[168] JESSICA DUNCAN, GLOBAL FOOD SECURITY GOVERNANCE: CIVIL SOCIETY ENGAGEMENT IN THE REFORMED COMMITTEE ON WORLD FOOD SECURITY 209 (2015).

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society thus serves as a "benchmark" for an alternative vision of security-knowledge in global politics.[169]

The foregoing examples, while specialized and partial, suggest alternative mechanisms for producing knowledge about security. These fora are not closely tied to national security establishments, but neither are they embedded in the wider claims to expertise that characterize most other international organizations. Here, instead, is an approach to security that, as in Rana's counterintuitive reading of Hobbes, "is fundamentally egalitarian and thoroughly rejects any distinction between elite and ordinary rationality."[170] Notably, however, in international legal settings these sources of lay knowledge must address themselves to, and reconcile themselves with, the still-dominant discourses of international security, diplomacy, and technocratic expertise.[171] This tension underscores the extent to which security in international politics remains the province of elites, even if the sources of elite knowledge can sometimes be expanded to embrace a wider range of disciplines and expertise from time to time.

B. Knowledge in Security: The Logic of Security Policy

Once a security issue is identified, the question turns to how expert or lay knowledge will be deployed to address it. This question, which concerns the logic of security policy, is a central concern, particularly in judicialized international systems today.[172] At one end are doctrines of "public reason"—devices like proportionality, reason-giving, means-ends rationality, and publicness, which force states to justify any policies that burden human rights, trade, or property.[173] At the other extreme is the idea that legal institutions, whether national courts or international tribunals, have no place second-guessing a national executive's action to protect the country's security interests. Rather than belonging to the realm of reviewable and intelligible public reason, such judgments are, in words recently resurrected by the U.S. Supreme Court, "'delicate, complex, and involve large elements of prophecy.'"[174] This tension, between public reason and prophesy, is well-known in the study of security exceptions and international law.[175] But these doctrines also have implications for whose knowledge matters in security policy, which have gone undertheorized.[176]

One of the major, field-spanning developments in post-Cold War international law has been to subject state policymaking in various domains to requirements of rationality and

[169] *See id.* at 119 (arguing that the Committee is a "benchmark," not a model, for participatory governance, owing to the historically contingent circumstances of its evolution and the challenges it continues to face).

[170] Rana, *supra* note 26, at 1431.

[171] *See, e.g.*, DUNCAN, *supra* note 168, at 223–24 (describing the concept of food security itself as an "anti-political device" that "turns a symptom of poverty into the ends of policy" and enables governments to seem earnestly concerned about hunger with "little threat to the status quo").

[172] *See generally* KAREN A. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW 68–111 (2014); Benedict Kingsbury, *International Courts: Uneven Jurisdiction in Global Order*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203, 211–12 (James Crawford & Martti Koskenniemi eds., 2012).

[173] Mattias Kumm, *"We Hold These Truths to Be Self-Evident": Constitutionalism, Public Reason, and Legitimate Authority*, *in* PUBLIC REASON AND COURTS 143, 159 (Silje A. Langvatn, Mattias Kumm & Wojciech Sadurski eds., 2020) (arguing that proportionality fills this role in public law adjudication).

[174] Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018) (quoting Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

[175] *See, e.g.*, Heath, *supra* note 28, at 1063–80 (surveying approaches).

[176] *See generally* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011).

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reason-giving.[177] International legal regimes from trade to human rights have developed robust requirements of consistency, ends-means proportionality, scientific rationality, and publicity in their review of national decision making.[178] For example, when a state adopts a public-health measure that negatively affects foreign investors—such restrictions on marketing for tobacco products—a tribunal will ask whether and to what degree the measure is rationally related to the pursuit of its health objective.[179] Even where a treaty appears to preclude this kind of inquiry by reserving substantial discretion to the state, courts, tribunals, and other bodies might still review the procedure by which those aims are addressed.[180] As the level of required scrutiny increases, these forms of process and rationality review shift power from elected officials and political appointees, and toward the scientists, experts, and lawyers that staff government bureaucracies.[181]

Security decision making, the traditional view goes, resists the demands of public reason and tends toward prophecy. Security is said to demand a degree of "decision, activity, secrecy, and dispatch" that is inconsistent with the broad, open-ended debates of ordinary politics.[182] Security decision making is also resistant to the demands of scientific and procedural rationality: it is recognized as being ad hoc, subject to demands of expediency, and not necessarily amenable to the requirements of reasoned consistency and publicness that attend ordinary government regulation.[183] Expertise is still required—indeed, contemporary security policy is replete with recognized and self-appointed experts clamoring to be heard on everything from migration to climate change.[184] But on one standard account, security expertise is an amalgam of judgments about what is prudent, expedient, or possible, and in that respect it is not easily compared to the kind of expert knowledge that is imagined to support ordinary, science-based regulation. It was this conception of security, for example, that appeared to animate the U.S. Supreme Court's 2018 decision upholding a travel ban against claims of anti-Muslim bias, reasoning that any rule "'that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained."[185]

In international law, the tension between expertise and prophecy can be framed, but not fully resolved, by the text of the relevant legal instruments. Some treaties, for example, may offer guidance as to how tightly a particular policy must be related to an articulated security objective, and some also indicate the level of deference to be afforded by a reviewing

[177] *See, e.g.*, Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

[178] *See, e.g.*, Lukasz Gruszczynski & Wouter Werner, *Introduction*, *in* DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION 1, 13–15 (Lukasz Gruszczynski & Wouter G. Werner eds., 2014).

[179] *E.g.*, Philip Morris Brands SARL v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, para. 391 (July 8, 2016).

[180] A particularly forceful statement is Schill & Briese, *supra* note 76, at 134.

[181] Magill & Vermeule, *supra* note 176, at 1051–56.

[182] *See, e.g.*, Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1551–52 (2008) (quoting THE FEDERALIST NO. 70 (Hamilton) (alterations omitted)) (stating and then criticizing this conventional view).

[183] *See* Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1136–37 (2020) (describing and calling into question this account).

[184] See, for example, note 86 *supra*.

[185] *Trump v. Hawaii*, *supra* note 174, at 2419–20 (citing Mathews v. Diaz, 426 U.S. 67, 81 (1976)).

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court.[186] Still, these texts do not resolve the question, and under each of these regimes security demands still face competing pressure toward public reason and prophecy. Even where the law does not explicitly demand deference at all, institutions often feel pressure to implicitly soften their standards of review when it comes to security measures.[187] Standards like "necessary," or even the "only way" requirement of customary international law, can be ratcheted up or down through legal interpretation.[188] Where treaty law appears to grant wide discretion, interpreters have relied on customary international law,[189] general principles of law,[190] *jus cogens* norms,[191] or the law of the reviewing tribunal[192] to ratchet up the level of scrutiny.

These varying degrees of scrutiny have implications for whose knowledge matters in security policy and how that knowledge is deployed. The capitulatory approach, where legal institutions abstain in the face of security measures, amplifies the significant power that executive agencies enjoy in the national security state. Stricter forms of review, such as "hard look" review or strict necessity and proportionality, seek the "progressive submission of power to reason."[193] This view shifts power from political to legal, scientific, and technocratic forms of expertise, promoting evidence-based policy but raising questions about the suitability of having technocrats choose between competing values.[194] A middle approach—sometimes referred to as a "suitability" or "rational basis" test—is limited to ensuring a relationship exists between the policy goal and the measure pursued.[195] This approach expands the space in which legislators and political appointees can work, giving them broad scope to define and pursue policies, while ensuring that policies pursue publicly defined goals subject to political accountability.[196] The implications of these approaches are depicted below in Figure 2.

[186] *See, e.g.*, *Mutual Assistance in Criminal Matters*, *supra* note 67, at 229–30 (dealing with a treaty clause allowing a state to take a decision when "it considers" the matter necessary to its security interests); *CC/Devas v. India*, Award on Jurisdiction and Merits, *supra* note 112, paras. 233–45 (applying a treaty that excepts measures "directed to" state security); Military and Paramilitary Activities in and Against Nicar. (Nicar. v. U.S.), 1986 ICJ Rep. 14, 117, 141 (June 27) (dealing with a treaty allowing measures "necessary" to protect essential security interests); *cf.* Responsibility of States for Internationally Wrongful Acts, Art. 25, GA Res. 56/83, UN Doc. A/RES/56/83 (Jan. 28, 2002) (providing, under the customary international law doctrine of necessity, that the measure in question must be the "only way" to protect an essential interest).

[187] Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT'L J. L. IN CONTEXT 221 (2018); *cf.* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

[188] *See* Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef, Report of the Appellate Body, para. 161, WTO Doc. WT/DS161/AB/R (Dec. 11, 2000) (adopted Jan. 10, 2001); Enron Creditors Recovery Corp. v. Argentine Republic, ICSID Case No. ARB/01/03, Decision on the Application for Annulment, paras. 367–73 (July 30, 2010).

[189] El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, paras. 613–26 (Oct. 31, 2011).

[190] *Mutual Assistance in Criminal Matters*, *supra* note 67, at 278 (dec., Keith, J.).

[191] Kadi v. Council & Commission, ECJ Case No. T-315/01, Judgment of the Court of First Instance, paras. 226–32 (Sept. 21, 2005), *set aside on appeal by* Kadi & al Barakaat Int'l Found. v. Council & Commission, ECJ Case Nos. C-402/05 P & C-415/05 P, Judgment of the Court (Grand Chamber) (Sept. 3, 2008).

[192] Devika Hovell, *Due Process in the United Nations*, 110 AJIL 1, 8–29 (2016).

[193] JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT 11 (2018).

[194] Magill & Vermeule, *supra* note 176, at 1053 (citing Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1617 (1995)).

[195] Chad P. Bown & Joel P. Trachtman, Brazil–Measures Affecting Imports of Retreaded Tyres: *A Balancing Act*, 8 WORLD TRADE REV. 85, 87 (2009).

[196] Magill & Vermeule, *supra* note 176, at 1053.

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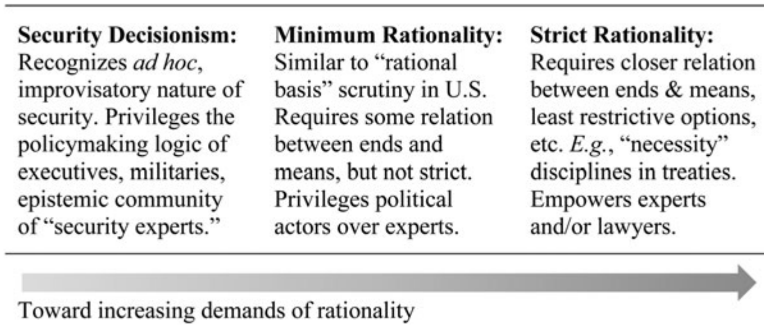

FIGURE 2. Responding to Security Threats

By framing these techniques in terms of epistemic authority, we can see how different approaches might be valued in different circumstances. In some circumstances, such as *C.G. v. Bulgaria*, it may make sense to push toward rationalization in a way that empowers lawyers to tailor security policies to minimize the burden on civil liberties.[197] But, more generally, it is open to question whether and to what extent international law should empower bureaucratic experts over political actors. In many cases, it may make sense to ratchet review downward to give full scope for political debate, struggle, and compromise—thus empowering lay forms of knowledge—even if the results cannot be fully justified on rationalist terms.[198] Even minimal demands for rationality can be troubling when they are used to entrench elite forms of knowledge or outdated notions of security against possible contenders whose politics may appear unruly. For example, some tribunals have shown an unexamined distrust of "politically motivated" policies, treating these as non-rational.[199] In such circumstances, a turn toward strong, even self-judging exceptions may be a useful means to disrupt established routines and press for transformative change.[200]

IV. FOUR APPROACHES TO SECURITY, KNOWLEDGE, AND INTERNATIONAL LAW

The foregoing analysis indicates why, when international lawyers speak about "security," we are often talking past each other. To take the example from the outset of this Article the characterization of climate change as a security threat potentially suggests a wide range of meanings and approaches to security, including the elevation of science and environmental expertise, or the encroachment of the military into climate policy.[201] Though potentially clarifying, it does not fully answer the question to suggest that climate policy is a *human* or *international* security issue as opposed to a national one, because these vocabularies can also be

[197] *Cf.* Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001).

[198] This is the same question posed in *United States v. Carolene Prods.*, 304 U.S. 144, 152, n. 4 (1938). For an argument that the WTO Appellate Body has shifted in this direction for precisely this reason, see Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 7, 48–51 (2016).

[199] Jonathan Bonnitcha & Zoe P. Williams, *State Liability for "Politically" Motivated Conduct in the Investment Treaty Regime*, 33 LEIDEN J. INT'L L. 77 (2020).

[200] *See* Sections V.C, D *infra*.

[201] *See* text accompanying notes 1–6 *supra*.

