

## 2. The influence of international law in a new international order

### **Abstract**

This chapter seeks to find a correlation between the changes that the international order is undergoing and changes on the use -or disuse- of the international legal system. The main argument is that international law gained ground with the prevalence of a rules-based order. Multilateralism was the grounds for finding solution to global problems, and international norms were designed with the goals to finding common grounds to solving international issues and maintaining peace and security. While this has not changed, and international norms are still an important part of how states relate with one another, today states seem to find it harder to agree on new instruments, and they do not want to be bound by new international obligations. As a result, states are turning to national law to resolve common international threats, or at least this has been the case with migration. The goal of the present chapter is to explore these changes between the development of the international legal system and the changes within the international order. In particular, these pages will set forth this parallelism in the field of security, providing a new vision of states deal with new security threats today.

### **The return to a Westphalian state system?**

Theoretically, liberal democracies base their relations on multilateralism and cooperation. This is not only due to the economic gains that can be generated from international trade, but also because of the mutual goal to pursue international protection and security. This cooperation in the field of security has been aimed at preventing armed conflict and deter threats. And one way to do so has been through the construction of an international legal system with its own institutions.

A system of rules within the international order can be useful to avoid conflict and solve disputes. First, rules can facilitate international cooperation and, in general, any type of transaction. Second, rules also give information beforehand on the consequences of wrongful acts. They prevent cheaters from getting away from their transgressions. Their acts have consequences and can be punished, while those adhering to agreements are rewarded with trust and increased cooperation. Third, rules create a linkage between actors, which generates greater interdependence and in turn increases the costs of cheating. The rule of law has an important role in all these spheres, and an international body of norms is key to promote economic and social development, and to maintain international peace and security.

In international relations, the idea of sovereignty arose with the Treaties of Westphalia in 1648. Since then, states have been considered political units with the monopoly of force within their mutually recognised territories. They are all sovereign independent states within an international system. They have formal diplomatic ties and international law is the basis of these international relations. The domestic and international spheres remain separate, and one state cannot intervene in the internal affairs of another. At a smaller scale, sovereignty is also the power of an authority to control the decision-making process within a territory. And in today's modern democracies, this power rests in the citizens

who, through electoral processes, select the leaders who will exercise this power through representative institutional bodies. Essentially, sovereignty can also be understood as the power to make laws.

With the end of the Cold War, there was a common understanding that governments were expected to protect the human rights of individuals and that failure to protect them could legitimate concern to other international actors and the international community. According to this vision, states were no longer responsible for protecting their territories and their citizens, but there was also a duty to protect the human rights of those residing in other nations where the state failed to do so. A “post-Westphalian” system emerged, one where international authority structures and supranational interests prevailed (Kreuder-Sonnen and Zangl, 2015).

Nevertheless, in recent years we have seen an increase in conflict, but also of impunity (Colomina et al, 2023). There even seems to be a comeback of territorial disputes. While it seemed that in this Century we had long left behind these types of controversies, conflicts to gain territorial control have proliferated, as the conflicts in Ukraine, Gaza, or Nagorno-Karabakh have recently shown. There seems to be a return of an order based on geopolitics. But the idea of what “geopolitics” means has varied since its early beginnings.

The notion is best known to have been used since the origins of the nation-state as an international actor after the Peace of Westphalia in 1648, which put an end to the Thirty Years’ War in Europe. One of the first theorists in the discipline was Friedrich Ratzel, who used the idea of the “Kampf um Raum” (Fight for Space) in the book “Political Geography” of 1897. His geopolitical theory was focused on the relationship between geography and the political system, as he believed that the expansion of a state’s territory was associated with the expansion of its economy, politics, development and, altogether, influence. For him, space was vital for geopolitics, and he suggested that it was key for a state to govern certain spaces (land) and its resources to secure its survival (Costachie and Damian, 2010; Hernández, 2022). Later, theorists like Alfred Thayer Mahan, Halford MacKinder or Henry Kissinger have contributed to the nature of the concept of geopolitics with diverse perspectives, theories, and elements.

History then shows that theories evolve, and so has the concept of geopolitics. While at its core it remains a combination of geography and politics, understanding that power politics are influenced by geographical factors, these factors have widely varied over time. In the current international scenario, geopolitics is no longer only the expansion of land or sea, or the balance of political constellations. It has new elements that are equally important. The rise of disruptive technologies such as artificial intelligence or quantum computers will also shape how great powers use them for geopolitical gains, as the advantage they provide will also be a key factor for achieving superiority in confrontation. Cybersecurity has also become part of the arsenal in times of conflict, as attacks in the cybersphere are highly sophisticated, persistent, and can lead to crucial infrastructure damage for the opponent. In sum, today geopolitics are not only based on purely territorial gains, but are also conditioned by the economy, technology, or the cyber sphere, among other factors.

Therefore, the image that we had immediately built after the end of the Cold War and the one we are facing today are quite different. Back then, there was good reason to think that

wars were becoming obsolete, that conflicts over territory were disappearing, and that violence was vanishing of the international system. Between 1992 and 2005, violent conflicts fell by some 40 per cent (Mack, 2007). In the 1990s many civil wars ended, such as those in Cambodia, Lebanon, or Mozambique, as these were no longer useful as fields of influence between the Soviet Union and the West (Lacina, 2004). The level of economic interdependence across the world was growing at a rate we had not seen before. Democratization was taking place.

