SECURITIZING MIGRATION
IN A CHANGING INTERNATIONAL ORDER

A CRITICAL COMPARATIVE ANALYSIS OF THE CASES OF THE EUROPEAN UNION, THE UNITED STATES, AND SOUTH AFRICA

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A la família

ABSTRACT

Is linking migration to security threats justified? How is the securitization of migration applied in practice? To what extent does it change the lives of migrants around the world? And in a wider context, does this have an effect on the international order? These are some of the questions this thesis wants to respond, through an analysis of the ways in which migration is securitized and the impact of these within the international system. Increasing migratory flows to Western countries and higher insecurity feelings due to the terrorist threat, have been used to justify the need to protect from external dangers. Immigration has been presented as one of these dangers menacing national security. Through the study of different legal frameworks, this thesis investigates the ways in which the law has been used to connect migration to security and how this affects the rights of migrants. More specifically, the cases of the European Union, the United States, and South Africa are deeply examined. From the other hand, these practices securitizing migration can also be understood as a sign that the international order is changing. As debates within academia have emerged on the changes that the international order is facing today, a growing part of scholars now believe that we are seeing a comeback to the realist model based on geopolitics. The securitization of migration can then be seen as another manifestation that nations today prefer dealing with international security issues -such as migration or terrorism- through national security measures instead of international cooperation or through the development of international norms. There is a prioritization to dealing with security affairs through the lens of national security, and to put them over the universal values and the human security that Cosmopolitism had fought to establish in the past decades.

RESUM (CATALAN)

És justificat establir una connexió entre la migració i l'amenaça de seguretat? Com s'aplica la "securitització" de la migració a la pràctica? De quina manera canvia les vides dels immigrants arreu del món? I en un context més ampli, això té algun efecte sobre l'ordre internacional? Aquestes són unes de les preguntes que aquesta tesis vol respondre, a través de l'anàlisi sobre les maneres en què la migració és securititzada i l'impacte d'aquestes mesures en el sistema internacional. L'augment en el nombre de fluxos migratoris cap als països Occidentals i els creixents sentiments d'inseguretat deguts a la intimidació terrorista, han sigut utilitzats com una manera de justificar la necessitat de protegir-nos contra amenaces externes. La immigració s'ha presentat com una d'aquestes amenaces contra la seguretat nacional. A través de l'anàlisi de diferents marcs legals, aquesta tesis vol investigar les formes en què el dret s'ha fet servir per connectar la immigració a la seguretat i com això afecta als drets d'aquests col·lectius. Més concretament, els casos de la Unió Europea, els Estats Units i Sudàfrica són analitzats de manera més concreta. D'altra banda, aquestes pràctiques securititzant la migració també es poden entendre com un altre senyal que l'ordre internacional està canviant. Mentre els debats dins el món acadèmic sobre aquests canvis que s'estan vivint avui en l'ordre internacional han anat sorgint, un creixent nombre d'acadèmics creuen que avui estem veient un retorn a un model realista basat en concepcions geopolítiques. La securitització de la migració pot ser interpretada com una altra manifestació que demostra que els estats, avui, prefereixen gestionar temes de seguretat internacional -com la migració o el terrorisme- a través de mesures de seguretat nacional en comptes de fer-ho a través de la cooperació internacional o la creació de normes internacionals. Hi ha una piritització per adreçar els afers de seguretat a través d'una visió de seguretat nacional, i de posar aquests per sobre els valors universals i la seguretat humana que el Cosmopolitisme havia lluitat per establir en les últimes dècades.

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LIST OF ACRONYMS

AfD Alternative for Germany
ANC African National Congress
ASEAN Association of Southeast Asian Nations
ATCSA Anti-terrorism, crime and security Act
BMA Border Management Authority
CATS Crimes Against the State
CEMU Executive Committee for the Unified Command
CICO Intelligence Center Against Organized Crime
CITCO Center for Intelligence against Terrorism and Organized Crime
CJEU Court of Justice of the European Union
CLEAR Clear Law Enforcement for Criminal Aliens Removal Act
CNCA National Antiterrorism Coordination Centre
COP Conference of Parties
CTC Counter Terrorism Committee
DHS Department of Homeland Security
DNA Deoxyribonucleic Acid
DOJ Department of Justice
DRC Democratic Republic of Congo
DZP Dispensation of Zimbabweans Project
EASO European Asylum Support Office
ECHR European Convention on Human Rights
EPP-ED European People's Party
ETA Euskadi Ta Askatasuna
EU European Union
EUNAVFOR European Union-led Naval Force
EUROJUST European Union Agency for Criminal Justice Cooperation
EUROPOL European Union Agency for Law Enforcement Cooperation
FBI Federal Bureau of Investigation
FISA Foreign Intelligence Surveillance Act
FRONTEX European Border and Coast Guard Agency
GAM Global Approach to Migration
GAMM Global Approach to Migration and Mobility
GDP Gross Domestic Product
GUE European United Left
HRW Human Rights Watch