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associated with a range of approaches from community empowerment to military humanitarianism.[202] A more robust discussion of the merits and demerits of securitizing climate change, or any other issue, demands that we take apart the constituent parts of security itself, to see how they might be scrambled and reassembled. The previous part made the case that the power of security lies to a large degree in the way in which it vindicates competing claims to epistemic authority. This Part uses that insight to build a framework for understanding and analyzing security claims and their impact on international law.

To that end, this Part sets out a four-part typology of approaches to security. These types are developed from actual historical and social practices of security but are designed to be sufficiently abstracted to enable comparisons and analysis across particular situations.[203] Such a typology thus exists at some remove from the actual, far messier reality of history, and few actual instances of security are likely to easily conform to any one particular type. It is hoped that whatever is lost in terms of strict fidelity to history will be gained by enabling comparative analysis across time, space, and regime, but the usefulness of this classification can in the end "only be judged by its results in promoting systematic analysis."[204] Note that this typology is not meant to provide either a comprehensive or exhaustive discussion of all possible approaches to security,[205] nor are the citations here meant to firmly associate the scholar cited with the ideal-typical frame being put forth.

Figure 3, above, introduces each of the types developed in this Part, and compares their views of how knowledge about security is developed and put into practice. The top row refers to approaches that rely on some form of specialized knowledge to identify security threats: for *realist security*, as I define it, this means primarily military knowledge; for *widened security*, threat identification is open to a wider range of expertise. The bottom row of Figure 3 contains theories that embrace, at least in principle, a despecialized approach to framing security issues: *discursive security*, drawing on the Copenhagen School of security studies, accepts in principle that anyone can attempt to securitize an issue, though in practice political elites are more readily able to do so; *pluralist security* expects that threats will be constructed on the basis of shared and emergent identities, rather than according to some expert logic. Realist and discursive security, in the left-hand column, are united in their view that security is fundamentally associated with extraordinary measures, such as emergency power, secrecy, or violence.[206] Widened and pluralist

[202] On the use of human security for intervention, see Barbara von Tigerstrom, Human Security and International Law 96–112 (2007); Chinkin & Kaldor, *supra* note 20, at 29–30. On climate change, international security, and the prospect for militarism, see Martin, *supra* note 4, at 378–83.

[203] 1 Max Weber, Economy & Society: An Outline of Interpretive Sociology 19–22 (Guenther Roth & Claus Wittich eds., 1968). As a set of ideal types, the framework presented here attempts to navigate a middle ground between rich historical and factual analysis of security practices and a strictly analytical set of categories. *See* Roberto Mangabeira Unger, Law in Modern Society: Toward a Criticism of Social Theory 22–23 (1976). This typology draws on the deep and violent history of security in international politics, but it would be further enriched by continued engagement with sociological, anthropological, and historical analysis.

[204] *Id.* at 216.

[205] For useful overviews that do aim to be relatively comprehensive, see Barry Buzan & Lene Hansen, The Evolution of Security Studies (2009).

[206] This typology thus raises the tricky question of what constitutes an "extraordinary" measure. As this term is essentially relative, it can quickly devolve into difficult questions about what constitutes the norm in a particular society or regime, against which the exception takes place. *See* Barry Buzan, Ole Wæver & Jaap de Wilde, Security: A New Framework for Analysis 208–10 (1998). With respect to international law, the continuum developed in Section III.B., *supra*, is thus a helpful baseline. In international legal practice as currently structured, a measure qualifies as extraordinary to the extent that, by reason of a claim to protect security, the measure is expected or permitted to deviate from the requirements of public reason that are increasingly pervasive in

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	Exceptional Logic	**(Potentially) Routine Logics**
Specialized Knowledge	**REALIST SECURITY** • Core concern is actual or potential use of force. • Privileges military and diplomatic knowledge. • Follows an exceptionalist logic (*e.g.*, use of force, emergency powers).	**WIDENED SECURITY** • Concerns expand to address any serious threat. • Privileges any relevant expert knowledge. • Security need not challenge rational, law-governed policymaking.
Lay Knowledge	**DISCURSIVE SECURITY** • No core concern; any issue could be "securitized." • Any actor could claim security; all knowledge is potentially relevant. • The core feature of security is not the threats it identifies but its exceptionalist logic.	**PLURALIST SECURITY** • Security claims reflect (perceived) vulnerabilities of social groups • Knowledge about security comes from those affected. • Security may be pursued through any means, from ordinary law to exceptional violence.

FIGURE 3. Four Views of Security-Knowledge

security are distinguished, on the righthand side, as having no necessary connection to extraordinary measures, though these are not strictly ruled out either.

Each of these types is designed to be primarily descriptive—a way to identify, categorize, and analyze existing statements about and practices of security—but these types have both normative and forward-looking implications. First, by suggesting how security policy is likely to unfold, each type is likely to provoke in us a normative intuition about how widely the security frame should be deployed. For example, if security policy empowers military officials to classify the world and pursue threats through force and emergency powers, then many of us would likely want its deployment to be strictly limited.[207] Second, as the following discussion emphasizes, each type is inherently dynamic, in the sense that it contains elements that, if rigorously applied, open doors to the alternative approaches to security reflected in the remaining types.[208] The four types described here are thus not stable equilibria but rather more like quantum states, in which each type contains the potential for the others. This

international legal regimes. The lefthand paradigms either seek that permission for a narrow set of measures relating to force and survival (see Section IV.A *infra*), or for a broader set, such as actions to prevent climate change or slow the spread of disease (see Section IV.C *infra*). The righthand paradigms seek to re-embed security in existing practices of public reason (see Section IV.B *infra*), or, more radically, to embed them in an alternative set of routine practices that displace the existing liberal-legalist logic of the international system (see Section IV.D *infra*).

[207] *See, e.g.*, Daniel Deudney, *The Case Against Linking Environmental Degradation and National Security*, 19 MILLENNIUM 461 (1990).

[208] This is also a familiar feature of ideal types. *See* WEBER, *supra* note 203, at 226, 270 (showing how rigorous bureaucratization characteristic of the formal-rational type of authority leads to a process of "social levelling" that "foreshadows mass democracy," which in turn disturbs the formal rationality of economic life).

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dynamism is reflected in actual practice,[209] and underscores the extent to which our understanding of the grammar and logic of security can be only a first step toward formulating a normative position in any concrete case.

A. *Realist Security*

The first approach identified here identifies security primarily with the use or non-use of military force. The term "realism" is used here to reflect the affinity with Kenneth Waltz's argument that security, defined as state survival, "is the highest end" among the infinitely varied world of possible national interests.[210] Survival, moreover, is in the (neo-)realist tradition frequently associated with use, threat, and non-use of military force.[211] On this view, security is used primarily to signify the defense of states against destruction or destabilization by force, either coming from outside or within.[212] This close connection between force, statehood, and security remains influential on interdisciplinary scholarship in international law and politics.[213]

The focus on the use of force here centers military knowledge, alongside shifting sets of civilian expertise that support the security establishment, in the definition of security threats and issues. The U.S. security establishment, as it developed during and immediately after the Cold War, offers an example of this approach to security knowledge. Prior to World War II in the United States, military affairs were largely the province of professionals, and civilian involvement in strategy and military planning were discouraged.[214] This changed with the emergence of the concept of "national security" during the war, which, as Dexter Fergie points out, was from the beginning bound up with civilian expertise—exemplified by the "hordes of social scientists who contributed their expertise to the war effort."[215] The emergence of nuclear

[209] *See* Part V *infra*.

[210] KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 91–92, 126 (1979).

[211] Stephen M. Walt, *The Renaissance of Security Studies*, 35 INT'L STUD. Q. 211, 212 (1991) (describing the study of security as "the study of the threat, use, and control of military force"). Walt's comment was intended to assure the coherence of an academic field—security studies—and not to define security policy. *See id.* at 212–13. Nevertheless, the idea that security *policy* is best left to focus on military matters has developed along similar lines. *See, e.g.*, Ashton B. Carter, *The Architecture of Governance in the Face of Terrorism*, 26 INT'L SECURITY 5, 5–6 (2001/2002).

[212] The inclusion of *internal* security here derives in large part from Mohammed Ayoob's work on the security of post-colonial states. *See, e.g.*, Mohammed Ayoob, *The Security Problematic of the Third World*, 43 WORLD POL. 257 (1991). Ayoob's emphasis on internal and transnational security threats now appears prescient, even as post-colonial security studies has in many cases moved beyond Ayoob's own avowedly "realist" perspective. *See, e.g.*, COLUMBA PEOPLES & NICK VAUGHAN-WILLIAMS, CRITICAL SECURITY STUDIES: AN INTRODUCTION (2020).

[213] See, for example, the many references to security in INTERDISCIPLINARY PERSPECTIVES, *supra* note 39. This type is not meant to be aligned *solely* with "realist" approaches as they are understood today in international law scholarship—as assuming rational actors conditioned by system structure, with limited potential relevance for international law and regimes. As a particular way of thinking about security, this type is also consistent with the mainstream constructivist insight that, in fact, many practices of security and military institutions are not readily explained by rationality and system structure, and instead reflect embeddedness within epistemic communities, transnational networks, normative systems, and culture. *See generally* THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996). Constructivist insights on security do transcend this type when they identify interactions that can fundamentally transform the way security is conceived and acted upon in international politics. *See, e.g.*, Emmanuel Adler & Michael Barnett, *Security Communities in Theoretical Perspective*, *in* SECURITY COMMUNITIES 3 (Emmanuel Adler & Michael Barnett eds., 1998).

[214] Walt, *supra* note 211, at 213.

[215] Dexter Fergie, *Geopolitics Turned Inwards: The Princeton Military Studies Group and the National Security Imagination*, 43 DIPLOMATIC HIST. 644, 658 (2019).

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deterrence as a primary security concern during the Cold War led for a time to the ascendance of game theory and quasi-economic modeling as an adjunct to security policy.[216] As U.S. security concerns shifted in the 1990s to concerns about internal strife and "resource wars," new forms of expertise were incorporated into the security and defense establishment.[217] A similar shift happened again after 2001, as U.S. policy refocused on international terrorism and state-building.[218] In each of these examples, a broad range of expertise is attached to the security and defense establishment for the purpose of aiding the military and intelligence agencies in identifying and framing potential security threats. The military and security establishment thus remains at the center of the process, with other forms of knowledge performing a critical but adjunct role.

When it comes to the logic of decision making, the default mode for realist security is *raison d'état*. On this view, requirements of legality, publicity, and rationality may yet be appropriate for a wide range of issue areas or circumstances. But where (national) security is threatened—as in an emergency—courts, legislators, and other actors have "no real choice but to hand the reins to the executive and hope for the best."[219] The typical legal controls for non-arbitrariness, reason-giving, and factfinding will be suspended, or dialed so far down as to be meaningless.[220] This is because the national security bureaucracy, headed by the executive, is alone thought to possess the secret knowledge, capacity for efficient action, or political legitimacy to address urgent and existential threats.[221] The connection between this rationalist view of international affairs and the treatment of security policy as ad hoc, improvisational, and not amenable to review or publicity is historically contingent rather than logically necessary.[222] Indeed, while the justifications for such deference are often premised on the expertise of the national security establishment, this flexibility also creates substantial space for the influence of professional norms, ideology, bias, and racial or religious animus.[223] Nevertheless, this view of security logic remained popular among those who came to theorize security after the attacks of September 11, 2001.[224]

We can see the union of these two variables—military-centered knowledge and *raison d'état*—in arguments that claim wide latitude under international law for national security

[216] Buzan & Hansen, *supra* note 205, at 66, 88–89; Adler, *supra* note 131.

[217] Rita Floyd, Environment and Security: Securitisation Theory and US Environmental Security Policy 73–79 (2010) (describing the influence of the "environmental scarcity thesis," developed by Thomas Homer-Dixon, among others, in U.S. defense policy circles).

[218] *See* Philip Zelikow, *The Transformation of National Security*, Nat'l Interest (Mar. 1, 2003), *at* https://nationalinterest.org/article/the-transformation-of-national-security-491.

[219] Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. Chi. L. Rev. 1613, 1614 (2009).

[220] Vermeule, *supra* note 187. In Vermeule's view, the bite of the exception might be felt most strongly during periods of perceived emergency or crisis, but he argues the same problem of legal "black holes" and "grey holes" is likely to persist in some pockets of public law even in "ordinary" times. *See id.* at 1139–40.

[221] A critique of this view, which also acknowledges its entrenchment in the United States, is Michael J. Glennon, *National Security and Double Government*, 5 Harv. J. Nat'l Sec. 1 (2014).

[222] *See generally* Douglas T. Stuart, Creating the National Security State: A History of the Law That Transformed America (2008); Rana, *supra* note 26; Robert Knowles, *National Security Rulemaking*, 41 Fla. St. Univ. L. Rev. 883 (2014).

[223] On the latter, see, for example, Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 Mich. L. Rev. 1333 (2019).

[224] William E. Scheuerman, *Emergency Powers*, 2 Ann. Rev. L. & Soc. Sci. 257, 259–62 (2006) (describing this view as "constitutional relativism").