As put by Salamé (SIPA, 2022), “In the very first years of this Century, the three major vehicles for the optimism of the liberal order came to a halt, almost at the same time”. The elements he sets for are democratization, economic interdependence, and globalization. While democracy reached a peak at the end of the 1990s, it then started to “stagnate” (SIPA, 2022). New countries were not becoming democratic, and some democratic ones faced *coup d'états* (i.e. Myanmar, Thailand, or Burkina Faso). On top of that, the quality of democracy was dropping.

As stated by Freedom House, “For years now, authoritarians have been on the offensive, while liberal democratic practices have increasingly been discarded” (Smeltzer and Buyon, 2022). The numbers are unequivocal: “The present threat to democracy is the product of 16 consecutive years of decline in global freedom. A total of 60 countries suffered declines over the past year, while only 25 improved. As of today, some 38 percent of the global population live in Not Free countries, the highest proportion since 1997. Only about 20 percent now live in Free countries” (Repucci and Slipowitz, 2022). The Democracy Index led by The Economist shows similar numbers, revealing that only 8% of the world’s population lived in full democratic countries in 2022 (The Economist, 2023). The International Institute for Democracy and Electoral Assistance concluded in 2022 that half of the world’s democracies were in retreat, and that between 2016-2021, the number of countries moving towards authoritarian regimes had more than doubled (IDEA, 2022).

In democratic states, violent events have materialized after free democratic elections. Rioters in the Capitol of the United States in 2021 to overturn the results of the presidential elections in the country are an example of the same illiberal forces that are corrupting democratic institutions. Hundreds of sympathizers of Jair Bolsonaro irrupted in the Congress of Brazil after Lula da Silva took office in 2023. These events are just but another example that change is happening, and that liberal democracies must be reinforced if we want them to endure. Repucci and Slipowitz (2022), from Freedom House, summarize the changes within the international order over the past twenty years:

“For much of the 21st century, however, democracy’s opponents have labored persistently to dismantle this international order and the restraints it imposed on their ambitions. The fruits of their exertions are now apparent. The leaders of China, Russia, and other dictatorships have succeeded in shifting global incentives, jeopardizing the consensus that democracy is the only viable path to prosperity and security, while encouraging more authoritarian approaches to governance.”

(Repucci and Slipowitz, 2022)

While these changes had been baking for a while against the abuse of the West, the events of September 11 set a landmark, and a new wave of securitization began. Securitization then becomes another sign of this changing international order. Since 2001, there has been an apparent return by states to recentre their focus on the units of the territory and the population (Foot, 2005), and different domains have been securitized. Securitization theory shows that certain political issues can be presented as security threats that need to be dealt with certain urgency because of the danger they pose to the nation or society. It also asserts that “issues are not essentially threatening in themselves; rather, it is by referring to them as ‘security’ issues that they become security problems” (Eroukhmanoff, 2018). Buzan et al. (1998), when introducing the notion of securitization, referred to the military, environmental, economic, societal, and political sectors. For instance, in the name of protecting national security, counter-terrorist legislation has diminished some of the rights of the population. And over time, discourses connecting the terrorist threat with immigration have expanded. While securitization theory can be analysed from different issue areas, the field of migration will also be the one concerning the central question of this book.

In sum, what securitization shows in the context of international relations is that national security and the protection of sovereignty remain the most important units for the state, and that liberal values seem to be side-lined when confronted with security matters. The European Union, a strong advocate of the liberal order, has also moved towards these securitization practices in the field of migration. Since the beginning of the century, the EU has prioritised security issues to facilitate the use of short-term policymaking instead of political or economic reforms, which would require long-term policies. This is the case, for instance, of EU-Maghreb countries relations. As Joffé (2008) argues, in the aftermath of 9/11, these relations became based mostly on the securitization of migration and on controlling transnational terrorism, instead of the normative objectives that used to characterise the objectives of the EU in the Maghreb area. There has been what he called an “externalization-in-reverse”, as this prioritization for security issues has nullified the normative policies that the EU had previously adopted in the area. He poses a series of questions and concerns on the implications that these actions may have for the EU:

“This pattern of events raises other questions as well, not least as to the real novelty of the Union’s normative agenda and of the degree to which it really wishes to act as a normative power. It may well seek to project its values but to what extent can those values be described as universal and to what extent are they merely a projection of a specifically European agenda? It also revives the argument as to whether the European Union is really – as it now claims – an experiment in supranationalism or whether it is still trapped within the intergovernmental arena.”

Joffé (2008)

As a result of the 2022 Russia’s invasion of Ukraine, there was an important shift by some states in Europe. Firstly, Denmark changed its almost thirty year opt-out direction regarding EU security and defence matters, and in June 2022 the Danes decided to abandon this reservation and join EU and security defence. Secondly, Finland and Sweden also gave up their long-term neutrality and applied to join the NATO in May of the same year. Thirdly, Germany passed a constitutional amendment to provide additional budget to their armed forces and renew its army equipment. While this may seem unimportant,

if one analyses defence issues within the country, it can be seen that these have been rather neglected by German politicians, thus increasing the budget for armed forces now represents an important “paradigm shift” (Moser, 2022).