ICAO International Civil Aviation Organization
ICJ International Court of Justice
ICRC International Committee of the Red Cross
IDP Internally displaced person/people
ILC International Law Commission
IMO International Maritime Organization
INA the Immigration and Nationality Act
IND/DEM Independence/Democracy
IOM International Organization for Migration
JPCPOA Joint Comprehensiva Plan of Action
KORUS United States-Korea Free Trade Agreement
LEC *Ley de Enjuiciamiento Civil* (Civil Procedure Law)
LIP Local Initiatives Program
LTRD Long-Term Residents Directive
MEDAM Mercator Dialogue on Asylum and Migration
MERCOSUR *Mercado Común del Sur* (Southern Common Market)
MOP Meeting of the Parties to the Kyoto Protocol
MPP Migrant Protection Protocols
NAFTA North American Free Trade Agreement
NAP National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance
NATO North Atlantic Treaty Organization
NCIC National Crime Information Center
NGL Nordic Green Left
NGO Non-govermental organization
NSEERS National Security Entry-Exit Registration System
OEA Organization of American States
OECD Organization for Economic Cooperation and Development
OHCHR Office of the High Commissioner for Human Rights
OXFAM Oxford Committee for Famine Relief
PATRIOT Act Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act
PES Party of European Socialists
PICUM Platform for International Cooperation on Undocumented Migrants
POCDATARA Protection of Constitutional Democracy Against Terrorist and Related Activities Act
RAA Refugees Amendment Act
RELA *Jabatan Sukarelawan Malaysia* (People's Volunteer Corps)
RRO Refugee Reception Office
SADC Southern African Development Community

SAPS South African Police Service
SIAC Special Immigration Appeals commission
SIVE External Surveillance Integrated System
SVP *Schweizerische Volkspartei* (Swiss People's Party)
TFEU Treaty on the Functioning of the European Union
UDC Democratic Union of the Centre
UK United Kingdom
UN United Nations
UNAIDS Joint United Nations Programme on HIV/AIDS
UN DESA United Nations Department of Economic and Social Affairs
UNDP United Nations Development Programme
UNESCO United Nations Educational, Scientific and Cultural Organization
UNFCCC United Nations Framework Convention on Climate Change
UNHCR United Nations High Commissioner for Refugees
US United States
USRAP United States Refugee Admissions Program
US-VISIT U.S. Visitor and Immigration Status Indicator Technology Program
ZEP Zimbabwean Exemption Permit
ZSP Zimbabwean Special Dispensation Permit

INTRODUCTION

INTRODUCTION

A. General context

Debates on the crisis of the global order as we know it have by now become common. They have been going on for some years, but since the start of the war between Russia and Ukraine, some are wondering if this change has already begun, and a new geopolitical age has emerged.

China and India have gained relevance within the international system. They have high population numbers, they have an exponential GDP growth, and they are two of the few nuclear powers existing in the world. Furthermore, China has projects such as the Belt and Road Initiative and the Silk Road to further extend its power across regions. Russia, from its side, has never been too keen on the international order established by the United States after the end of the Cold War and it has tried to challenge US hegemony and the universalization of liberal values which have been imposed to the international system. Conflicts like those of the South China Sea or the Arctic show the importance that territory still has today and potential inter-state conflicts that may more violently arise in the future. These states dispute the world as it has been understood in the past decades and are calling for a revision of the world order, on the fundamentals it is based on, and on the powers dominating it.

Powerful changes in the dynamics of international security and the confrontation between globalization and regionalization processes are part of the equation. But the effects of the Trump administration in the United States marked by an anti-multilateral approach of international relations and the partial decay of the European Union with the Brexit also show a turmoil within the West's hegemony, and especially on the role and impact of the United States. The United Nations has been unable to respond to the Russia-Ukraine crisis, another sign of the moulder of the widest international organization bringing states together to promote global peace and security. This is precisely where the importance of maintaining this order lays: on the promotion of international peace and security, the protection of fundamental rights, and the spread of democratic values across countries.

While it is true that some states might have profited from these moral standards to intervene in the national affairs of third countries, these are nevertheless still important to maintain a world based on the protection of the individual. And a world in which human security is put at the forefront of international agendas should be defended. It is with liberal values and with international cooperation to tackle insecurity that during the 1990s and 2000s wars have been at their lowest level since the end of World War II.

Nevertheless, terrorism has been one of the most violent phenomena in recent years. And even though most terrorist organizations are concentrated in the Middle East, its violence has reached other regions in the world. This has led many countries to create security measures specifically directed to counter the terrorist threat. At the same time, massive refugee flows fleeing from conflict have widely spread and reached European shores, collapsing the European asylum system. As a result, states have lost control over this influx of incoming peoples and the political elite and mass media outlets have started presenting immigrants as a security threat to the social and economic stability of the country. They are blamed for aggravating economic crises and threatening our cultures. And after terrorist attacks, they have also been held accountable for these massacres, reinforcing the image that the terrorist is one with a particular ethnicity or religion.