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policies. For example, in a recent case brought by Iran under a 1955 commercial and consular treaty, the United States defended its reimposition of economic sanctions against Iran on the ground that the sanctions were necessary to protect its essential security interests.[225] The United States' arguments in this pending case have emphasized the fact that this "core national security decision was made at the highest levels of the U.S. Government, following a National-Security-Council-led review of the United States' policy toward Iran."[226] The United States has further emphasized that the treaty's security exception "provides wide discretion for a State to evaluate and determine what measures are necessary to protect those essential interests," and that its corresponding burden to justify those measures internationally is low.[227] This position reflects a view that "core national security tools" are subject to limited oversight by the economic treaties at issue, and affording maximum flexibility to the national security establishment is preferable to close judicial scrutiny.[228] As of this writing, the ICJ has yet to rule on the merits of this defense.[229]

As this example suggests, those adopting something close to the ideal-typical vision of security knowledge—including various strands of realist thought and so-called traditional security studies—are likely to counsel modesty for both security and for law. As to the former, realist security recognizes that the pursuit and defense of security is bloody business not to be widely extended.[230] By limiting international security to "core" matters of military affairs, realism arguably can be deployed to reject the conceptual apparatus that has justified the expansion of military affairs into nearly every corner of domestic and international life.[231] In international law, this sense of modesty is reflected in calls to refocus international institutions like the Security Council on narrower conceptions of "international peace and security" that are centered on interstate conflict.[232] Such approaches are suspicious of the mobilization of military force for humanitarian intervention, regime change, or democracy promotion, emphasizing the folly of these military adventures and their cost in terms of human life and security.[233] This caution, however, should not be confused with a radical commitment to peace.[234]

Equally, we should expect modesty when it comes to what law might accomplish with respect to "real" security interests.[235] Military force will sometimes appear necessary, and it

[225] Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Judgment, para. 98 (Int'l Ct. Just. Feb. 3, 2021). By way of disclosure, the author served as counsel for the United States in a parallel case, *Certain Iranian Assets*, under the same treaty, but took no part in this case.

[226] Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Preliminary Objections Submitted by the United States of America, para. 6.44 (Int'l Ct. Just. Aug. 23, 2019).

[227] *Id.*, para. 6.47.

[228] *See id.*, para. 6.37.

[229] The 2021 judgment found that a decision "may require an assessment of the reasonableness and necessity of the measures." *Violations of the 1955 Treaty of Amity*, Judgment, *supra* note 225, para. 112. Depending on how the case develops, it may suggest a wider scope for judicial review that is less in line with the realist ideal type depicted here.

[230] *See, e.g.*, Deudney, *supra* note 207.

[231] *See generally* ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING (2016).

[232] Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279 (2018).

[233] *See, e.g.*, Richard H. Steinberg, *Wanted—Dead or Alive: Realism in International Law*, *in* INTERDISCIPLINARY PERSPECTIVES, *supra* note 39, at 146, 167 (arguing that "realism has saved (and could have saved) countless lives by challenging the foolishness of various proposed policies").

[234] J. ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS: FEMINIST PERSPECTIVES ON ACHIEVING GLOBAL SECURITY 50 (1993).

[235] *See, e.g.*, Robert Jervis, *Security Regimes*, 36 INT'L ORG. 357 (1982).

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is unlikely that law will do much to constrain that possibility.[236] We should therefore recognize that security—in its core, military-focused sense—is likely to work as an implied, de facto limitation on the effectiveness of international legal regimes.[237] Realism may also be congenial to narrowly framed treaty-based exceptions that generally embed states in a relatively thick set of international rules vis-à-vis allies, but offer states a free hand to pursue security competition with adversaries.[238] At the same time, realist security would be skeptical of attempts, whether by neoconservatives or human security advocates, to expand the notion of security to encompass issues like human rights violations, and potentially to justify military responses thereto.[239] Realist thinking, however, offers fewer critical remarks about the expansion of security concepts to extend hegemonic power through international organizations, such as the use of Security Council authority to extend the reach and effect of U.S. sanctions, with minimal legal oversight.[240]

This ideal type, however, contains internal tensions, which tend to drive it toward any one of the other three types discussed below. Even in its most military-focused sense, security as an academic discipline and political practice has always been inherently interdisciplinary, inviting other forms of expertise to perform adjunct roles.[241] This interdisciplinarity raises the possibility that those other forms of civilian and political expertise might become dominant, shifting the relevant knowledge and logic of security away from military affairs or from exceptionalism.[242] More radically, as Rana points out, realism's exceptionalism suggests that, in truth, "no science or expertise of security exists," pointing the way to a radically democratic approach that supplants experts with the lay public.[243] These possibilities are explored in the following Sections.

B. *Widened Security*

Set against realist security are various approaches that seek to expand security into new realms and decenter the role of military affairs. Many of these approaches find their roots in an intellectual and policy-oriented push in the 1980s, which accelerated after the end of the Cold War, to "broaden" and "deepen" the concept of security.[244] A key theoretical

[236] *Cf.* Kenneth N. Waltz, *The Politics of Peace*, 11 INT'L STUD. Q. 199, 206 (1967) ("If developments in Vietnam might indeed tilt the world balance in America's disfavor, then we ought to be fighting.").

[237] This position can be overstated if not careful. The influence of ideology, culture, and norms is acknowledged also in realist approaches. *See, e.g.*, ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 21 (2001).

[238] *See, e.g.*, Herbert Feis, *The Geneva Proposals for an International Trade Charter*, 2 INT'L ORG. 39, 45 (1948).

[239] *E.g.*, Edward Newman, *Human Security and Constructivism*, 2 INT'L STUD. PERSPEC. 239, 247 (2001).

[240] *Cf.* Robert O. Keohane, *The Globalization of Informal Violence, Theories of World Politics, and the "Liberalism of Fear*,*"* DIALOG-IO, at 29 (2002).

[241] *See* Fergie, *supra* note 215; Joseph S. Nye, Jr. & Sean M. Lynn-Jones, *International Security Studies: A Report of a Conference on the State of the Field*, 12 INT'L SECURITY 5 (1988).

[242] BUZAN & HANSEN, *supra* note 205, at 67.

[243] Rana, *supra* note 26, at 1431.

[244] Broadening, in this sense, refers to expanding security beyond its military associations to embrace new threats and issues, while deepening refers to decentering the role of the state in favor of individuals or non-state groups. PEOPLES & WILLIAMS, *supra* note 212, at 4. For influential early examples, see Richard H. Ullman, *Redefining Security*, 8 INT'L SECURITY 129 (1983); BUZAN, *supra* note 22, at 49–63; Jessica Tuchman Mathews, *Redefining Security*, 68 FOR. AFF. 162 (1989); Ken Booth, *Security and Emancipation*, 17 REV. INT'L STUD. 313 (1991).

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development in this period was the rise of feminist security studies, which, among many insights, showed how threats to women's security can come from their own states and state security forces, as well as from non-military threats such as inadequate access to health care or birth control.[245] These approaches scored some political successes, including the adoption at national, regional, and international levels of documents relating to human security,[246] global health security,[247] and women, peace, and security,[248] among others. At the same time, states reformulated their national security policies over the first two decades of the twentieth century to increasingly address non-military threats, though not always with results that human security advocates would have endorsed.[249] The "broadening and deepening" debates have produced a complex field with a wide range of approaches to security, which cannot be reduced to a single conception or ideal type.[250] Each of the remaining three types discussed here owes a debt to those debates.

One type that emerges from these debates, which has gained traction in mainstream security circles and even in some state policies, is referred to here as *widened security*. This view has sought to dislodge military affairs from their central role in security policy, and argues that today's most deadly threats, such as climate change and pandemics, do not come from any foreign or domestic adversary,[251] and instead are made intelligible through the application of scientific expertise.[252] Nevertheless, the widened-security view, as described here, remains reliant on state-based structures to ensure security, and is likely to count diplomacy, lawmaking, and regulation high among its list of tools.[253] This distinguishes the approaches described here from those that focus on "deepening" security by going beyond the emphasis on states in the international system.[254]

This widening view finds echoes in the Obama administration's national security strategies,[255] and has enjoyed a revival of mainstream interest since the COVID-19 pandemic. For example, at the height of the pandemic, Oona Hathaway wrote:

[245] Laura Sjoberg, *Feminist Security and Security Studies*, *in* OXFORD HANDBOOK OF INTERNATIONAL SECURITY, *supra* note 42; *see also* TICKNER, *supra* note 234, at 127–44; ENLOE, *supra* 26, at 1–13, 56–58l; Knop, *supra* note 41.

[246] *See, e.g.*, UN DEVELOPMENT PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 1994, at 22–40 (1994).

[247] *See* note 7 *supra*.

[248] SC Res. 1325 (Oct. 31, 2000).

[249] On environment in particular, see FLOYD, *supra* note 217.

[250] For example, Chinkin and Kaldor must distinguish their view as "Second Generation" human security, as against competing models. KALDOR & CHINKIN, *supra* note 20, at 32–34.

[251] *See, e.g.*, Jeffrey Goldberg, *The Obama Doctrine*, ATLANTIC (Apr. 2016), *at* https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525 (quoting U.S. President Barack Obama) ("ISIS is not an existential threat to the United States. Climate change is a potential existential threat to the entire world if we don't do something about it.").

[252] Morgan Bazilian & Cullen Hendrix, *An Age of Actorless Threats: Rethinking National Security in Light of COVID and Climate*, JUST SECURITY (Oct. 23, 2020), *at* https://www.justsecurity.org/72939/an-age-of-actorless-threats-re-thinking-national-security-in-light-of-covid-and-climate ("[S]ecuritizing these issues is not the same as militarizing them. The important point is to bring more non-militarized agencies—like the EPA, NOAA, and the Department of the Interior—into the discussion.").

[253] *See id.*

[254] *See* note 244 *supra*; *cf.* Olúfẹ́mi O. Táíwò, *States Are Not Basic Structures: Against State-Centric Political Theory*, 48 PHIL. PAPERS 59 (2019). For approaches focused on deepening, see Section IV.D *infra*.

[255] The incorporation of this perspective in official documents was only partial, however. Christine Gray, *President Obama's 2010 National Security Strategy and International Law on the Use of Force*, 10 CHINESE J. INT'L L. 35 (2011) (noting "tonal" shifts alongside deeper continuities between Bush and Obama).

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> [W]e should broaden the lens of national security to think about all serious global threats to human life. Terrorism should be a part of the conversation, but it should be considered next to other, more pressing threats to American lives, including pandemics, other public health threats, and climate change. *The assessment of threats should be based on scientific assessments of real global threats that require serious global solutions.* That's what "national security" must mean in the post-COVID-19 world.[256]

While this comment explicitly refers only to knowledge of security threats, its assertion that threat assessment must be based on scientific evidence also has implications for the logic of security policy. By yoking threat-assessment to the full range of available scientific expertise, this approach narrows if not eliminates the distance between security policy and the ordinary rationality requirements of the administrative state.[257] There is also the possibility that a more rationalized and reviewable security policy could emerge even in more "classical" domains of warfighting and counter-terrorism.[258] Perhaps, for example, the securitization of the environment has promoted alternative "security practices based on prevention, risk management and resilience," while challenging the close association between security, emergency, and exception.[259] Likewise, the close association between human security-style approaches and human rights law suggests a preference for proportionality and rule of law values over exceptionalism.[260]

Despite its limited institutional successes, this type, too, is unstable. First, widened security can collapse back into forms of realism if these new security interests like climate and health become militarized.[261] For example, Diane Otto has argued that the "women, peace, and security" frame has in a sense become a victim of its own success, as it has "become captive to the militarized security frame" that typically characterizes Security Council action.[262] Second, as actors turn to exercising extraordinary legal powers to address these new security threats, widened security's claim to preserve a place for legality and rationality in security policy becomes increasingly tenuous.[263] Here, climate change is a relevant example: where it was once possible to say that the climate policy was still "designed and developed in the realm of ordinary policy debate,"[264] this assumption arguably no longer holds as actors are increasingly considering the use of emergency powers to pursue climate policy.[265] Finally, the increasing

[256] Oona A. Hathaway, *After COVID-19, We Need to Redefine "National Security*,*"* SLATE (Apr. 7, 2020), *at* https://slate.com/news-and-politics/2020/04/coronavirus-national-security-terrorism.html (emphasis added).

[257] For an argument that the fates of these two institutions were always linked, see Rana, *supra* note 26.

[258] *See, e.g.*, Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 U.C.L.A. L. REV. 2 (2021); Chachko, *supra* note 183.

[259] Trombetta, *supra* note 25, at 143.

[260] *See* Diane Marie Amann, *Le changement climatique et la sécurité humaine*, REGARDS CROISÉS SUR L'INTERNATIONALISATION DU DROIT 239 (Mireille Delmas-Marty & Stephen Breyer eds., 2009).

[261] This is the case in some discourses on climate security. *See, e.g.*, Rita Floyd, *Global Climate Security Governance: A Case of Institutional and Ideational Fragmentation*, 15 CONF., SEC. & DEV. 119 (2015).