National security has gained relevance through liberal states, and while the West used to be the promoter of universal values, it has slowly shifted its security policies towards protecting the nation from external threats. Trump made this move evident during his presidency, but the European Union has also seen its states increase military budgets and strengthen border control. The securitization of migration is just but another example of these measures moving states away from liberalism and bringing them back to centring their agendas through the lens of security and the protection of the nation.

### **International law-making in the 21<sup>st</sup> Century**

We are well aware of some of today’s armed conflicts in Ukraine and Gaza. But there are also other conflict zones determining the future of the world’s order. I am referring to those in the South China Sea and the Arctic region. The return for geostrategic considerations and realist calculations by big powers, the emphasis on power sources, and the return of international realist conceptions show a system in constant competition (García et al, 2019).

International commitments are also backsliding. The last significant multilateral agreement was the 2015 Paris Agreement on climate change (Sending, 2022). The United Nations Climate Change Conference of 2023 (COP28) in Dubai was the first event of the kind to produce a text that explicitly recognized the need to “transitioning away from fossil fuels” (oil, coal, and gas) as a response to the climate crisis (UNSDG, 2023). Paradoxically, at the same time, the International Energy Agency (IEA) expects that global demand for oil, coal and natural gas will reach its peak this decade, based only on current policy settings (IEA, 2023). WTO members can invoke exceptions, but only in exceptional circumstances, as there must be a balance between states’ interests and their obligations to reduce barriers to trade. Nevertheless, trade restrictions on national security grounds have proliferated in recent years, as well as questions on the connection between trade and national security (Bacchus, 2022). Multilateralism as a system of rulemaking is seems to be in decline. Firstly, because very little is happening, with few international agreements being concluded. Secondly, because even when agreements are reached - being mostly declarations or soft mechanisms without binding obligations- the content of the same texts is often overlooked. In a way, the war in Ukraine is seen as existential threat, not only for the country at stake, but for the principles of the rules-based order (Sending, 2022). On a similar note, Nigerian President Muhammadu Buhari made a statement at the UN General Assembly in September 2022, on the effects of the armed conflict in Ukraine:

“Such a conflict will have adverse consequences for us all, hindering our capacity to work together to resolve conflicts elsewhere, especially in Africa, the Middle-East and Asia. Indeed, the ongoing war in Ukraine is making it more difficult to tackle the perennial issues that feature each year in the deliberations of this Assembly, such as nuclear disarmament, the right of the Rohingya refugees to return to their homes in Myanmar, and the

Palestinians' legitimate aspirations for statehood and reduction of inequalities within and amongst nations.”

(Buhari, 2022)

Even in the case of the United States, the hegemonic power that endured the international order, we see a decline in multilateralism and advancement of international treaty law. Trump took office being clearly hostile towards international treaties. Following his ideals of “America first”, he even withdrew the country from the United Nations Human Rights Council (AJIL, 2018). But this decline in treaty law was also seen by his predecessor, Barack Obama, as he submitted far fewer treaties to the Senate for approval than previous presidents (Peake, 2018).

As put by Salamé, there has been a “deregulation of force” (Bobin, 2022). Colomina argues that the capacity to govern of international law has been diminished, and an example of this lack of enforcement is precisely the dispute between Prime Minister Benjamin of Israel Netanyahu and Secretary-General António Guterres on the legitimacy and influencing role of the United Nations on the Israel-Palestine conflict (Barcos, 2024). And while international events are becoming more unpredictable, there is also an erosion of international norms (Colimina, 2023). Sending (2022) describes this decay of multilateralism:

“The multilateral system will be further undermined, that new efforts at multilateral rule making will be blocked, and that multilateralism will be used more and more as a tool to be exploited rather than a framework for international cooperation. This does not mean that there will not be multilateral governance, in the form of loans from the IMF, development finance available from the World Bank, and operational work by UN agencies on a range of issues. But it does mean that we will see more club governance, increased reliance on private actors and funding, and more fragmentation with great powers advancing competing agendas through these organizations. This is happening at a time when the need for stability in international rules, and beefed up governance capacity to prevent and manage global challenges is greater than ever.”

(Sending, 2022)

Jorgensen (2020) explores the rule of law through the lens of American foreign policy. In his book, he analyses five different competing conceptions of the international rule of law through the lens of American foreign policy ideology. Legalism, liberal internationalism, illiberal internationalism, liberal nationalism, and illiberal nationalism. At this point, it is particularly insightful to compare the notions of liberal and illiberal internationalism. Liberal internationalism is one of the ideal American policy types. This identifies the rule of law “in externalization of American constitutional government to establish a seamless system of law” (Jorgensen, 2020), with both national and international legal systems supporting liberal values, and where democracy is then a constitutive of the international rule of law. What the rule of law should achieve in this sense is a steady progression for greater freedom and conscience (Slaughter, 2007). Illiberal internationalism, on the other hand, uses the international legal system to clear the way for American foreign policy objectives. As put by Jorgensen (2020), “The rule of law for illiberal internationalists

means a flexible framework of legal rules and institutions that facilitates US strategic autonomy and diplomatic justifications (...) International law is thereby preserved as a diplomatic tool between state rather than a means for vindicating the legal rights of natural persons”.