In the second half of 2015, with the escalation of the conflict in Syria, thousands of its citizens left looking for protection in Europe, leaving its devastated homes by war. Nevertheless, because of these increasing migratory flows and the terrorist threat, a considerable number of individuals -particularly those sharing populist and right-wing ideas- have seen these refugees and asylum seekers as "invaders". Altogether, this Century, with the events of September 11 and the Syrian refugee crisis, is marked by the extension of this idea that irregular migration is a security threat. One that needs to be resolved through national and international security strategies.

B. Objectives, research questions, and hypothesis

It is in this context that the idea of this thesis arose. From the one hand, I found it necessary to understand the specific ways in which

the securitization of migration was being carried out, analysing specific laws and policies of different countries from various regions in the world to get a clearer idea on how these processes emerged and how they were being justified. From the other hand, as I was doing this research, I found it possible that it could also fit within the international relations scholarly debates on whether the international order was changing towards a more realist model based on geopolitics. If this were to happen, the securitization of migration could be understood as a process which has also become a sign towards this more Westphalian perspective, one based on the prioritization of national security mechanisms instead of international cooperation and the advancement of global norms.

Therefore, this thesis tries to respond two central questions: First, how do states securitize migration through the law? And second, can these measures be a sign that the international order is changing? That is why this thesis can be divided into two main themes: that of the securitization of migration and that in relation to the debates on the changing world order. The questions emerged in this order. However, the thesis has been structured to present the current changes and situation of the international order first, only to put in context the international scenario to the reader. Then, we will dig into the concept of "securitization" and the measures in relation to this process linking migration to national security, and altogether will be useful to understand how these laws and policies can be seen as a sign of the changes within the international scenario.

At the practical level, I think it is extremely important to be aware of securitization processes -in whatever area they take place-, and to understand how they happen. Because when we talk about securitization, we are talking about bringing a non-security issue to the security agenda of a country and, in this way, to justify the restriction of specific rights. That is why we need to be very careful when applying extraordinary measures to the general population, but also to especially vulnerable groups -such as that of immigrants- as these can make their lives even more difficult than they already are. Extraordinary measures should be proportionate and held only so long as the security threat persists. But once it is over, these measures would go away with it too. Is this the case for the securitization of migration? Is it justified to treat migration through the lens of national and international security? If so, are these measures proportional and

temporarily limited? Do all countries apply them in the same way and in the same contexts? Is it only in response to the terrorist threat? Who is the actor responsible for pushing these measures? These are some of the questions that this thesis will seek to answer.

At the theoretical level, I believe that bringing this analysis to the world of international relations will be useful to contribute to the debate on the changes of the international order. Firstly, because international law and international relations, I believe, go hand in hand, and we cannot understand one without the other. International law is, after all, a result of the processes and relations carried out between states, international organisations, and a whole range of other actors. International politics and relations are a determining factor for the making of international norms. And at the same time, international law is the instrument through which international relations are carried out. It is necessary to have an international body of norms regulating international relations to make sure common issues crossing boundaries are fairly solved, but also to promote international peace and justice. Secondly, because I found it useful to interpret the securitization of migration in a wider context and in relation to the debates on the changes of the world order. As theorists scrutinize the consequences of the rise of China, the reasons why an anti-multilateralist like Donald Trump won the presidency of the United States, or the consequences of the war by Russia on Ukraine, questions on whether the world as we know it today will change have emerged. Can the United States maintain its hegemony? Is the liberal order in decline? What would a world under Chinese dominance look like? These are just some of the questions being asked today. And I believe that the study of securitization processes would fit within this debate to try to explain whether these securitization processes can also be a sign of the prioritization for brining non-typically security issues to the security arena, and to solve them through the lens of national security. A proof that the system is changing towards a more realist than liberal one.

But what is more, this clash between Liberalism and Realism that we are facing today can also be seen through the development of international norms. International law, the development of global norms, has in part been a result of liberalism to push for the regulation of international relations and the securement of liberal values. And through cosmopolitism, some states have tried to

promote the idea that all human beings are members of the same community, citizens of the world. However, we see a new tendency by states to be more unwilling to sign treaties as they do not want to bind themselves to international obligations. They are not so often developing explicit global norms anymore. We may find shared patterns, similar practices between them, but they are not putting them together to create a specific norm. This resistance is also worth studying, and I will try to analyse whether we can find new international norms through the securitization of migration, or whether states have been resilient to developing new legal frameworks and have instead opted for addressing these issues at the national level only.

If societies base their national identities on race, ethnicity, or religion, and exclude those who are different, conflict is more likely to arise. In a world where globalization has facilitated transportation, communication technologies, and migratory movements, societies are becoming more diverse. But we need to see this diversity as a cultural enrichment, not as a social threat. And we see every time more often the application of securitization measures in a wide range of countries, which shows how countries perceive these migratory movements as a security threat. Higher border controls, restricting access to healthcare, and imposing difficulties for them to formalize their legal status in hosting countries are just some of the signs that universal liberal values have not completely overcome the realist vision of the state, in which maintaining national security is what is most important and where geopolitics shape security agendas. And when the protection of the individual -and not the state- is the goal of national and international security strategies, when enough people reject liberal principles, the liberal order cannot be fully maintained.