[262] Diane Otto, *Women, Peace, and Security: A Critical Analysis of the Security Council's Vision*, *in* OXFORD HANDBOOK OF GENDER AND CONFLICT (Finnoula Ní Aoláin, Naomi Cahn, Dina Francesca Haynes & Nahia Valji eds., 2017). Thanks to a reviewer for highlighting this piece.

[263] For example, whereas it was once possible to argue that even so-called emergency responses to climate change "are still designed and developed in the realm of ordinary policy debate," BUZAN, WÆVER & DE WILDE, *supra* note 206, at 83, this is arguably no longer the case. *See, e.g.*, Farber, *supra* note 3; Nevitt, *supra* note 6.

[264] BUZAN, WÆVER & DE WILDE, *supra* note 206, at 83.

[265] *See, e.g.*, Farber, *supra* note 3; Nevitt, *supra* note 6. The recent deployment of emergency powers and derogations to address the COVID-19 pandemic provides another example. Julian Arato, Kathleen Claussen &

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pluralization of expertise in determining security threats suggests, consistent with many "deepening" approaches to security, that lay knowledge rather than expertise does, and should, drive security policy.[266] The latter two possibilities are taken up below.

C. Discursive Security

In contrast to each of the above frames, which privilege expertise and specialized knowledge for identifying security threats, an alternative view emphasizes the irreducibly political character of such determinations. One such view is readily captured for our purposes by what is known as securitization theory.[267] This approach, developed by the so-called Copenhagen School of Security Studies, emphasizes the fundamental and irreducibly political character of claims to know something about security.[268] Security, on this view, is not necessarily associated with any particular threat (e.g., military invasion), or any particular object (e.g., securing the state).[269] Rather, security is a discursive practice wherein some actor identifies something as an existential threat, and argues that the threat requires an extraordinary, and perhaps extra-legal, response.[270] As these moves gain acceptance, an issue is "securitized," meaning it is transferred to the realm of extraordinary measures and left outside ordinary politics.[271] This association with exceptionalism makes the theory inherently wary of security, arguing that "desecuritization is the optimal long-range option," because it moves issues "out of th[e] threat-defense sequence and into the ordinary public sphere."[272]

When framed this way, the insights of securitization theory are compatible with a set of intuitions about security-knowledge that are likely to be held by many international lawyers.[273] First, as noted above, security is an indeterminate concept, whose meaning and content at any given time is socially and politically constructed.[274] On this view, we can acknowledge the privileged position that elites—such as politicians, bureaucrats, officials, lobbyists, pressure groups, and, increasingly, scientists—hold over the definition of security issues, just as the aforementioned types do.[275] But at the same time we can recognize that the

J. Benton Heath, *The Perils of Pandemic Exceptionalism*, 114 AJIL 627 (2020); Laurence R. Helfer, *Rethinking Derogations from Human Rights Treaties*, 115 AJIL 20 (2021).

[266] *See* Section IV.D *infra*.

[267] The ideal type developed here is an attempt to reflect a political position, and it uses securitization theory only to illuminate that position. As such, I use the off-brand label *discursive security* to reflect the fact that the theory is being used here as a political artifact rather than a framework for social-scientific analysis. On securitization theory and the Copenhagen School of Security Studies, its projects and approach to security, see BUZAN & HANSEN, *supra* note 205.

[268] *See* Ole Wæver, *Politics, Security, Theory*, 42 SECURITY DIALOGUE 465, 468 (2015) (explaining that Securitization Theory is structured to "insist on responsibility and ultimately to protect politics," and that a "user can never reduce away politics by deriving it from objective threats or causal explanations at the particular point of securitization").

[269] BUZAN, WÆVER & DE WILDE, *supra* note 206, at 29–31, 204–05.

[270] *Id.* at 23–26.

[271] *Id.*

[272] *Id.* at 29; *see also* Lene Hansen, *Reconstructing Desecuritisation: The Normative-Political in the Copenhagen School and Directions for How to Apply It*, 38 REV. INT'L STUD. 525, 531–33 (2012).

[273] *Cf.* FLEUR JOHNS, NON-LEGALITY IN INTERNATIONAL LAW 88 (2013) (remarking critically that "[i]t is, after all, the exceptional and the extra-legal that ring liberal alarm bells").

[274] BUZAN, WÆVER & DE WILDE, *supra* note 206, at 23–26.

[275] *Id.* at 40; *see also* Trine Villumsen Berling, *Science and Securitization: Objectivation, the Authority of the Speaker and Mobilization of Scientific Facts*, 42 SECURITY DIALOGUE 385 (2011).

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moment of securitization itself is not determined by that expertise, and instead reflects a move that belongs to politics and narrative.[276] Second, despite being radically open to redefinition, lawyers might intuitively agree that security has a troubling historical connection to emergency powers and exceptionalism.[277] Third, this link to exceptionalism suggests a normative orientation that, like many public lawyers, is skeptical of security claims, and prefers the long-term desecuritization of issues.[278] The likelihood that security claims will be fused with demands for secrecy, emergency power, extra-legalism, military force, etc., places a thumb on the scale against such claims, even if the desirability of using the security label can never be fully resolved in the abstract.[279] Together, these insights are broadly compatible with a liberal-constitutionalist spirit that seeks to limit the abuse of security claims and provide offramps back to normal politics, even if that liberal spirit was not the intention of the theory's progenitors.[280]

This set of insights is broadly compatible with the ways that international lawyers have addressed derogations from internationally recognized human rights. Many human rights treaties include derogations provisions allowing states to "suspend certain rights during emergencies while subjecting such measures to international notification and monitoring."[281] The substantive scope of what might constitute an "emergency" is open ended, and in practice these provisions have been applied to war, insurrection, terrorism, economic crises, natural disasters, and COVID-19.[282] Once this threshold is reached, a public emergency can

[276] A classic text on this point, though outside the bounds of Securitization Theory, is DAVID CAMPBELL, WRITING SECURITY: UNITED STATES FOREIGN POLICY AND THE POLITICS OF IDENTITY (2d ed. 1998). *See also* Harlan G. Cohen, *The National Security Delegation Conundrum*, JUST SECURITY (July 17, 2019), *at* https://www.justsecurity.org/64946/the-national-security-delegation-conundrum. This view has radical and egalitarian implications, as it suggests that no person has a special claim to identify security threats or issues, any more than any person has a privileged claim to act politically. *See* Michael C. Williams, *Words, Images, Enemies: Securitization and International Politics*, 47 INT'L STUD. Q. 511, 520–21 (2003).

[277] *See* BUZAN, WÆVER & DE WILDE, *supra* note 206, at 24–26; *see also* note 60 *supra*. This assertion can be read, weakly, as merely an analytical move designed to ensure the workability of a social-scientific theory, in which case there is no conflict with alternative approaches to security like "human security" or "ecological security." But our politics allows for a stronger association, in which the demand for exceptional measures is closely and practically bound up with claims to security, such that the two are mutually reinforcing and tend to emerge together. *Cf.* Ole Wæver, *Securitization and Desecuritization*, *in* ON SECURITY 46, 47 (Ronnie D. Lipschutz ed., 1995) ("[S]ecurity, as with any other concept, carries with it a history and a set of connotations that it cannot escape."). In other words, to speak "security" in today's politics is almost inherently to lay the groundwork for future calls for emergency powers and exceptionalism, even if the original speaker does not intend it that way, because those are the associations that our politics creates. Such associations might be said to be borne out in recent arguments over climate change. See *supra* note 263 and sources cited therein. On this strong view, to speak "security" in most political settings today is a risky move precisely because of this association. *Cf.* Barry Buzan, *A Reductionist, Idealistic Notion That Adds Little Analytical Value*, 35 SECURITY DIALOGUE 369, 370 (2004) (warning that human security is a dangerous label precisely because of the link between security and exceptionalism).

[278] *See* Rita Floyd, *Can Securitization Theory Be Used in Normative Analysis? Towards a Just Securitization Theory*, 42 SECURITY DIALOGUE 427 (2011).

[279] Wæver, *supra* note 268, at 469.

[280] For one effort to combine securitization theory with a liberal-constitutionalist ethos and engage with public international law scholarship, see Tine Hanrieder & Christian Kreuder-Sonnen, *WHO Decides on the Exception?: Securitization and Emergency Governance in Global Health*, 45 SECURITY DIALOGUE 331 (2014). On the skepticism of securitization theory toward classical liberal approaches to security, see BUZAN, WÆVER & DE WILDE, *supra* note 206, at 208–10.

[281] Helfer, *supra* note 265, at 22; *see also* note 61 *supra*.

[282] *Id.* at 23–24, 28. *But see* GROSS & NÍ AOLÁIN, *supra* note 60, at 249–52 (noting points of definitional agreement).

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justify suspensions of rights otherwise ordinarily guaranteed in a liberal democratic society, subject to reporting and monitoring requirements, as well as substantive requirements of proportionality.[283] By encouraging states to channel their exercises of exceptional power through the derogations system's procedural framework, human rights treaties force officials to make "public assertions about the nature of the crisis and the scope and duration of emergency restrictions," which can provide benchmarks for public pressure if those are later exceeded.[284]

This dynamic, though it specifically relates to emergencies, reflects more generally both the perils and hopes of the discursive security frame.[285] Under the derogations regime, a wide (though not unlimited) range of issues can be "securitized" through declarations of public emergency. Such declarations provide a rationale for extraordinary power in the form of rights suspensions. From the perspective of many human rights lawyers, the role of law is to help desecuritize—to end the exception and restore an ordinary, rights-respecting politics.[286] From this perspective, the derogations regime fails insofar as it allows "permanent" emergencies that normalize such exceptional measures, and it succeeds insofar as it enables opposition to those regimes.[287]

Discursive security's focus on exceptionalism, however, raises difficult questions that pull toward our final ideal type. The drama of exception and emergency, for instance, arguably ignores the extent to which security practices are bureaucratized and routinized in national, transnational, international, and other institutions.[288] The consequent normative preference for desecuritization, moreover, raises questions about what "ordinary" politics looks like, and how such a politics exists apart from security practices.[289] The derogations example above offers a helpful illustration: while liberal-legalist critiques of the derogations regime seek technical fixes that would limit emergencies and facilitate the return to "normal" politics, more radical critiques seek to undermine this normal/abnormal dichotomy and show how racialized and oppressive security practices are entrenched in, and are even constitutive of, "ordinary" politics in modern liberal states.[290] Notably, in 2020, Alison Howell and Melanie Richter-Montpetit published an article titled *Is Securitization Theory Racist?*—a question which they answered in the affirmative.[291] The article's publication was met with a trenchant

[283] *See, e.g.*, ECHR, *supra* note 61, Art. 15.

[284] Helfer, *supra* note 265, at 33.

[285] On the overlap and distinction between "security" and "emergency," see note 60 *supra*.

[286] *E.g.*, Gross & Ní Aoláin, *supra* note 60, at 255–63 (describing the derogations regime as an "accommodations" model that seeks to discipline the recourse to emergency power and facilitate a return to normalcy). *But cf.* Karima Bennoune, *"Lest We Should Sleep": COVID-19 and Human Rights*, 114 AJIL 666, 671–73 (2020) (critiquing the bias of human rights actors in the early stage of the pandemic in favor of limiting state power, rather than urging a strong state response).

[287] *See* Gross & Ní Aoláin, *supra* note 60, at 283 (critiquing the ECHR's seeming "structural inability to deal credibly with permanent emergencies").

[288] *See, e.g.*, Didier Bigo, *Security and Immigration: Toward a Critique of the Governmentality of Unease*, 27 Alternatives 63 (2002).

[289] *See, e.g.*, Hansen, *supra* note 272; João Nunes, *Reclaiming the Political: Emancipation and Critique in Security Studies*, 43 Security Dialogue 345, 348–50 (2012); Christopher S. Browning & Matt McDonald, *The Future of Critical Security Studies*, 19 Eur. J. Int'l Rel. 235, 248 (2011); Claudia Ardau, *Security and the Democratic Scene: Desecuritization and emancipation*, 7 J. Int'l Rel. & Dev. 388 (2004).

[290] *E.g.*, Reynolds, *supra* note 49, at 267.

[291] Alison Howell & Melanie Richter-Montpetit, *Is Securitization Theory Racist?: Civilizationalism, Methodological Whiteness, and Antiblack Thought in the Copenhagen School*, 51 Security Dialogue 3 (2020).

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defense from securitization theory's architects, and the range of disputes between the authors goes well beyond what can be covered here.[292] Most relevant for the present purposes is Howell and Richter-Montpetit's observation that a normative orientation *against* securitization appears to privilege the status quo and leaves unexamined "the racial violence of normal (liberal) politics."[293] Implicit in this critique is a concern that the security claims of "racialized, indigenous, and poor communities"—whose enslavement, displacement, dispossession, and detention helped construct existing political orders[294]—would be reflexively dismissed out of a fear of exceptionalism and a desire to maintain the established order.