The views of liberal and illiberal internationalism from a US foreign policy perspective exemplify the same contradictions that some states face when looking at the world order and the international legal system under which it stands. The liberal order seeks to promote liberal values, those connected to democracy, international trade, individual rights and human dignity. But it has also been abused by the same hegemonic power that established it, intervening in the domestic affairs of less powerful states and being used to advance its own national interests. What stands out about the comparison between all five competing conceptions of the rule of law in the context of American foreign policy is that they all integrate a “strategic formulation for advancing [American national interests] through law” (Jorgensen, 2020).

Krisch (2005) discerns this use and misuse of international law, arguing that it can serve both as an instrument to exercise dominance and as an element of resistance to it. From the one hand, international law bows to the demands of powerful states in order not to be entirely sidelined. On the other hand, if it serves to the powerful only, it may appear as a mere tool, unable to provide the legitimacy they seek. As explained in the previous chapter, some states have seen the international legal system, and the international order, as one reflecting only the values and interests of a dominant West. And as a response, states like China and Russia, but also others such as those being part of the BRICS or the Middle East, are today contesting this Western hegemony and calling for an order that also represents them. In this context, international law should not be seen as undesirable, but as a tool that provides legitimacy, humanitarianism, and “order”.

Securitization processes such as those seen in the field of migration are another sign that the order as we know it is changing. Again, these practices are another example of the ways through which states prioritize adopting national legislation and policies to address what they see as international “security threats”. In turn, this serves as an additional example of this return to national security and bringing at the forefront of the security arena the protection of national sovereignty. International concerns such as those in relation to migration, terrorism, climate change, and others, are thus not addressed through the lens of multilateralism and international law. They are instead managed mostly domestically, even when they have a clear international reach. Sovereignty remains the most important unit for the state, and today it seems to be moving away from the liberal values that had been established in the past decades. Thus, while with the end of the Cold War it seemed that the protection of human rights and the promotion of liberal values would be at the center of the international arena, national political interests are regaining prominence in today’s political affairs, if they ever lost it.

Vietti and Scribner (2013) argue that from a sovereignty perspective, irregular migration is perceived as an attack on the state’s sovereignty, which justifies the deployment of immigration officers and frontier guards, as well as the construction of border fences. The worsening of the image of refugees given by some governments and media outlets presents them as invaders from which we need to protect. The systematic representation of the image of refugees as threats to our security has put them at the forefront of many national security agendas and has led to a rise of populist and extremist parties. As argued

by Massimino (2017), this increasing numbers of ultra-right nationalist groups and their supporters in Europe poses an existential threat to European democracies and to the European Union.

Recent practices securitizing migration have shown that there is a preference for national security over human security. National self-interests and the protection of national territory come first, even before the security of vulnerable groups such as that of migrants. What the securitization of migration shows in this respect is that the new geopolitical model and a potential return of a more realist vision of politics strongly affects the rights of unprotected or more exposed groups. These become even more vulnerable due to the changes in the international order is undergoing and because of the prioritization of national security strategies and defense over the protection of the rights of the most vulnerable.

The effects of prioritizing national interests and national norm-development over international norm emergence, leads to creating new patterns around the globe and for more states to adopt the same strategy in a kind of spill-over effect. This was what happened after 9/11, when the United States reacted adopting hard security norms restricting the rights of immigrants in the country. This is a practice which has been reinforced thereafter not only in the United States, but also abroad. Ever since, there has been a new wave of securitization practices, and securitization laws and policies in the field of migration have become rather common in regions around the world, as explored in Chapters 5 to 8. When new security measures are adopted in a group of countries or in a region, this can easily lead to other states following with similar behaviors. When these states already face immigration concerns, this serves as an impulse to further justify the adoption of national security controls. And this has been the case with migration, an area which has become highly securitized.

If we consider law development as a flexible process in which different actors participate, we also see a tendency change in the way international law has been promoted in the past years. As it will be discussed in the following section, states are not the only actors interested in securitizing migration. It is not a matter of states alone or of international organizations, but civil society and private actors have a huge impact in the design of new norms. And actors such as Private Military and Security Companies (PMSCs) are today highly involved. Some scholars (Kaunert and Ezeokafor, 2022; Mabon, 2018) have already emphasized the role of non-state actors in the securitization process, thus showing the importance of a wide range of actors intervening in the construction of security threats. This book will also refer to the influence of private actors in the decision-making process and in securitization practices, although the main focus will remain at the state level.