But we need to keep in mind that liberalism is not incompatible with the idea of nation-states. And even though the theory behind liberalism claims for universalism, that does not mean that identities must be denied. National identities are a social construction and as such, are malleable and can be shaped by liberal values and can be used to install a sense of community and belonging. A sense belonging not based on pointing out the differences, but one based on sharing. This thesis seeks to put an eye on securitization processes to emphasize the importance of maintaining human security and the protection of particularly vulnerable groups, such as that of migrants.

It tries to shed light on the relevance of securing the fundamental values in which democracy is formed, international human rights and freedoms. Advancing the liberal agenda through international institutions and multilateral cooperation can help protect these values while adjusting economic liberalism so that it addresses inequalities more effectively. But what is more, it humbly wants to shed light on the importance of building a sense of common belonging to show that the idea of the nation-state is not incompatible with that of diversity, so that we can build societies centred on the ideas of equity, equality, and non-discrimination. Because global cosmopolitanism cares about the peoples in the world, no matter where they are from or what their beliefs are. And national frontiers can be compatible with the idea that we are all citizens of the world.

This investigation lies under two main hypotheses, which are the result of posing the questions which have been aforementioned. The first assumes that the securitization of migration is an actual practice of states to bring migratory issues to the security domain with the justification that the society and the state need to protect themselves from these external security threats. The second argues that these securitization practices are a sign that the international order is in fact changing towards a model based on realism and geopolitics. This way, instead of promoting universal values and the spread of the democratic liberal system across borders and solving obstacles through international cooperation, states are now more concerned about addressing their problems through the lens of national security.

This research is based on the analysis of three specific cases: that of the European Union, the United States, and South Africa. These case studies are useful to exemplify different measures securitizing migration from states and organizations from different regions. Since they all have different historic, economic, and social contexts, it is interesting to compare the ways in which the securitization of migration has taken place, what justifications have been used to approve these measures, and to what extent the legal framework in this field has been developed. Interestingly, the European Union and the United States have been objectives of terrorist organizations, but the presence of the terrorist threat in South Africa is not as strong as in other countries in the continent. This is another reason to precisely analyse these countries, as in Western countries these measures to control immigration have been approved on the grounds of

countering terrorism. Through this analysis, I hope to be able to either confirm or refute these hypotheses.

C. Personal justification

This thesis arose from a long and deep interest in human rights. Ever since I finished my law degree, I have tried to specialize in international human rights law both in my academic and professional career. I have worked in international organizations and NGOs focusing on the protection of the rights of migrants, and I have spent some time in Mexico doing field work in refugee and women's rights. And during this time, I have always had a profound interest for international relations to understand international history and its conflicts. Pursuing a PhD was the natural stage for me to continue learning and growing in these areas. And being able to devote these years to the writing of a topic that I find so interesting and relevant as this has been a challenging but also a fulfilling personal process.

Even though my academic background has always been linked to the legal field, I have always wanted to improve my knowledge on international relations. I see the law as being intrinsically connected to international politics and international relations, and I knew that a better understanding of the latter would give me the means to become a better thinker. That is why I have always seen the process of writing a PhD as the best means to acknowledge the changes that the world is facing today and further specialize and understand these areas.

This thesis has been a way for me to better recognize the situation of migrants in host countries, but also to rise those issues concerning them and their most fundamental rights. It is necessary today more than ever to condemn those who encourage anti-immigration feelings, those who unjustifiably accuse them of being the cause of terrorism, and the source of the economic problems of our countries. My hope is that this thesis can contribute to shedding some light to these issues and encourage the control of securitization measures, so they are applied only in case of extreme necessity and ensuring the most proportionate means. We need to be aware of those political and media discourses fostering discrimination instead of promoting the securement of universal values based on peace and equality for all citizens in the world.

D. Methodology

This is a legal thesis, and the analyses of the selected case studies is done through the study of their legal frameworks in the field of migration and security. However, it is also very close to the field of international relations theory, as the debate on the world order, its changes of power distribution and of the model governing it are part of international relations scholarly debates. Therefore, at times, the dialogue will move between one field and the other, understanding them as being necessarily attached, as my understanding of international law goes hand in hand with international relations.

From a methodological perspective, this thesis follows the hypothetico-deductive method, typical of Social Sciences. Therefore, the construction of the theories presented are based on the premises or hypotheses set out at an initial stage. These hypotheses are then analysed and compared through the study of different case studies with the intention to either confirm or refute them. In addition, it is also qualitative research in the sense that it is a result of a process of inquiry that seeks an in-depth understanding of social phenomena within its natural setting, and it is constructed on both primary and secondary sources. Primary sources are mostly the laws and policies analysed from different states and are thus an important part of this research. I have also used statistical data and research reports to gather information, but the biggest part of the primary resources used for this thesis are directly based on the law.