This argument, regardless of how well it identifies problems internal to an academic discipline like securitization theory, is useful in delineating a fourth and final approach to security-knowledge. Each of the three approaches thus far could be invoked, in many contexts, to resist racist or oppressive invocations of security. Even so, each does so from its own perspective of security-knowledge, either that of military affairs (realist security), wider expertise (widened security), or from the perspective of a set of knowledge practices grounded in respect for the rule of law and "ordinary" politics (discursive security). Howell and Richter-Montpetit's intervention points toward the conclusion an alternative frame is needed if the security interests of the colonized, marginalized, racialized, and subaltern are to be taken seriously on their own terms. The final Section attempts to sketch such a frame.

D. Pluralist Security

A fourth approach to the production of security-knowledge would strip away the last of the necessary connections, presenting security as fundamentally political and open to contestation. The previous view, informed by securitization theory, already did this with respect the identification of security threats and issues, treating the construction of security issues as a matter of politics rather than expertise. This final approach likewise eschews the logic of exception, recognizing that, at the very least, "[t]he exclusionary and violent meanings that have been attached to security are themselves the result of social and historical processes, and can thus be changed."[295] This view has a further consequence: once any necessary conceptual connection to emergency power and institutionalized expertise is sheared away, the state is radically decentered in the security analysis. Security is defined and executed politically, and we should thus expect to find it articulated in the first instance not by states themselves but by political groupings, which both fragment and extend beyond state

[292] *See* Ole Wæver & Barry Buzan, *Racism and Responsibility – the Critical Limits of Deepfake Methodology in Security Studies: A Reply to Howell and Richter-Montpetit*, 51 SECURITY DIALOGUE 386 (2020). It must be said that this reply is unfortunate insofar as it suggests that a "charge of racism" must be subjected to a higher burden than "normal academic disputes about facts, methods or theories," and is troubling inasmuch as it very nearly threatens a libel suit against the publishing journal. *Id.* at 386–87. The current public discussion on antiracism and systemic racism should suggest that, to the contrary, racist thought is ubiquitous, is not the sole province of enthusiastic racists, and should be confronted frankly wherever discovered. A more graceful reply, which disputes Howell and Richter-Montpetit's findings but takes their intervention as a call for further reflection, is Lene Hansen, *Are "Core" Feminist Critiques of Securitization Theory Racist? A Reply to Alison Howell and Melanie Righter-Montpetit*, 51 SECURITY DIALOGUE 378 (2020).

[293] Howell & Richter-Montpetit, *supra* note 291, at 9, 12.

[294] *Id.* at 9.

[295] Nunes, *supra* note 289, at 350.

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boundaries.[296] Moreover, the institutions of the state may themselves be sources of insecurity, against which demands for security are made.[297] Security-knowledge is in this sense "pluralist"—it emerges from the claims of overlapping and contesting social groups, and is pursued via a range of exceptionalist and routine logics both inside and outside of the state.[298]

Pluralism's descriptive purchase is illustrated by a recent study of private security companies in the Kenyan oil sector.[299] As Charis Enns, Nathan Andrews, and Andrew Grant explain, the discovery of oil in the Lake Albert Basin in 2006 led to an explosion of development of the oil sector in northern Kenya, which already faced "regional insecurity, a limited state presence, and a proliferation of small arms."[300] The oil companies and local community both expressed an interest in securing the region, though they articulated the idea in vastly different terms.[301] The oil companies, for their part, involved a complex assemblage of actors that included the Kenya Police Reserves, a force of "untrained civilians armed by the government to provide communities with protection in the absence of a formal police presence," who are the "main visible state-sanctioned security" in northern Kenya.[302] The reserve forces were established to deter livestock raids and intercommunal conflict, but their local knowledge and language expertise proved valuable to the oil companies interested in facility security.[303] Researchers found that this practice caused military-age men to leave their communities to work for the reserves, contributing to "new risks and vulnerabilities at home, such as . . . cattle raiding, banditry, and other forms of violence."[304] As these stories, first articulated by community members, were taken up by international human rights groups, many companies discontinued their reliance on the reserves.[305] But young men "continue to be drawn towards oil exploration and drilling sites, . . . putting aside their [Reserve] uniforms and weapons in exchange for positions with private companies."[306]

This example is a useful portrait of security-knowledge production in a pluralist perspective. The two entities whose security is most visible in this picture are those of the foreign oil companies' operations in northern Kenya, and that of the rural communities, often dozens of kilometers away, whose pre-existing security practices are further threatened by the oil

[296] *See, e.g.*, Olúfẹ́mi O Táíwò, *Who Gets to Feel Secure?*, AEON (Oct. 30, 2020), *at* https://aeon.co/essays/on-liberty-security-and-our-system-of-racial-capitalism.

[297] This is a key insight of feminist security studies. *See, e.g.*, TICKNER, *supra* note 234.

[298] By invoking "pluralism" in this way, I mean to refer to refer to the existence of contested and overlapping forms of normative claims, with that contest giving rise to imperial exercises of authority, resistance, and violence. *Cf.* Robert M. Cover, *The Supreme Court 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 12–14 (1983). This is distinguished from the more sanguine discussions of "legal pluralism" that are common in mainstream international law literature, emphasizing the management of conflicting legal rules through various juridical techniques. *See, e.g.*, Paul Schiff Berman, *Global Legal Pluralism as a Normative Project*, 8 U.C. IRVINE L. REV. 149, 165–178 (2018).

[299] Charis Enns, Nathan Andrews & J. Andrew Grant, *Security for Whom?: Analysing Hybrid Security Governance in Africa's Extractive Sectors*, 96 INT'L AFF. 995 (2020).

[300] *Id.* at 1001.

[301] Whereas the oil sector considered security largely in terms of the physical security of extractive operations, the local communities articulated a broader desire to ensure a robust safety and security of community even "before we take the oil out of the soil," in recognition of the destabilizing effects of such operations. *Id.* at 1001–02.

[302] *Id.*

[303] The companies paid up to ten times what reservists were paid by the state. *Id.*

[304] *Id.* at 1003.

[305] *Id.*

[306] *Id.*

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operations. These two entities share an interest in regional security but articulate that interest differently. For the oil companies, security primarily refers to the stability of extractive operations, and for this purpose the companies relied on a complex assembly of state security forces, private security companies, risk analytic consultants, and subcontracted reserve police.[307] For the local communities, security was articulated in terms of community resilience, as well as the absence of theft and violence, and on that view the drilling activities themselves constituted a potential for further insecurity. The state here is clearly instrumentalized in the pursuit of both community and corporate security—a fact made readily visible by its sparse presence in the region and by the ability of the companies to subcontract the state's deputized police. And the case study shows how overlapping interests in security can at once be united, in the sense of desiring more regional stability, and conflictual.

Once we have elucidated these dynamics, we can see them everywhere, even in highly developed states with an overwhelming national security apparatus. For example, the Movement for Black Lives frames its demands in terms of ending "the war against Black people," arguing effectively that in the United States the security of predominately white neighborhoods has been achieved by the overpolicing, militarization, surveillance, and incarceration of Black communities.[308] The state, in this view, can be redescribed as an entity that reliably puts its security forces in the service of protecting white lives and property, while rendering non-white communities insecure.[309]

This picture of conflicting and overlapping security claims also has radical implications for the knowledge and logic of security issues. On this view, knowledge about security threats emerges from communities, rather than from any purportedly objective field of expertise. To carry on the above example, the Movement for Black Lives platform suggests that the knowledge needed to identify security threats, and the logic appropriate to addressing them, emerges from the affected communities themselves, rather than from technocratic discourses about law or policing.[310] Likewise, the security interests of the dominant communities are understood to be constructed not out of objective determinations informed by technical expertise, but from an anti-Black bias that is pervasive both in everyday social practice and in legal and political institutions.[311] In both cases, the ideas about appropriate knowledge practices emerge from the felt needs of the community making the security claim.

Security pluralism thus leads to a much more contingent, and even tactical, orientation toward exceptionalism.[312] The same orientation toward non-state centers of security knowledge may also suggest alternative, non-exceptionalist security logics.[313] Monica Bell, for

[307] *See id.* at 1002.

[308] *E.g.*, MOVEMENT FOR BLACK LIVES, *End the War on Black Communities*, *in* POLICY PLATFORM: END THE WAR ON BLACK PEOPLE (2020).

[309] *See, e.g.*, Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 696–701 (2020) (showing how police officers can be "tasked with spatial exclusion in predominantly White and more affluent areas," and arguing that "watching and warding off people who seem out of place in White areas are core aspects of police work").

[310] *See, e.g.*, Amna A. Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021) (section on "shifting the episteme").

[311] *E.g.*, Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016).

[312] *See* REYNOLDS, *supra* note 49, at 285–86.

[313] *See* Nils Burbandt, *Vernacular Security: The Politics of Feeling Safe in Global, National and Local Worlds*, 36 SECURITY DIALOGUE 275 (2005).

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example, suggests that a "sense of security" in Black communities can be multifaceted and not primarily about the presence of armed police, embracing "economic integration, racial integration, greening, increased community engagement, activities for youth, employment opportunities for youth, social activities for adults, and widely available healthy food."[314]

But exceptionalism is not always ruled out. Movement campaigns for divestment, abolition, and other "non-reformist reforms" are, in their own way, demands for exceptional measures that disrupt ordinary categories and legal routines.[315] In international politics, non-state entities may also take exceptional measures, including the use of force, to protect what are framed as security interests.[316] This view was reflected in the long-running efforts to extend international legal protection to non-state forces fighting "wars of national liberation"—a movement that ultimately led to the inclusion of such recognition in Additional Protocol I to the Geneva Conventions.[317] And smaller, post-colonial states have defended their sovereignty and their rights under security exceptions as a means of preventing the emergence of a "one-way international law which lacks mutuality in its observance and therefore becomes an instrument of oppression."[318] In all, the portrait that emerges from a pluralist perspective is far more mixed with respect to the types of knowledge deployed to define security, and potentially strategic in its orientation to exceptionalism.

V. Security-Knowledge in International Economic Law

Once we have elucidated these divergent approaches to security, we can identify these ideal types in operation throughout international law. As actors within different legal regimes take up a particular approach, they shape expectations about who is entitled to speak about security and how security policy is expected to unfold.[319] International legal institutions, in this way, do not passively receive ideas about security that were generated elsewhere. Instead these institutions actively participate in reshaping how we think about the way security is defined and pursued. The following examples, drawn from current debates in international economic law, demonstrate how the four ideal types described above are deployed on the international stage in ways that empower certain actors, frame policy alternatives, and shape understandings of security itself. These examples also demonstrate how the above types can be used

[314] Bell, *supra* note 21.

[315] *See* Inés Valdez, Mat Coleman & Amna Akbar, *Law, Police Violence, and Race: Grounding and Embodying the State of Exception*, 23 Theory & Event 902, 926–28 (2020). The threat of violence is also recognized as a mechanism that can, under certain circumstances, secure critical concessions. Butler, *supra* note 311, at 1470.

[316] *E.g.*, Tarak Barkawi & Mark Laffey, *The Postcolonial Moment in Security Studies*, 32 Rev. Int'l Stud. 329, 349–52 (2006); Roxanne Lynn Doty, *States of Exception on the U.S.-Mexico Border: Security "Decisions," and Civilian Border Patrols*, 1 Int'l Pol. Sociology 113 (2007).

[317] *See, e.g.*, Georges Abi-Saab, *The Newly Independent States and the Rules of International Law*, 8 Howard L.J. 95, 112 (1962); Jessica Whyte, *The "Dangerous Concept of the Just War": Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions*, 9 Humanity 313 (2018); *cf.* Abraham D. Soafer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)*, 82 AJIL 784, 786 (1988) (arguing that this position would unduly "treat[ ] terrorists as soldiers," affording them POW status and immunity from prosecution, and "enhanc[ing] their stature").

[318] Ibrahim F. I. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AJIL 591, 626 (1974) (arguing that the OPEC oil embargo targeting allies of Israel was justified under the GATT security exception).

[319] *Cf.* Weber, *supra* note 203, at 212–16.

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analytically to diagnose tensions in existing approaches to security, predict how one vision of security might lapse into another, and thus expand the range of alternatives.

International economic law provides a useful object of study because it exists today at the center of so many contests about the meaning of security. Since the nineteenth century, the ideal of "desecuritizing the international economic realm" has been central to the ideology of capitalism and to the project of constructing a liberal international economic order.[320] This project, of course, was never entirely complete, as desecuritized economic relations frequently depended on military and political alliances.[321] Today even that partial success seems to be eroding: the universalization of the liberal economic order—symbolized most dramatically by the accession of China and Russia to the WTO—has, ironically, contributed to resecuritizing economic relations within that system.[322] Alongside these great power rivalries, international trade and investment law, by virtue of their expansion, are now colliding with renewed debates over the securitization of other matters such as cybersecurity, migration, pandemic disease, and climate change.