Actors such as PMSCs have an important role in shaping norms and policies in the security arena, as the interplay between government and private entities has become key in today's norm-making processes. In the field of migration, there has been a privatization of the sector, as these companies do not merely provide border security and control services or consultant advice to governments, but they actively frame, shape, and implant militarized responses. Governments and regional bodies have shifted the burden to deal with forced migration towards non-state actors to "blur" their responsibility with refugees. Their responses to deal with these migratory flows have been directed to the security sphere, with an increased and more technical control of the borders, the

militarization of the way we deal with migratory-related issues, and a decrease of the eternalization of human rights (Morgades, 2017:38).

Furthermore, new ways of understanding the international legal system have also evolved, from voices claiming a growing relevance of Soft Law, to those defending a new doctrine of sources, to theories of new forms of creating norms such as informal law-making. Altogether, this has meant that a new way to understand international law and the international system has emerged, partly due to the continuous changes that the international order is facing, and partly due to the impact of globalization, which has led to a continuous renovation of the way international norms are made. A change in the way we recognize and accept law has mutated since the traditional doctrine of sources of international law.

This change of direction of international law, when mixed together with the changes within the global order and power forces, shows a completely new picture for the future of the international legal system. The Brexit in the European Union; Trump's unilateralist vision during his presidency in the United States; security issues like the climate crisis, terrorist attacks, or nuclear threats, are just a few examples of the events which have shaped the 21<sup>st</sup> Century. And more recently, the invasion of Ukraine by Russia of 2022, or the escalation of the Israeli-Palestine conflict in 2023 bring us back to old military conflicts. All these episodes are crystallizing the era of change that we are living in, where geopolitical interests and national security come first, and international cooperation and problem-solving are somehow side-lined. This does not mean that the international legal system fails to be observed, but it does raise awareness on the maintenance of international peace and security as some thought it would be after then end of the Cold War. And today it is becoming more important than ever to secure the prevalence of the protection of human rights above all.

We seem to have forgotten that it is not only important to protect the security of the nation (national security), but we also need to secure that of the individual (human security). According to the 1994 UNDP report, human security is both "freedom from fear" (i.e. threats from war or violence) and "freedom from want" (i.e. poverty, pandemics, etc.). In this report, the UN agency enumerates seven different categories which can lead to human security threats: economic, food, health, environmental, personal, community and political (UNDP, 1994). Failure to protect the individual from one or more of these categories can lead to increasing the vulnerability of already ill-protected groups such as refugees. Economic crises, environmental disasters and political, religious, or ethnic persecution, can all lead to forcing families to leave their homes in search for a safe haven. Internally displaced peoples and refugees are a result of these and other catastrophic events, thus migration results from and can lead to human insecurity.

Thence if we continue focusing on the national security perspective instead of that of human security one, we are opening the pathway to militarizing migration, that is, increasing surveillance and border control and allowing the detention and deportation of immigrants. In sum, more restrictive security policies and a more restrictive legal framework. And contrary to what some appear to believe, establishing prohibitions and restrictions to migration will not increase the security of the state, but will mostly diminish the security of these already vulnerable groups.

## **New age, new threats**

Global governance is compound by rules, systems of rules and rule-governed behaviour at the global level (Biersteker, 2017). While international norms used to be designed and addressed to deal with the relationship between states, global governance arrangements today involve a wide range of actors, including public and private actors, from private companies to the citizenry.

Globalization, privatization, and the fragmentation of states have introduced new actors in the international legal sphere (Creutz et al., 2019). International law's subjects and scope have varied over time, and past definitions -such as those referring to international law as "the law of nations" whose rules only applied to states- have become old-fashioned and in misuse, since the literature has shown that this definition and its scope has changed (Whytock, 2016). Thus, focusing solely on states as actors of international law could provide a misleading picture of international law-making (Boyle and Chikin, 2007).

While debates on world legislation date back to the twentieth century (Wessel, 2011), in the past years, discussions on the role of international actors in the international law-making process have expanded, and there seems to be some agreement on the idea that "law-making is no longer the exclusive preserve of states" (Boyle and Chinkin, 2009). Much of the power that non-state actors have in shaping international legislation and legal measures is influential, as they have specific knowledge in particular areas and thus can help in the shaping of new standards and operations with their expertise. International organizations, NGOs, and civil society organizations are some examples of actors contributing to making international law.

But there are also other actors such as transnational enterprises or multinational corporations, seeking to expand their business interests across countries. This does not necessarily mean that their interests represent those of the state. While they became more manifested during the 1950s and 1960s, they have become more powerful over time. Throughout the years, the idea that there are different types of international subjects besides states has gained momentum, and sovereignty does not seem to be the determinant feature that defines an international actor anymore (Ibáñez, 2016). Instead, characteristics like autonomy, influence, and the willingness to participate in international affairs have become increasingly important (Pareja-Alcaraz, 2010).

The role of non-state actors has been addressed in the field of international law-making, but it is also important in shaping international events that lead to new power structures or geopolitical concerns. The 9/11 bombings became the first attack ever to be directed against the United States by a non-state actor. This raised questions even for realists, who had centred states as the main and sole unit of the international system (Buzan and Hansen, 2009). Now an actor they had not perceived to be as relevant as the state was precisely the one to attack a country and shake the international security panorama.