More specifically, to show the outcomes of the securitization of migration, the research strategy was based on the study of three particular cases. That is, the study of norms and policies which can relate immigration to national security as designed in the European Union, the United States, and South Africa. The hope is that these cases show that there is in fact a process of securitizing migration in different countries, and also in different political and social contexts, whether in relation or not to countering terrorism. These cases have been analysed through their most recent legislative developments and have been compared to their previous legislation or political agendas. I do not deny that there can have been other periods in history when securitization measures in the field of migration took place, nor that securitization in other areas took -or is taking- place too. However,

the goal of the analysis of the cases selected is to show that in recent years, and especially since 9/11, there has been a wide range of securitization measures in relation to immigration which started as a response to the terrorist threat but which have expanded largely and widely around the world and with different justifications.

Another important part of this research is based on secondary resources, a core body of the present investigation. Journal and academic articles, textbooks, academic books, political and media discourses, and editorial/opinion pieces, are some of the most cited sources, and the ones which have helped me construct the biggest part of this investigation and research approach. The opinion and research of scholars, specialists, and other professionals has been key to further understand the securitization process and the evolving scenario of international politics. These have all been an important part of my research and for the development of my own perspectives.

E. Structure

This thesis has been divided into three main parts. Part I refers to the construction of international norms in a changing international order. That is, it is an introductory part to understand the changes that the world order is facing, the actors involved in the construction of international norms, and the processes of international law-making of today. This first part is necessary to contextualize the historical moment of changes that we are living today within the international order but also on the development of international norms.

Part II studies the processes in relation to the securitization of migration. It first contextualizes the situation of migrants today; migratory flows, the massive arrival of asylum seekers in the European Union -which will be useful to later understand the context in which securitization measures in the EU have been applied-, and it also explains the conflicting debates on the definitions of the concepts of 'refugee' and 'terrorism', as these will be often used in this thesis. After this initial contextualization, it goes over the concept of securitization, and it explains the ways in which these measures are applied in practice by different states around the world. This is a way to put different nations as an example besides the three main cases of study of the thesis. The idea of this second part is to prove that the securitization of migration is a practice that is widely applied in

different regions of the world. Migrants have been placed as a national security problem and they have been many times blamed for the social and economic deficiencies of the country, which has aggravated their situation, rights, and integration into host societies.

The third part is the one making specific reference to three cases: that of the European Union, the United States, and South Africa. Here we will see the laws which have been used in these countries to advance in the securitization processes, linking immigration to security threats from which the country needs to be protected. As it will be seen, the global war on terror has been used many times as a justification to advance in measures to control migration, but counter-terrorism measures are not the only argument to contend immigration flows. There are other political, social, and economic arguments presented by governments -and supported by the media- linking migration with national security. These will be all explored in these chapters. To close with the presented research, a last section in relation to the conclusions will set forth the main findings of the thesis and offer a few ideas on the prospects which may be awaiting in this field in the coming future.

PART I:

UNDERSTANDING THE CONSTRUCTION OF INTERNATIONAL NORMS IN A CHANGING INTERNATIONAL ORDER

CHAPTER 1
THE INTERNATIONAL ORDER TODAY

The law is made to give security and establish justice (Pagliari, 2004). International public law is made to do the same, but at the international level. It seeks to maintain a non-violent coexistence between the different sovereign states and establish a fair world order. Security in its broadest meaning is equal to having peace, thus international law is made to preserve this peaceful environment and to protect all of its members from international threats and aggressions.

Nonetheless, the way in which states interact between them, their international relations, can escape the realms of international norms. The distribution of power between them is what shapes the main world powers and ultimately defines world order. In recent times, debates on the new world order have emerged due to globalization, new emerging powers and different global economic relations. This new organizational functioning at the international arena has also been customized by new forms of international law-making, which are currently shaping the way international actors engage and create norms, establishing changes in the way the international legal system functions.

This is what will be studied in this chapter. Starting with a rundown on the changes in power shifts and current international order, new forms of legal interaction at the international level, including new ways of dealing with international norms, will be analysed. While different theories and thoughts will be presented hereinafter, the purpose of the chapter is not to question the existence of traditional sources of international law, but to think of the evolving nature of the relationship between states and other international actors in the international legal system, which leads to new processes and outcomes.

1.1. The new international order

International order is a concept which has long been discussed[1]. In this case, when we refer to international order, we conceive it as the pattern of relationships among international actors -historically the states-, including norms, rules and institutions, that govern the international environment. This sense of international order can be built upon rules and norms, on a combination of alliances, on the creation of common institutions and organizations, and other similar mechanisms.

1.1.1. Debates on the crisis of the international order

In recent scholarly debates, some have referred to the crisis of the international order, and others have even contemplated the possibility of the emergence of a new international order. But what exactly do we refer to when we talk about this "new international order"? And when did this idea appear, distinguishing it from the "old" one? Many scholars draw a line between the old and the new order after the end of the Cold War. According to the Cambridge Dictionary, the new international order is "a political situation in which the countries of the world are no longer divided because of their support for either the US or the Soviet Union and instead work together to solve international problems".