A. *Security Realism Under Pressure at the WTO*

In the international trading system, there is no more visible marker of the boundary between security and economy than the General Agreement on Tariffs and Trade (GATT) security exception. Article XXI of the 1947 GATT recognizes the right of any state to take any measure "it considers necessary for the protection of its essential security interests" relating to nuclear materials, arms, military supplies, war, or "other emergency in international relations."[323] Under the GATT system, this exception set up a boundary between ordinary liberal economic relations and matters of security, and the phrase "it considers" in the exception was often understood to render the provision "self-judging," meaning that it was for states themselves to decide on the precise location of this boundary.[324] For almost seventy years, well into the era of the WTO, the meaning and scope of this exception, while sometimes hotly contested, was never tried before a dispute-settlement panel.[325]

This picture suddenly changed in the late 2010s, as the WTO dispute settlement system saw a range of disputes that potentially turned on the security exception.[326] The most high-profile and dramatic of these involved complaints by several countries lodged against the Trump administration's tariffs on steel and aluminum, which had been imposed using statutory national-security authority and justified internationally by invoking Article XXI.[327] This case was important conceptually as well as politically, because the United States' justification so brazenly blurred the line between economic industrial policy and national security

[320] Barry Buzan, *Rethinking Security After the Cold War*, 32 COOPERATION & CONFLICT 5, 22 (1997).

[321] JOANNE S. GOWA, ALLIES, ADVERSARIES & INTERNATIONAL TRADE (1995).

[322] *See, e.g.*, Roberts, Moraes & Ferguson, *supra* note 19, at 659–60.

[323] GATT 1947, *supra* note 64, Art. XXI(b).

[324] For a defense of this view of the GATT exception, see Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697,(2011).

[325] Heath, *supra* note 28, at 1051–63.

[326] Peter van den Bossche & Sarah Akpofure, *The Use and Abuse of the National Security Exception under Article XXI(b)(iii) of the GATT 1994* (World Trade Inst. Working Paper No. 03/2020, Sept. 2020).

[327] *See, e.g.*, Yong-Shik Lee, *Three Wrongs Do Not Make a Right: The Conundrum of the U.S. Steel and Aluminum Tariffs*, 18 WORLD TRADE REV. 481 (2019).

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that there was a felt need to draw that line ever more sharply. The first case to reach a decision, however, would concern a more traditional security issue: trade restrictions imposed by Russia as part of its ongoing conflict with Ukraine.[328] A second dispute, concerning intellectual-property measures imposed by Saudi Arabia as part of a broader diplomatic rupture with Qatar, would follow in short order.[329] In this context, these two panels faced the difficult task of resolving the relatively straightforward cases at hand, with the knowledge that their decisions would go on to shape outcomes in the more difficult cases to come.

The panels' decisions, whether consciously or not, carefully deploy security realism to protect against the threat that more expansive approaches pose to the liberal economic order. Interpreting GATT Article XXI, the *Russia–Transit* panel explained that each state may define its own essential security interests, and that the state also retains the discretion to determine whether a measure is "necessary" for the protection of those interests.[330] This comes close to a fully exceptionalist approach to security, though the panel did impose some legal controls, including by requiring the invoking state to "articulate" its essential security interests "sufficiently enough to demonstrate their veracity."[331] In so doing, the state is expected to defend its conception of security in terms of "defence or military interests, or maintenance of law and public order interests."[332] These terms are flexible, and the decision leaves panels ample room to expand what counts as a security interest in future cases.[333] But the panel is expressly anchoring the concept of security in realist terms, defined as involving military affairs abroad and law enforcement domestically.[334]

The resolution of these first two cases, under this framework, was mostly straightforward. The border restrictions in *Russia–Transit* were imposed vis-à-vis Ukraine during a period of deteriorating diplomatic relations and outright armed conflict, wherein the existence of a strong security interest on Russia's part was, in the panel's view, nearly self-evident, even if it was also self-serving.[335] In the subsequent *Saudi Arabia–IP Rights* case, the panel found that Saudi Arabia's articulated interest in "protecting itself 'from the dangers of terrorism and extremism'" justified wide-ranging and draconian measures that were designed to "to end or prevent any direct or indirect interaction or contact between Saudi Arabian and Qatari nationals."[336] Saudi Arabia could therefore take measures that had the effect of preventing a Qatar-based entertainment company from enforcing its intellectual property (IP) rights

[328] Russia — Measures Concerning Traffic in Transit, Panel Report, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) [hereinafter *Russia–Transit*, Panel Report].

[329] Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights, Panel Report, WTO Doc. WT/DS567/R (June 16, 2020) (unadopted) [hereinafter *Saudi Arabia–IP*, Panel Report].

[330] *Russia–Transit*, Panel Report, *supra* note 328, paras. 7.131, 7.146.

[331] *Id.*, para. 7.134. In addition, the existence of a "war or other emergency" is a fact to be determined objectively, and the measures at issue must plausibly contribute to the protection of the articulated security interests. *Id.*, paras. 7.71, 7.138. While this aspect of the ruling is celebrated as a break from the longstanding view that the GATT security exception, and provisions like it, are "self-judging," the account above emphasizes the ways in which the panel sought continuity with past practice by enforcing a relatively traditional notion of security.

[332] *Id.*, para. 7.135.

[333] *See* Section V.C *infra*.

[334] *Russia–Transit*, Panel Report, *supra* note 328, para. 7.130.

[335] This was despite the fact that Russia was widely regarded as being responsible for the conflict, and that Russia had avoided "expressly articulat[ing]" its security interests in the case. *Id.*, para. 7.137.

[336] *Saudi Arabia–IP*, Panel Report, *supra* note 329, paras. 7.280, 7.284.

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against a pirate broadcaster operating in the territory of Saudi Arabia.[337] These decisions reflect the basic shape of realist security: a wide scope for action within a zone defined by military and defense forms of knowledge-production, relating to border security, armed conflict, and terrorism.[338]

The *Saudi Arabia–IP* panel, however, took a further step toward defining security's boundaries by identifying actions that fell outside the scope of the exception. In addition to preventing the Qatari company from using civil law to enforce its IP rights, Saudi Arabia's own authorities had failed to apply criminal penalties against the pirate broadcaster, which had been engaged in infringement on a commercial scale.[339] The panel struggled to understand how the *failure* to enforce criminal laws could be in Saudi Arabia's security interests, particularly when the pirate broadcasts also infringed the rights of companies from third-party countries.[340] In this respect, the panel cited favorably Brazil's third-party statement, which questioned whether "any country's essential security interests" could be protected by failing to prosecute a commercial-scale copyright pirate.[341] In the panel's view, Saudi Arabia could have commenced the prosecutions without undermining its stated security goal of avoiding contact with Qatari officials and nationals.[342]

Together, the panel decisions reflect both the promise and perils of realist security. The panels' adoption of this frame for security is, given the context, almost self-evidently an effort to ring-fence the concept against the background of the Trump administration's combative assertion that "economic security is national security."[343] By policing the boundaries of security, but imposing only minimal plausibility requirements on its logic, the panels have crafted an approach that prevents the security exception from swallowing trade law whole by limiting it to situations relating to armed conflict, breakdowns in diplomatic relations, and terrorism. At the same time, the realist approach largely avoids putting panels in the unenviable position of having to second-guess the security judgments of major players in the trading system.[344]

This is nevertheless a relatively traditional approach to security, with all the drawbacks that may suggest. The panels' approach privileges actors who are capable of coding persons and ideas—such as terrorism, border instability, and "extremism"[345]—as threats to national

[337] *Id.*, paras. 2.40–45,

[338] This is not to naturalize the inclusion of terrorism on the security agenda. *See* ANGHIE, *supra* note 48, at 306–07.

[339] This was a violation of TRIPS Article 61. *See Saudi Arabia–IP*, Panel Report, *supra* note 329, paras. 7.214–7.221.

[340] *See id.*, paras. 7.289–7.294.

[341] *Id.*, para. 7.291.

[342] *Id.*, para. 7.289.

[343] *See* WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17 (Dec. 2017) (quoting President Trump). The specter of the United States and Trump's steel tariffs looms large in the text of the *Russia – Transit* decision—a fact that was not missed by contemporary observers. *See, e.g.*, Todd Tucker, *The WTO Just Blew Up Trump's Argument for Steel Tariffs*, WASH. POST (Apr. 5, 2019), *at* https://www.washingtonpost.com/politics/2019/04/05/wto-just-blew-up-trumps-argument-steel-tariffs.

[344] Identifying this approach with realist security would be a useful insight even if the panels' approach had simply been a mechanical application of the treaty. Here, however, the panels' interpretations of Article XXI took place on deeply contested terrain where multiple approaches were possible. *See* text accompanying notes 324–325 *supra* (discussing prior approaches to Article XXI). The panels thus exercised some agency in giving shape to the conception of security that treaty drafters had encoded into the GATT, and in doing so they made choices that were deeply political, even if not unmoored from the ordinary rules of treaty interpretation.

[345] *Saudi Arabia–IP*, Panel Report, *supra* note 329, para. 7.280.

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defense and public order. And this frame can validate even extreme controls on the bodies and activities of the persons so coded. The idea of security presented here is also one-sided: the *Saudi Arabia–IP* panel decision, for example, was unable to process even the possibility that a state's security interests might be served by *refraining* from criminal prosecutions.

These aspects of the rulings place the panels' realist security frame under continuing pressure. The COVID-19 pandemic and the continuing reality of climate change are likely to cause actors to seize on the open-textured elements of the treaty provisions and panel decisions, to push toward a wider view of security in international trade.[346] This, in turn, is generating pressure to demand a more rationalized logic of security in the trading system, rendering security matters subject to increasing levels of scrutiny and narrowing the distance between security and exceptions for other types of public-policy measures.[347] The *Saudi Araba–IP* panel judgment, for its part, raises the interesting possibility that the rights of IP holders are themselves being securitized through requirements of criminalization and international legal limits on prosecutorial discretion, and that these interests are being set against the security claims of the Saudi authorities.[348]

B. "Global Health Security" as Widened Security

In contrast to the GATT security exception, the 2005 International Health Regulations offer a paradigmatic example of widened security in practice at the international level. Substantially overhauled following the World Health Organization's success in combatting SARS in 2003,[349] the Regulations are a binding legal instrument that provide, in one commentator's words, "the only international rules governing global health security."[350]

Although it may appear strange to treat this regime in a discussion of economic law, the Regulations are in many ways a trade treaty, even if not usually discussed as such.[351] The Regulations' objective is not to enable a forceful and overwhelming response to disease outbreaks, but rather a disciplined and rationalized one, which avoids "unnecessary interference with international traffic and trade."[352] The Regulations thus provide a unique framework for "global health security" that imagines a rationalized and proportionate response to health emergencies, preserving as far as possible the status quo of liberalized commerce.

The conception of security at work here is reflected most powerfully in the Regulations' framework for emergency powers.[353] The Regulations empower the WHO director-general

[346] Arato, Claussen & Heath, *supra* note 261, at 633.

[347] *See, e.g.*, United States—Certain Measures on Steel and Aluminum Products, Opening Oral Statement by the European Union, WTO Case No. DS548, paras. 123–29 (Nov. 4, 2019).

[348] *Cf.* Helen Nissenbaum, *When Computer Security Meets National Security*, 7 ETH. & INFO. TECH. 61, 68 (2005) (noting other ways in which corporate owners of IP have tried to "hitch their star to the security wagon," such as by linking peer-to-peer file sharing to international terrorism).

[349] *See generally* DAVID P. FIDLER, SARS, GOVERNANCE, AND THE GLOBALIZATION OF DISEASE (2004).

[350] LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW 177 (2014).

[351] *But see* ANN MARIE KIMBALL, RISKY TRADE: INFECTIOUS DISEASE IN THE ERA OF GLOBAL TRADE (2006); David P. Fidler, *From International Sanitary Conventions to Global Health Security: The New International Health Regulations*, 4 CHINESE J. INT'L L. 325, 382–83 (2005).

[352] IHR 2005, *supra* note 68, Art. 2. For operational requirements along these lines, see *id.* Arts. 25–26, 28, 31–32, 43.