McFate (2015) comments that this multiplicity of actors has led states to lose their centrality in the international order. For instance, software multinationals and their support to a specific software programme can affect public spending (Wright, 2020). When a private company owing the keys to 5G is regarded as a threat to national security, the refusal to purchase its equipment delays the adoption of 5G coverage and, consequently, also the modernisation of certain areas (Monti, 2020). In the words of

Monti and Wacks (2022), “the decline of governmental power has increasingly placed the reins of public sector in the hands of private, supranational entities that control very aspect of our Matrix-like existence”.

The involvement of Private Military and Security Companies (PMSCs) is evident in the field of security as they are shaping the legal and policy measures are implemented in a wide range of countries. PMSCs are participating in armed conflicts such as that between Russia and Ukraine, but they are also actively involved in the regular administration of security services of states. They are controlling territorial borders, and, in the case of migration, they are also involved in deportations, detention, housing or transportation. And they are not only providing these services to states but are also actively involved in the framing and shaping of them (Davitti, 2019). Through their lobbying and involvement in regulatory processes, it is hard to separate their interests from those of the international community when they are at the negotiating table. The more influence they have, the higher their economic profit, and they have created a security market with new technologies, that states heavily rely and depend on. As a result, there has been a normalization of the use of PMSCs in the context of migration. The increasing need to provide security services and improving technologies has paved the way for these companies to expand throughout and reinforce their role as the security guarantor. Today, “these measures have become everyday policies integrated in our societies and which many believe to be necessary for the normal functioning of the state” (Planas, 2023).

In the field of migration and security, they are heavily involved in the draft and negotiation process of security measures and strategies. And with their participation, they are “helping to classifying irregular migration as a security threat and framing the situation as a ‘crisis’, one that can only be addressed through emergency responses” (Planas, 2023). As explained in a report by Statewatch and the Transnational Institute, “the EU is always keen to proclaim its origins in and ongoing commitment to upholding peace, human rights, democracy, and the rule of law, and promoting diplomacy and soft power over militarism and war. Upon closer examination, however, the bloc’s spending priorities make clear that its identity as a political project is shifting” (Jones et al., 2022).

And this shift towards prioritizing national security has occurred in the past years and has intensified over time. National security has always been used as a reason to justify a wide range of political decisions. However, there are different scenarios, and some may seem more easily justifiable than others. We have recently lived a pandemic where the restriction of rights was unquestioned because of the alarming consequences and uniqueness of the situation. A different situation was that in relation to the Global War on Terror, where the army and law enforcement powers were used to respond to the 9/11 events.

Global governance is highly concerned with security threats. But one needs to keep in mind that national security threats evolve over time and are also used according to different ideas. Ullman offered a definition of national security threat a few decades ago that did not include terrorism (1983):

“A threat to national security is an action or sequence of events that (1) threatens drastically and over a relatively brief span of time to degrade the quality of life for the inhabitants of a state, or (2) threatens significantly to narrow the range of policy choices available to the government of a state

or to private, nongovernmental entities (persons, groups, corporation) within the state”.

(Ullman, 1983)

However, this is a rather old definition, and more recently other authors have identified a national security threat as any action or event conducive of negative consequences for the state or society (Krahmann, 2005). Therefore, there are new threats today and these seem to have a much wider range. Bello (2017) refers to these new threats in the following words:

“The particular novelty of *new threats* consists of the unpredictable extension that they can reach; in fact, new threats are characterized by unpredictability in terms of 1) occurrence, 2) places and agents involved, and 3) duration. They implicate perceptions of insecurity that concerns an extended number of states perceiving common menaces”.

Bello (2017)

Furthermore, it is also important to note that there is a subjective element, as threats are also shaped by the actors’ perceptions and/or misperceptions (Duelfer and Dyson, 2011). Threats have an important psychological element, and our perception of what a threat is and what is not can change over time, or according to what is presented to us as a potential danger.

In fact, in the case of migration, this increase in border policies and border control has not stopped or lowered the number of migrants trying to reach these shores (Avdan, 2012). Instead, it has increased the market for irregular crossings (Dunn, 2009; Bello, 2017). And negative public perceptions have also contributed to further securitizing migration. With inflation, debts, and economic crisis, sectors such as public health or education have been affected by cuts in recent years. As a result, citizens were faced with more unstable lives, and were concerned about maintaining their jobs and providing for their families. And when a period of economic instability is mixed with a salient number of incoming migrations, the perception of migrants as threats to the security of ordinary people is intensified, discourses linking migration to security are more easily believed, and prejudices are spread throughout.

These factors are then also used in public debates by certain groups to justify the need to stop immigrant flows into their countries or regions. While the unstoppable growing number of refugees has also raised awareness of their vulnerable situations and has turned into support by many, others have also felt threatened by their presence and have started proliferating discourses advocating for greater controls of migrant flows. The political elite, supported by the media, have presented refugee flows as crisis, and a feeling of insecurity has been spread throughout.

Furthermore, terrorist attacks have exacerbated these perceptions and have reinforced the connection between migration and security. The attacks against the Twin Towers and the Pentagon in 9/11 were just the first of many other terrorist attacks in Western countries, the aftermath of which has always witnessed discussions on whether refugee waves hide potential terrorists and debates questioning the reception and integration of immigration.