During a discourse given by President Bush in the US Congress in 1991 during the Gulf crisis, he called on a "new world order" where "the rule of law supplants the rule of the jungle". He was talking about a new order arising, right then. Bilder studied the concept in 1992 and recalled a combination of events including the expulsion of Saddam Hussein from Kuwait, the collapse of the Soviet Union and the end of the "cold war" (Bilder, 1992). They were talking as if a new international order was emerging, and it can be argued that the international system did in fact change. However, while the

[1] For a more extended discussion on this, see: Bull, H. (1977) *The Anarchical Society: A Study of Order in World Politics*, New York: Columbia University Press; Falk, R. (1983) *The End of World Order: Essays on Normative International Relations*, New York and London: Holmes & Meier; and Huntington, S. (1996) *The Clash of Civilizations and the Remaking of World Order*, New York: Simon & Shuster.

international order did not change to a new one as such, what we have instead seen is our international order being in crisis.

Debates on the crisis of the international order have remained ever since, and many scholars have pointed that we are now living in what will later on arise as the construction of new order. Globalization has interconnected individuals and states as never before. And it has also had a dramatic impact on the wealth of those economies which have opened up to its effects. International trade and investment, the development and export of new technologies around the world, and the 21st century inter-connectivity have all shaped a new way of working, communicating, and relating internationally. At the same time, those countries which were accustomed to being most powerful have had to make some readjustments, and popular frustration has led to demands for economic protection and has resulted in the rise of populist parties. These effects are also part of the other face of the consequences of globalization (Chatam House, 2014). This phenomenon has connected governments and nations as much as markets, and some states have seen considerable changes in their economies and political influences internationally. We are now walking towards a new redistribution of power and to building a new durable international order, with new rising powers in conjunction with declining others. The constitution of this new era will not be an easy task, and so will be to determine how it will be structured.

There are three main reasons that explain why the international order as we have understood it until now is cracking (Patrick, 2019a). Firstly, it does not reflect the current distribution of global powers. Russia keeps on questioning the legitimacy of the current structure, and China has emerged as a global power whose economy is already the world's second largest and is hot on the heels of that of the United States. Secondly, globalization, although it connects most parts of the world an expands goods, services, but also cultural, political and economic activities, also exacerbates economic inequalities. Inequalities that are hard on some poor economies and which policymakers and political leaders seem unable to resolve. Thirdly, transformative technologies are disrupting labour markets and political systems. And while some countries prefer an international order based on a basic set of rules, others want it to be a reflection of democratic liberal values and human rights.

There is then a clear shift in the global balance of powers. For centuries, international law was expanded and imposed to the rest of the world by European leaders. Later on, with the leadership of the US, international law became part of the Western world ruled by Western nations. However, if current economic trends continue the way they are aligned today, it will not be rare to spread this leadership elsewhere, diffusing influence and dominance, that is, power, among multiple power centres in different points around world. And if this were the case, China would not be the only state to take part. It is estimated that India's defence spending could surpass that of the entire Europe in 2045. Russia also wants to play a key role in this leadership race, and even though its negative demographic growth, by 2035 its military budget might exceed that of France, Germany and the United Kingdom all together (ESPAS, 2015).

Furthermore, as Dworkin and Leonard (2008) argue, the US and Europe wanted to establish a world liberal international system. Western states wanted to expand the system of the World Trade Organization, enhance international financial institutions through the G8, reinforce the commitment to safeguard human rights, and amplify the allegiance with the responsibility to protect all citizens from large-scale violence. The idea was to have China and other emerging powers on their side, protecting a minimum of liberal norms to achieve a certain degree of global security. However, the authors point out, as non-Western powers have gained economic stability and influence, there has been a decline in liberal democracy. This does not only have to do with the will of these countries, but also on the lack of convincing capabilities of developed nations, whose self-interested and inconsistent practices have failed to proclaim the need to promote liberal values. In addition to this, the US invasion of Iraq and the 2007-2008 financial crisis could be seen by some as events proving the failure of the Western system. All these circumstances put together may be the reason why countries like China, Russia, Iran, Saudi Arabia and Turkey have decided to follow the old vision of great powers instead of joining the liberal system established by the West (Mead, 2014; Dworkin and Leonard 2008).

This shift in power politics has to do with the rise of certain economies and with the change of course in US policies at the national and international level. While the US used to play from a particularly privileged position in the economic sphere, the Trump

administration has increasingly invoked national security as a justification for restricting trade and raising sanctions, tariffs and quotas to the commerce with third states. Not only does this affect the global economic growth, but it also leaves minor and middle powers in a weaker position, since they depend on international rules for playing in the international field (Patrick, 2020). This continuous calling on the protection of homeland security by the US, along with the preference for unilateral action, has actually played against itself and has led Trump's economic ideals far from where he wanted them to be.