[353] *See* Christian Kreuder-Sonnen, *International Authority and the Emergency Problematique: IO Empowerment through Crises*, 11 INT'L THEORY 182 (2019). *But cf.* Armin von Bogdandy & Pedro Villareal, *International Law on*

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to issue an emergency declarations on the basis of expert advice and in accord with scientific evidence and principles.[354] Such an emergency declaration, as in analogous constitutional systems, enables the WHO director-general to exercise special powers, but with a widened-security twist. That is, rather than opening up a zone of exception, WHO emergency declarations are arguably designed to create a legalized and rationalized space, in which all states' responses to a pandemic are based on available science, rationally related and proportional to appropriate objectives, and no more restrictive on travel and trade than necessary.[355] In this way, a "public health emergency of international concern," rather than being a normless space, is designed to be a norm-governed and rationalized one, in which cool-headed scientific expertise prevails over panic.[356]

As is well-known following the COVID-19 pandemic, these ideals do not work well in practice.[357] In particular, there is a widespread belief, with some supporting anecdotal evidence,[358] that the very issuance of WHO emergency declarations spurs states to take extraordinary measures to restrict travel and trade, against WHO advice and in contrast with the Regulations' objectives.[359] Following a 2018 outbreak of Ebola in the Democratic Republic of the Congo, the WHO appeared to recognize that emergency declarations might have this perverse effect on developing countries and initially refrained from exercising its emergency authority, finding that doing so would produce "no added benefit."[360] This approach, which may have represented an attempt to desecuritize health emergencies, produced an outcry from public health experts, and the WHO eventually relented.[361] Even so, many experts today see the benefit in de-escalation, and are considering formally or informally dialing back the WHO's emergency system, replacing it with a graded system of "alerts" that lacks the same dramatic flair.[362]

Pandemic Response: A First Stocktaking in Light of the Coronavirus Crisis, at 15 (Max Planck Inst. for Comp. Pub. L. & Int'l L., Res. Paper Ser. No. 2020-07, 2020) (doubting whether "emergency powers" is the right frame).

[354] IHR 2005, *supra* note 68, Art. 12(4).

[355] *See id.* Art. 43(1); Gian Luca Burci, *The Outbreak of COVID-19 Coronavirus: Are the International Health Regulations Fit for Purpose?*, EJIL:*TALK!* (Feb. 27, 2020), *at* https://www.ejiltalk.org/the-outbreak-of-covid-19-coronavirus-are-the-international-health-regulations-fit-for-purpose; David P. Fidler, *To Declare or Not to Declare: The Controversy Over Declaring a Public Health Emergency of International Concern for the Ebola Outbreak in the Democratic Republic of the Congo*, 14 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 287, 294 (2019).

[356] *See* IHR 2005, *supra* note 68, Arts. 12, 15–17, 43.

[357] *See, e.g.*, Eyal Benvenisti, *The WHO—Destined to Fail: Political Cooperation and the COVID-19 Pandemic*, 114 AJIL 588 (2020); Gian Luca Burci & Mark Eccleston-Turner, *Preparing for the Next Pandemic: The International Health Regulations and World Health Organization During COVID-19*, 2 Y.B. INT'L DISASTER L. (2021).

[358] *See* Eric Lipton, David E. Sanger, Maggie Haberman, Michael D. Shear, Mark Mazzetti & Julian E. Barnes, *Despite Timely Alerts, Trump Was Slow to Act*, N.Y. TIMES, Apr. 12, 2020, at A1 (discussing Dr. Anthony Fauci's decision to start supporting travel restrictions immediately following the WHO's January declaration of emergency).

[359] *See, e.g.*, Burci, *supra* note 355.

[360] WHO, Statement on the Meeting of the IHR (2005) Emergency Committee for Ebola Virus Disease in the Democratic Republic of the Congo, Geneva (Apr. 12, 2019); *see also* Helen Branswell, *Could an Emergency Declaration Over Ebola Make a Bad Situation Worse?*, STATNEWS (May 14, 2019), *at* https://www.statnews.com/2019/05/14/could-an-emergency-declaration-over-ebola-make-a-bad-situation-worse.

[361] J. Benton Heath, *Pandemics and Other Health Emergencies*, *in* OXFORD HANDBOOK OF THE INTERNATIONAL LAW OF GLOBAL SECURITY (Robin Geiss & Nils Melzer eds., 2021).

[362] Burci, *supra* note 355.

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These controversies over the Regulations suggest that the widened-security vision remains unstable. The perverse effects on trade and travel suggest the discursive power of security, whereby WHO emergency declarations lure authorities into an "emergency trap" that justifies increasingly restrictive measures.[363] Alternatively, current proposals to de-escalate the WHO's emergency powers could reflect a realist view that global health security both mislabels the threat and overloads the WHO, suggesting the need to return to a more lower-profile, technocratic form of health governance.[364] Finally, the concern about perverse effects in the DRC case suggests a pluralist view: the existing system protects some states while destabilizing others, compounding the economic and political hardships caused by outbreaks.[365] In this context, a de-escalated WHO framework could reflect an attempt to accommodate all security interests at stake.[366]

C. Speaking "Security" at the Trade-Climate Nexus

Climate change, today, poses one of the most pressing policy and security challenges for international economic institutions. The extent to which liberalized trade and investment can both contribute to, and help alleviate, climate change is a matter of extensive debate, leading to a wave of thinking on how to redesign economic law to promote sustainability and environmental justice.[367] In the meantime, some policy tools to combat climate change, such as border carbon adjustments (BCAs) designed to address the carbon leakage that global supply chains enable, are potentially in tension with existing WTO rules on non-discrimination.[368] Environmental advocates and WTO critics frequently point to the fact that environmental measures tend to fare poorly in trade disputes, though defenders argue that the system shows substantial flexibility.[369] Regardless, the lack of legal certainty around climate measures is leading some actors to seek tools that afford a wider scope for action, and in that context "climate security" provides a helpful frame.

One such proposal suggests that the U.S. executive use extraordinary statutory authority over national security to impose BCAs.[370] This proposal, raised by Tim Meyer and Todd

[363] Hanrieder & Kreuder-Sonnen, *supra* note 280.

[364] *Cf.* Eric A. Posner, *The Limits of the World Health Organization*, LAWFARE (Apr. 21, 2020), *at* https://www.lawfareblog.com/limits-world-health-organization.

[365] *E.g.*, Sara E. Davies, *Securitizing Infectious Disease*, 84 INT'L AFF. 295 (2008).

[366] *E.g.*, Colleen O'Manique, *Responses to Recent Infectious Disease Emergencies*, *in* GLOBAL HEALTH AND SECURITY: CRITICAL FEMINIST PERSPECTIVES 112, 126 (Colleen O'Manique & Pieter Fourie eds. 2018); *see also* Matiangai Sirleaf, *Ebola Does Not Fall from the Sky: Global Structural Violence and International Responsibility*, 51 VAND. J. TRANSNAT'L L. 477, 545–52 (2018).

[367] *See, e.g.*, Shalanda H. Baker, *Climate Change and International Economic Law*, 43 ECOLOGY L. Q. 53 (2016).

[368] *E.g.*, Michael A. Mehling, Harro van Asselt, Kasturi Das, Susanne Droege & Cleo Verkuijl, *Designing Border Carbon Adjustments for Enhanced Climate Action*, 113 AJIL 433, 481 (2019) (noting "legal uncertainties" with respect to the legality of BCAs under current WTO law). *But see, e.g.*, Jennifer Hillman, *Changing Climate for Carbon Taxes: Who's Afraid of the WTO?*, GERMAN MARSHALL FUND U.S. (July 2013) (arguing that a properly designed carbon adjustment would be WTO-compliant).

[369] *See, e.g.*, J. Benton Heath, *Trade and Security Among the Ruins*, 30 DUKE J. COMP. & INT'L L. 223, 242, n. 103 (2020) (comparing views on this point).

[370] Timothy Meyer & Todd Tucker, *Trump's Trade Strategy Points the Way to a U.S. Carbon Tariff*, LAWFARE (Aug. 24, 2020), *at* https://www.lawfareblog.com/trumps-trade-strategy-points-way-us-carbon-tariff.

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Tucker, argues that the U.S. president has authority under Section 232 of the Trade Expansion Act to impose "security-motivated restrictions on carbon-intensive imports," on the ground that "climate change poses a threat to national security."[371] Meyer and Tucker argue that Section 232, as applied by the executive and interpreted by U.S. courts, gives the president discretion to regulate commerce "based on an expansive conception of security," with "virtually no administrative guardrails" in terms of process controls.[372] Elsewhere, Meyer and Tucker argue that a properly designed climate-security BCA should be justifiable under the WTO's environmental exception (Article XX(g)), obviating any need to invoke GATT Article XXI, but that the best reading of the text and jurisprudence suggests that the security exception is also available as a backstop.[373] Reading both pieces together, the proposal uses security for a kind of climate brinksmanship on at least two levels: the dispute settlement mechanism is pressured to resolve the legality of BCAs under Article XX(g) in order to avoid opening the floodgates under Article XXI, while the persistence of these tariffs under domestic national security authority "can motivate allies and competitors alike to come to the table" to achieve lasting agreement on trade-related climate measures like BCAs.[374]

This proposal is an almost paradigmatic example of the discursive approach to security at work.[375] Both the U.S. statute and the GATT security provision are "exceptionalist" in the terms described here, in that they are capable of giving rise to expansive visions of security and are accompanied by only limited procedural controls.[376] Meyer and Tucker are not unaware of the dangers posed by exceptional power. Rather, they appear to share the goal of desecuritization as the "optimal long-range option,"[377] presenting this use of extraordinary power not as an end in itself, but as a means to re-striking the balance between trade liberalization and climate protection. Securitizing climate change, in this way, might be characterized as a necessary but hopefully temporary disruption, oriented toward "saving the political consensus in favor of free trade"[378] in a time of global warming. It arguably reflects an attempt to adjust the liberal economic order, not to fundamentally challenge it.

This approach, not surprisingly, is contestable in ways that evoke the other three security frames discussed above. In the United States, proponents of liberalized trade have argued for transferring competence for national-security investigations to the Department of

[371] *Id.*

[372] *Id.*

[373] Timothy Meyer & Todd Tucker, *A Pragmatic Approach to Carbon Border Measures*, 21 World Trade Rev. 109 (2021).

[374] *Id.*

[375] *See* Section IV.C *supra*.

[376] The U.S. statute, in particular, sets out a particularly expansive definition of "security" that does not necessarily privilege military or defense expertise. *See* 19 U.S.C. § 1862(d). The Trump administration's controversial tariffs on steel and aluminum in the name of national security provide a precedent for this use of presidential authority. Meyer & Tucker, *supra* note 370. GATT Article XXI appears narrower in scope, but Meyer and Tucker persuasively argue that it is broad enough to cover climate change measures—a defensible but controversial position. *See* Meyer & Tucker, *supra* note 373; Heath, *supra* note 369, at 241–43.

[377] *See* note 272 *supra* and accompanying text.

[378] Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 Vand. L. Rev. 985 (2017).

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Defense,[379] thereby restoring the realist emphasis on military knowledge.[380] Another view is not to deny the urgency of climate change, but rather to argue that it should be addressed through more ordinary logics of administrative action and multilateral cooperation.[381] Finally, from a critical perspective, the imposition of tariffs appears as a fundamentally nationalistic solution, which reifies the very national borders that enhance insecurity and impede solidarity in the face of a truly global threat.[382]

D. Investment Treaties and Pluralist Security

The fourth—pluralist—approach to security illuminates rarely discussed dynamics in international law, and specifically in investment law. While there is an extensive literature on the role of security in investor protection, this literature is almost solely focused on the scope and effect of security exceptions in investment treaties, and the related issue of screening investments for national security risks.[383] A pluralist frame, however, reveals how investment treaties prioritize the security of foreign investors in ways that potentially conflict with state security interests, and how the security interests of rural, Indigenous, or other marginalized communities are easily rendered invisible in the context of investor-state disputes.

Investment law can be understood as a regime of security for foreign investors.[384] In particular, investment treaties frequently guarantee investors "full protection and security," which is understood, at a minimum, to require that the state provide an appropriate level of police protection for investors and their property.[385] This means that investors whose property is damaged during protests, strikes, demonstrations, or riots can bring claims against the state, arguing that the police were too restrained and failed to prevent property damage.[386] This aspect of the regime is rarely controversial today and is widely accepted by both claimants and respondent states in arbitral proceedings. Nonetheless, the suggestion that investors enjoy a special right to demand police activity—beyond what is afforded under some states'

[379] Those investigations would focus on the impact of imports on military readiness, critical infrastructure, and "the need for a reliable supply of the article to protect national security." S. 176, 117th Cong. (introduced Mar. 15, 2021).

[380] A similar initiative could be pursued internationally to maintain or even strengthen the tie between military security and GATT Article XXI, which appears in some parts of the *Russia – Transit* decision, discussed in Section V.A, *supra*.

[381] *See* Simon Lester, *Unilateralism vs. Multilateralism on Carbon Taxes / Carbon Tariffs*, INT'L ECON. L. & POL'Y BLOG (Aug. 30, 2020), *at* https://ielp.worldtradelaw.net/2020/08/unilateralism-vs-multilateralism-on-carbon-taxes-and-carbon-tariffs.html (responding to the Meyer/Tucker proposal on Section 232); Heath, *supra* note 369, at 255–58 (discussing efforts to narrow the distance between GATT Articles XX and XXI).

[382] *Cf.* Táíwò, *supra* note 5 (arguing instead for a "collaborative climate politics" that focuses on the redistribution of power and resources across borders).

[383] *See, e.g.*, William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times*, 48 VA. J. INT'L L. 307, 378–81 (2008).

[384] *See, e.g.*, Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L L. 501, 506–10 (1998).