As a result, many have started looking at migrants not just as an economic threat, but as a security threat.

In sum, the century has brought a series of changes that, when put together, have shaken the international security scenario. States are not the only actors perpetrating attacks and threatening international security, but they are also not alone in the law-making process. Instead, other actors such as private companies are also actively participating in legislating and negotiating policies, deciding security strategies, and framing new security threats. In the case of migration, the events of 9/11 were just the first of a series of terrorist attacks which have continuously presented immigrant communities as a source for concern. And after times of economic recession such as the 2008 financial crisis, or of instability such as with the migration crisis of 2015, the idea of an immigrant as a security threat has been reinforced. And over time, the image of the migrant as a dangerous outsider has been entrenched. Thus, when all of these elements are mixed, the result is an increasing and unstoppable process of securitization of migration which has been extended to this day. There are political actors interested in re-gaining control over certain areas, private actors with interests in securitizing them, and a changing global order that has even re-shaped the ways in which the law is made. States are returning to prioritizing national security, and migrants are the ones to pay the consequences.

### **Security at the border**

Border control is a fundamental part of states' sovereignty. States are the ones to decide who is allowed to enter their territories and under what conditions. Border control has also become a typical securitization element in the field of migration. A such, a question that arises is in relation to state sovereignty and migration: What are the reasons to expel a foreigner and how is this linked to state sovereignty? As explained by Guild (2009), there are three main reasons, and they are all connected to security. Firstly, and most simply, states may expel a migrant if it is in the territory of the state illegally. This can be due to not having authorised the entrance of the individual, or because the individual has overstayed his or her permission. This breach is in relation to the power of the state to control who is in its territory and the more a state invests in border controls, "the higher the stakes against the foreigner who has not fulfilled the conditions" (Guild, 2009). The individual is categorised as "illegal", and this illegality in itself is a security issue (Bogusz et al., 2004). A second main reason to expel a migrant is because he or she has committed a criminal act. In this case, the foreigner is within the territory of a state lawfully but is expelled because he or she has breached national criminal laws. The third common ground is in relation to national security, meaning that the individual is a threat to the security of the nation, and collective security is prioritised. The Century has come with discourses presenting immigrants, including refugees and asylum seekers, as security threats and even of potential terrorists. In the United States, asylum seekers have been conceptualised in the context of terrorism, assuming that they penetrate in the country through asylum systems to then perpetrating attacks (Baylis, 2008). The term "immigrant" has come to be associated with a pejorative meaning, associated with "suspect" and "potential hostile foreigner" (Bigo, 2008). Gibney (2004) contends that "Many of these connections are greatly exaggerated: a tribute to the enduring force of stereotypes and the vulnerability of new entrants rather than a victory for objective data". And states have been unwilling to provide protection to these groups in the name of national security. In the words of Guild (2009):

“The framing of the security issue as one of balance, between the duty of the state to ensure public and national security and the right of the individual to protection against return to a country where he or she fears torture, leads away from the protection needs of the individual. The argument always privileges the state position as it is inherently state-centred: the state’s duty to its people by definition excludes the refugee seeking protection. As the purpose of the state is to serve its people, the refugee is constructed as the outsider whose claims can be sacrificed in the name of the collective.”

(Guild, 2009)

The idea that has remained still since September 11 is that to securitize migration, refrain unwanted immigrants from coming and depict them as an external threat. Walia (2021) identifies four main border governance strategies. The first one is based on exclusion, based on expelling unwanted migration by using walls, detention centres, and deportations. Restrictions to enter and remain in the country are designed and migrants are *made* illegal. There is an association between unwanted migration and its criminalization. The second strategy is territorial diffusion through the internalization and externalization of border control. The state thus monitors and restrains migrants within its territory, but also beyond its borders. These restrictions within the state can be measures to limit access to services that citizens enjoy such as healthcare, childcare, education, voting, etc. Externalization measures refer to interdictions of boats at sea, offshore detention, readmission agreements with third countries, safe third country agreements, among other examples. A third strategy of border governance is the commodification of migrants with deflated labour power to guarantee capital accumulation. Since these migrants risk deportation, they are diverted towards labour exploitation. A final strategy occurs through the discourses used by the political elite and the media to refer to migration. Immigration is often connected to higher criminal rates, or refugees (and the so-called ‘refugee crisis’) are presented as a threat to the welfare system. Altogether, these measures put barriers to the enjoyment of basic rights of migrants while also complicating their integration into the host society.