His main propaganda during the campaign was that he would put back America first, as the prime and most important thing to protect. The "America First" slogan first appeared in 1884, but it is not until 1915 when the expression becomes a national catchphrase, when President Woodrow Wilson used it to defend US neutrality during World War I (Churchwell, 2018). The expression was always connected to strengthening American nationalism, protectionism, and isolationism. President Trump retook it and made it its slogan for his presidential campaign. Ever since, he has worked towards reinforcing this patriotic feeling through taking unilateral action. Following this line, he has withdrawn the country from different multilateral partnerships, such as the Trans-Pacific Partnership (TPP), the Paris Climate Agreement, the UN Human Rights Council, the UNESCO, and the Joint Comprehensive Plan of Action (JPCPOA), in addition to renegotiating the trade agreements with Mexico and Canada (NAFTA) and those with South Korea (KORUS). He decidedly abandoned global leadership and disdained international organizations, including the United Nations, treaties and law, as infringements on US sovereignty and freedom of action (Patrick, 2019b). He made his point clear during a speech given at the United Nations General Assembly in 2019: "The future does not belong to globalists. The future belongs to patriots" (Trump, 2019).

China, from its side, has replaced Russia as the prime contestant of US power. Its economic growth, which has placed the country as the second largest economic power in the world, is foreseen as being able to take US leadership in this global ranking. Its economic model is completely different to those of the West, which are based on economic and politic liberalisation, and instead rest upon restricted capitalism and political suppression (Creutz et al., 2019). Furthermore,

China (along with Russia and other states) sees US defence of liberal values as an abuse of the reach of liberal mandates to maintain international order. While the US declares that it has intervened in the internal affairs of some countries, breaching sovereignty rules to protect human beings from aggressions from their governments, other states have seen this as a way to interfere into the national affairs of other countries following US interests. As a result, there has been an intensification of the opposition to these so-called liberal values, as they look on these intrusions as measures by the US to maintain its hegemony.

And while China's agenda opposites the West liberal ideals, the European Union, which was marked by the spread of liberal norms since the end of the Cold War, has fought between moving away from the Westphalian system and holding onto each Member States' sovereignty. The EU's goal during the 1990s was to strengthen and deepen European norms and values, and EU institutions believed in their own supremacy and on the attractiveness of the EU model based on democratic systems and liberal values. However, during the last two decades, the EU has focused on building up its security: "The major trends over the last quarter of a century have moved the EU from expansion to introversion, from exporting security to importing insecurity, from transforming the neighbourhood and even the world to protecting itself, and from idealism to pragmatism (…) The shift towards pragmatism and self-protection has entailed adaptation to the revival of the relevance of military power" (Creutz et al., 2019).

Furthermore, the financial crisis and the rise of populism political parties' representation in national governments has also taken its toll on the Union's popularity. Eurosceptic parties have appeared and criticisms towards EU institutions have increased. In part, this is due to the austerity policies implemented by the EU during the financial crisis and which have been maintained by many countries to this day. This is the situation, for instance, of Southern states, which were very much marked by the economic crisis of 2007-2008. Northern states, from the other hand, have also seen more Eurosceptic movements among the population, but in this case, it is especially due to the Refugee crisis. In 2015, unprecedented numbers of asylum-seekers arrived to the EU and the EU immigration system resulted insufficient to cope with incoming refugee flows. Anti-immigration feelings have escalated all over Europe since the arrival of massive refugee flows to

the EU, but these feelings have been intensified following the diverse terrorist attacks that different EU members have suffered in the past years, and which have been many times attributed to nationals of foreign origin. This has all resulted in tightening immigration measures and border control, among other measures. To add to this, Brexit has become the manifestation of the disbelief and distrust on the EU system and its institutions, a clear breach of the EU sense of belonging in a community.

Russia, from its side, clearly wants to be a predominant power in the international order. However, since the end of the Cold War it has never been able to supersede US supremacy. Nonetheless, it has demonstrated many times that it has the capacity to destabilize the international order and has shown it is also capable of building ties in Asian, African and Latin American countries. It meddled in US elections, it occupied and illegally annexed Crimea, and deliberately destabilised its neighbouring country Ukraine for years until finally starting military operations to occupy it in February 2022. This has all toughened the relationships of the EU and the US with Russia. As most Western actors refuse to build a common global order with the Kremlin. Moscow, from its hand, has deepened partner relations with China, India, and US allies like Japan and South Korea. The decline of the West is seen by Russia as a chance to take advantage of the situation and finally established itself as a global power. Today, it remains to be seen to what extent its influence will shape the formation of a new order.

1.1.2. Debates on the structure of the new international order

Helal (2018) poses an interesting question on the crisis or potential development of a new international order, which refers to how recent political developments will affect international law and how this will in turn transform the international system. He enumerates these developments, which include the rise of China as a world power, Russia's resurgence, "America's flirtation with isolationism", European scepticism, populism, the global retreat of democracy, and anti-immigrant sentiments in western and non-western countries. All of these circumstances have been put together in a relatively short period of time, which is why he argues that the current global political

situation is shaped by instability and uncertainty, and one may wonder what all of these changes will imply for world politics.