[385] *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, Art. 5(2); RESTATEMENT (3D) FOREIGN RELATIONS LAW § 711, cmt. e (1987).

[386] For an example, see *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, paras. 84–95, (Dec. 8, 2000). On the relationship between bilateral investment treaties and state crackdowns on protest, see Christina Bodea & Fangjin Ye, 50 BRIT. J. POL. SCI. 955, 962 (2018).

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domestic laws[387]—is striking at a time when many are critiquing, and actively seeking to pare back, the role of police in protecting property ownership and in destabilizing communities.[388]

The security interests of investors can also clash with, and sometimes prevail over, the felt security needs of the state and its armed forces.[389] This clash is exemplified by the first-ever investment treaty arbitration, *AAPL v. Sri Lanka*.[390] In this case, a Hong Kong-based investor sought to recover for damages sustained by its prawn farm during a counter-insurgency operation by government security forces, which took place during a "civil war between Tamil separatists and the Sri Lankan Government."[391] The tribunal closely scrutinized the government's decision to retake the farm—located in an area that was "practically out of the Government's control"—and decided that its decision to proceed with the operation without first trying more peaceful means violated its obligation to accord the investor full protection and security.[392] The tribunal's decision, as James Gathii notes, effects in many ways the opposite of GATT Article XXI: rather than providing states with "safe harbor" for their national security measures, the *AAPL* case suggests that a state's decision to deal forcibly with a threat of internal rebellion is reviewable by a tribunal of investment lawyers if the state's action "conflicted with its treaty obligations to protect [the investor's] commercial rights."[393]

The *AAPL* case also reveals how other relevant security interests are effectively erased in the legal conflict between the investor and the state's security apparatus. The dispute between AAPL and Sri Lanka took place against the backdrop of a civil war, in which both government forces and rebel groups were accused of large-scale human rights abuses.[394] The experiences of the communities struggling for security in this context lack legal relevance under the investment treaty, and thus do not appear in the award or in much of the related commentary.[395] Decades later, it remains the case that, to have their security claims fully heard in the context of investor-state disputes, affected communities often must have their narratives seized upon by one of the parties.[396]

[387] *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 194–97 (1989). *But see* Laurens Lavrysen, *Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights*, *in* HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21ST CENTURY 69, 76–79, n. 41 (Yves Haeck & Eva Brems eds., 2014).

[388] For a characteristically subtle treatment of the interaction between contemporary abolitionist approaches and the human right to security, which resists collapsing into a demand for at least de minimis police protection, see Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. CIVIL RTS. & CIVIL LIBERTIES L. REV. 703, 715–22 (2019).

[389] *See* JAMES THUO GATHII, WAR, COMMERCE AND INTERNATIONAL LAW 168–85 (2009).

[390] Asian Ag. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990).

[391] *Id.*, para. 8. The tribunal could not determine whether the security forces or the Tamil separatists caused the property damage and loss of life. *Id.*, para. 85(d).

[392] *Id.*, para. 85.

[393] James Thuo Gathii, *War's Legacy in International Investment Law*, 11 INT'L CMTY. L. REV. 353, 373 (2009).

[394] ASIA WATCH, CYCLES OF VIOLENCE: HUMAN RIGHTS IN SRI LANKA SINCE THE INDO-SRI LANKA AGREEMENT 26 (1987).

[395] This is an ironic consequence of the judicialization of such disputes, particularly given that one historical basis for the full protection and security standard lies in the U.S. practice of making indemnity payments after failing to protect Chinese, Irish, Italian, and Mexican nationals, among others, from mob violence and lynching. *See* Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 ASIL PROC. 16, 21–25 (1910).

[396] *See, e.g.*, Bear Creek Mining Co. v. Peru, ICSID Case No. ARB/14/21, Award, paras. 251–66 (Nov. 30, 2017).

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In this way, international investment law validates the competence of specific actors—investors and state security forces—to speak about security concerns while obscuring others. The destabilizing effects of foreign investment on local communities are frequently obscured, and, even if raised in the context of a proceeding, are difficult to recognize under the applicable law.[397] Even ongoing reform efforts, which are said to range from reformist to radical, rarely contemplate mechanisms to enable such communities to shape understandings about the relationship between investment and security.[398] The failure to recognize the relationship between foreign investment and the insecurity of affected communities, in favor of privileging investor and (to a lesser extent) state security, remains what Gathii calls the "dark underbelly" of the international investment system,[399] and the pluralist perspective highlights the urgency of much more far-reaching reform.

Security pluralism thus points the way for a radically different approach to investment law, which goes beyond full security for investors and essential security for host states. A vital long-term project is to consider how investment law might be reformed to ensure the security of local communities, at every stage of an investment project, and enable them to speak for and define their own essential interests.[400] In the meantime, it is important to recognize that the security interests of local and Indigenous communities are often raised and recognized in investment disputes, if at all, through the arguments of the host state, after the communities have managed to obtain the government's attention.[401] It will thus be necessary to build in and enhance mechanisms for those security claims to be heard and given legal weight, including through the invocation of treaty-based exceptions when necessary.

VI. Conclusion

The foregoing analysis offers no easy conclusions about the relationship between security and international law. International legal regimes always empower the knowledge practices of some actors over others. Security can entrench or expand the existing practices of a regime, or it can disrupt the established order, empowering other forms of knowledge and allowing actors to operate according to a different logic. But we cannot know whether and how we want to disrupt an existing set of rules and institutions until we are faced with a particular regime and a concrete set of circumstances. To be sure, there are reasons to be cautious about security: the concept has longstanding associations with the sharp edge of state power, and there is no clear way to tell how even the most desirable security interests, once vindicated, will reverberate across international law's "spread-out web of

[397] Nicolás M. Perrone, *The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime*, 113 AJIL Unbound 16 (2019).

[398] *See, e.g.*, Chiara Giorgetti, Laura Létourneau-Tremblay, Daniel Behn & Malcolm Langford, *Reforming International Investment Arbitration: an Introduction*, 18 L. & Prac. Int'l Cts. & Tribunals 303 (2019).

[399] James Thuo Gathii, Reform and Retrenchment in International Investment Law, Santander Roundtable Discussions on International Economic Law, Univ. Cologne, Jan. 13, 2021.

[400] *See* Nicolás M. Perrone, *Making Local Communities Visible: A Way to Prevent the Potentially Tragic Consequences of Foreign Investment?*, *in* World Trade and Investment Law Reimagined 171 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019); Lorenzo Cotula, *Investment Disputes from Below: Whose Rights Matter? Mining, Environment and Livelihoods in Colombia*, Int'l Inst. Env. & Dev. (July 23, 2020), *at* https://www.iied.org/investment-disputes-below-whose-rights-matter.

[401] *See, e.g.*, *Bear Creek*, Award, *supra* note 396.

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normativity."[402] But security may also supply a much-needed disruption where international legal systems entrench outmoded forms of expertise, or where international law actually contributes to the creation of insecurity. The analytical framework developed in this Article contributes to addressing these dilemmas, enabling actors in the international system to take apart security claims and see how they work or might be made to work differently.

In addition to informing the work of legal actors, the framework also suggests, by way of conclusion, a systemic point about the position of the state in the international legal order. Security is closely associated with the rise of the state and the problematic notion of sovereignty, and in the international system security interests continue to be vindicated largely by states, acting either individually or collectively.[403] If security talk is indeed on the rise in contemporary politics, we may naturally ask whether this signals a return of the state, and potentially a thinning out of global ordering or, as we are seeing in Europe as this Article goes to press, a slide toward war.[404]

The analysis presented here suggests the picture could be more complex. The first three of the four types of security—realist, widened, and discursive—are closely associated with the military, bureaucratic, and executive apparatuses of the state.[405] But by distinguishing between these types, we can see how the state's relationship to security can be remarkably plastic. A focus on security interests can lead to militarization and the dominance of defensive thinking. But other vocabularies aim to domesticate security in the service of expertise and rational problem-solving, or attempt to reappropriate the power of the security state to address emerging threats like climate change or pandemic disease. Whether either of these alternative visions is obtainable under the pressure and constraint of today's politics is a far more difficult question. But it is critical to think deeply about the possibilities for remaking the security state, lest that thinking be done only by those with far more dangerous goals.[406] To aid this rethinking, this Article provides a conceptual apparatus that can contribute to ongoing interest in the "topography" of the security state in order to identify possible pathways of influence and change.[407]

Nevertheless, this Article's final frame—security pluralism—suggests that even these questions are insufficient to grasp the realities of security today. The insight that people can know their own security needs just as well as appointed experts sits poorly with the structures of the modern state,[408] particularly where those needs are embedded in associative ties that do not neatly conform to national boundaries. The security interests of the most vulnerable are thus often re-articulated and distorted by state officials, international civil servants, non-state

[402] Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 529 (2006).

[403] *See* text accompanying notes 47–54, 154–155, 383–401 *supra*.

[404] *See, e.g.*, John J. Mearshimer, *Bound to Fail: The Rise and Fall of the Liberal International Order*, 43 INT'L SECURITY 7, 44–49 (2019); Harlan Grant Cohen, *Multilateralism's Life Cycle*, 112 AJIL 47, 65–66 (2018). For an argument that the present crisis should bring about a "narrower" international legal order that is focused on preventing interstate war, see Ingrid Wuerth, *International Law and the Russian Invasion of Ukraine*, LAWFARE (Feb. 25, 2022), at https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine.

[405] This is a historically contingent, rather than necessary, association, and there are counter-examples.

[406] *Cf.* Nils Gilman, *The Coming Avocado Politics: What Happens When the Ethno-Nationalist Right Gets Serious About the Climate Emergency*, BREAKTHROUGH INST. (Feb. 7, 2020), *at* https://thebreakthrough.org/journal/no-12-winter-2020/avocado-politics.

[407] *See* NOMI CLAIRE LAZAR, STATES OF EMERGENCY IN LIBERAL DEMOCRACIES 155–59 (2009).

[408] *See, e.g.*, Rana, *supra* note 26, at 1486–90.

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experts, NGOs, or "well-intentioned intellectuals," burying their security claims under "layers of representation and thus silenc[ing] them further."[409] Forceful assertions of state sovereignty may nevertheless be the best available means of protecting those interests, at least under current conditions, and this Article considers when such assertions can be a critical tool to "change the rules of the game."[410] The analysis developed here is thus in sympathy with recent efforts to revisit moments such as Bandung or the New International Economic Order that offered alternative visions of effective state sovereignty, and recover in them lessons for the future of international law.[411]

The pluralist frame urges us to further broaden our horizons to imagine what security practices might look like in a system that more radically decenters the state. In this respect, we can follow history even further back to the early colonial period, where notions of security and safety, sovereignty and statehood, were commingled. As Lauren Benton writes, this early period was characterized not by the full extension and dominance of European sovereignty, but by a robust "jurisdictional politics," in which both the colonizer and colonized were sophisticated in interpreting and manipulating the plurality of normative orders to secure their interests.[412] The events of the early twentieth century, in particular the United States' response to the 9/11 attacks, have reproduced a similar kind of jurisdictional plurality, as an "international state of emergency" has justified the creation of novel forms of administrative power and legal subjecthood.[413] This new reality, like that under colonialism, is far from a benign or congenial pluralism.[414] Yet elsewhere we see resurgent interest in other vocabularies—such as food sovereignty and Indigenous sovereignty—that offer alternative visions of safety and security that emerge from associative ties other than statehood.[415]

This Article explores the extent to which these vocabularies create alternative demands for security and survival that are often rendered invisible by the international legal system, but are no less important than those of the dominant actors. The struggle for visibility is a long-running theme of strands of scholarship that are often left out of mainstream discussions of international law and security.[416] The framework developed here attempts to build a bridge across those divides in effort to foster a richer, more inclusive, and more authentic discussion of what it means to be secure in an uncertain, contentious, and warming world.

[409] Sarah Bertrand, *Can the Subaltern Securitize?: Postcolonial Perspectives on Securitization Theory and Its Critics*, 3 EUR. J. INT'L SECURITY 281, 287, 295 (2018).

[410] B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

[411] *See generally* ADOM GETACHEW, WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION (2019); BANDUNG, GLOBAL HISTORY & INTERNATIONAL LAW (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017).

[412] LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400–1900, at 10–15 (2002).

[413] Kanishka Jayasuriya, *Struggle Over Legality in the Midnight Hour: Governing the International State of Emergency*, *in* EMERGENCIES AND THE LIMITS OF LEGALITY 360 (Victor V. Ramraj ed., 2006).

[414] *Id.* at 367–68 (arguing that rise to prominence of the "enemy combatant" as a legal category is emblematic of this new reality).

[415] *See, e.g.*, Fakhri, *supra* note 165; Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367 (2021).

[416] See, in addition to what is cited above, HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN AMERICAN INTERESTS IN INTERNATIONAL LAW (2008); B. RAJAGOPAL, INTERNATIONAL LAW FROM BELOW (2003); James Thuo Gathii, *The Promise of International Law: A Third World View*, 114 ASIL PROC. 165 (2020).

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