However, as states and other actors continue drawing a picture of the migrant as an external threat from which society and the nation need to protect from, there is an important number of migrants, including refugees, fleeing from conflict, devastation, and poverty with the only intent to improve their lives and that of their families. Gibney (2004) challenges two assumptions that, he argues, people make about states and refugees. The first of these assumptions refers to the West and the creation of refugees. He argues that it is often assumed that liberal democratic states have few or no duties towards refugees, since they are not the ones responsible for their fleeing their country of origin. These states are the ones to blame, since they are the ones persecuting based on discrimination against them based on race, religion, ethnic origin or political opinions. However, he argues, Western states also “cause or contribute the harm that leads to refugee movements”. Examples of this are foreign military interventions such as the US and Australian involvement in the Indochina in the 1960-70s, or the Kurdish refugees of the Gulf War. Contribution to refugee movements can also be exacerbated by selling or supplying military arsenal, or political or economic support. Assisting or supporting states which violate the rights of its citizens is not a way to end conflict, but one to aggravate it. Other authors have also referred to neo-liberal economic policies and institutions such as

the International Monetary Fund or the World Bank as being another source for the emergence of conflicts, since these are funded by Western countries and established according to its standards (George, 2003). The second assumption refers to the idea that those being the cause of infliction of harm should be the ones to provide aid, and not the rest. While some may disagree with the later assumption, when the provision of aid does not imply negative consequences or has minor consequences for the state, it seems impossible to define a consistent and convincing argument to fail to provide aid to those individuals fleeing conflict and seeking for refuge.

Therefore, the result is one of inflicting pain to vulnerable peoples and failing to defend the liberal values and human rights of the liberal order. It seems as if we are inevitably moving towards the return of a Westphalian system where national security prevails. In the words of Bigo (2008):

“The narrative of “global terrorism” was a way of ending the agonizing effort of trying to make sense of the attacks, of neutralizing the fear of whatever might have been the reason for the attacks. (...) It was a way to discuss the attacks from the standpoint of “answers” instead of questions. Debate was then possible only inside this framework. This framework silenced any discussion about the origins of violence, its political element, its symmetry, and any questioning of the idea that violence is the only way to stop violence”.

(Bigo, 2008)

## **Conclusion**

The securitization of migration is an example of the way states have started addressing international concerns such as migration through the lens of national security and adopting domestic laws and policies. This idea will be presented through the case studies of this book. However, before going over into more detail in how states are dealing with migration, it was important to first set the grounds to understand how changes within the international order are also affecting the development of new international norms. As this chapter seeks to demonstrate, states are turning towards national measures to confront international threats. Instead of relying on international norms and multilateral cooperation, there is a preference for advancing national laws and policies to deal with these threats.

Jakob and Luedtke (2018) assert that “the 21<sup>st</sup> Century nation state is in crisis most directly from external or global forces, and the nature of national responses to these external forces”. They further state that while international and supranational institutions have emerged as a result of cooperation between states, these international institutions and international law “now pose a direct challenge to national sovereignty”. States have seen certain international cooperation actions turn into foreign interfere and control. Globalization has facilitated a freer flow of capital and commodities. It has also become faster and easier for people travel from one place to another, but migration has become an “obsession” (SIPA, 2022) and managed as a security threat. This “obsession” is reflected in the borders of states. With the fall of the Berlin Wall in 1989, there were only 15 countries with border walls. In 2017, over 70 walls separated nations and states, 50 of which had been constructed after 9/11 (Hayden, 2017; Jones, 2016).

The European Union has been for a long time seen as a human rights promoter. There was a demand and expectation for the EU to address global human rights problems (Balfour, 2008). Yet the EU has also securitized migration more forcefully the past years. The last step taken has been the agreement of the New Pact on Migration and Asylum in December 2023, a controversial tool that has become “a legitimisation of the EU’s anti-immigration policies” (Colomina, 2023), as it has lowered standards and legalised “what hitherto was unequivocally illegal” (Garcés, 2023). The international legal framework was designed to avoid conflict and maintain international security. But the past years have shown that national security is still the core element of liberal states, which shifted their security policies towards protecting the nation instead of the international community. As explained in the previous chapter, there are many events showing the changes within the international order. The securitization of migration is yet another sign that the liberal order is at stake. International norms are in decay, new conflicts are arising, and national security seems to precede human security.

Nonetheless, there are still grounds for hope. As Fukuyama once said, “Historically, we have seen that liberalism is the most attractive when it is threatened” (Illing, 2022). In fact, these same migrants that many dread, are also contributing to resisting autocratic regimes. Escribà-Folch, Wright, and Covadonga (2022) found that remittances shake two pillars upon which these systems stand on. Firstly, remittances from abroad make citizens more independent from their rules. Secondly, diaspora populations have been key to coordinate mobilization and protests in their countries of origin by allowing their citizens, through these remittances, to have the time and means to protest. According to the authors, remittances reshape the balance of power in dictatorships, sometimes even leading to democratic regime change. Therefore, migrants can then be seen as a pivotal part for the promotion of democracy in non-democratic countries, an important value for the spread of liberalism, instead of a threat to the nation. And contrary to some avoid admitting, hostile government policies do not deter migratory flows, but just lead them to take more dangerous journeys.

Therefore, the most valuable way to upholding the liberal system is protecting the rights of the most vulnerable, spreading democratic values and the protection of human rights, including those of migrants. In a world where national security seems to prevail, we cannot look away. The rule of law and the protection of human security should not be ideals, but well-established elements in our system. The following chapters will go deeper into the reasonings behind the securitization of migration. The hope is not to defend the treatment of migration as a security threat, but instead to break down these logics.

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