In the modern era, international order was built on the basis of the Westphalian system. This was a conservative perception of international order, based on the balance of powers and territorial sovereignty. The Westphalian system led to the "territorial integrity norm", a norm designed to avoid military aggression against neighbouring states to gain land, population, resources and goods (Mazarr et al., 2016: 10). But after World War II, and especially after the Cold War, a liberal order was led by the United States and thought to be the ultimate goal.

Thence this order, established in the past decades, is based on universal rules and international economic relationships. This has been the sturdiest order of the modern era and has transformed the way states interact with one another. Liberalism enhances the freedom of the individual and places it at the core of politics. The government is the body in charge of protection its peoples, but it does not have unlimited power as with it, it could even become a threat to the freedoms and rights of its citizens. The laws are then utterly important, as they establish not just the rights of the peoples, but also limits to power.

But even more, within this liberal and democratic political system the ideal of Cosmopolitanism was thought to be possible one day, some thought. This is a school of thought in which international relations are based on social bonds, and links peoples to bigger communities, understanding that we are all part of a universal human society. Through this idea, people are presented as citizens of the world rather than part of their particular nation-state. It is the ultimate theory linking all humans together and overcoming the traditional centric state perspective, working towards establishing international -even global- harmonic relationships, thus moving away from conflicts. Even if this has remained as an ideal rather than a reality, the liberal democratic model was in the long run the most potential system to bring us to this flawless theoretical model. With the changes that the international system has faced in the past years, today we are even further to ever reaching this goal.

This order has recently met with some limits such as the rise of national populism, the return to unilateralism, and the return to feeling the need to protect from external threats that have become much more real in the past years and have led some states to increase their defence budgets. There seems to be a change within the international order to return to realism or, if we never really left it, to establish it as the main model within the international order.

Realism is based on the idea that states exist within an anarchical system in which there is no superior authority but instead all states depend on their own power to survive. The most important thing is the survival of the state, national interests are a top priority, and the integrity of the territory and the population are the major interests. In this realist world, international relationships are never completely reliable as states are always self-interested and always put their nation first.

As Buzan and Lawson (2015) explain, a single international system shared by the global community was established during the 20th Century. This system has been structured by different political and legal orders during different periods of time. Firstly, there was an international order built around a Western center with a colonial periphery. After the Second World War, this Western center remained intact, but its periphery became more global and introduced, along with the United Nations, new principles based on the respect towards other nations and the promotion of their social, economic and cultural development. More recently, this center-plus-periphery type of order has disappeared, and the current international order is now more global than ever, even though divided (what has been called "decentered globalism"). As it has been said, the current international order is in crisis. The arrival of new emerging powers has shifted the global power balance, but at the same time there does not seem that the new order will be structured under new superpowers. On the contrary, we may see that the new international order will have new big powers and regional powers taking the lead of the international community, and the share of power among states and the global civil community will be better distributed and based on pluralism.

Many scholars believe that we are currently witnessing a return to the Westphalian kind-of-system, that which was in place during the 19th and 20th centuries. Until now, the US was the big 'defender' of the

democratic liberal system and it also counted with a well-established hegemony within this international order. However, it seems that this system is being replaced with a more complex one based on global multipolarity, where more than one actor will be having a lead role. Thus from now on, the US will not be alone, and China is likely to play an equally important role in this new balance of powers. Not only because of their growing economic power, but also because economic strength may lead to greater military power (Flockhart, 2016), which is key when calculating state power. Thence US hegemony has been threatened by the rise of China, which has emerged as a new global power.

China and Russia have challenged the liberal values established by the West in this international order. Instead, they have given support to other conservative elements such as to the norms of sovereignty and territorial integrity (Mazarr et al., 2016). Liberal internationalism, including multilateral institutions, international trade and cooperation in economic, financial and security matters, were all designed by the West (Creutz et al., 2019). And this structure was mostly under the leadership of the United States. But this multilateral system is now giving way to a fragmented system in which there are reinforced regional blocks and spheres of influence (Hofmann and Eilstrup-Sangiovanni, 2020). Furthermore, President Trump has taken a sharp change in the direction of the country in regard to this liberal internationalism and has instead marked the path towards unilateralism. As a consequence, this international liberal order that had been present until these days, and which had always been questioned by China and Russia, is no longer so firm.

However, Trump's administration has not been the only one in recent US history to be highly debated. After the September 11 attacks, President George W. Bush presented the chance to seize the unipolar moment created by the end of the Cold War to strengthen its security and military position. The War on Terrorism, leaded by the US government turned into the occupation of Iraq, ultimately seeking to change the existing regime to one that would "spread western values and initiate a process of democratization" (Abrahamsson, 2008: 22). As Abrahamsson further emphasizes, hard power could not be used to establish a political regime change by force, because a democratic regime needs to be built on the legitimacy of the peoples of the country and social trust. What the US actually achieved was to give the

feeling to many ordinary people in the Middle East, that the US War on Terrorism became a "War on Islam". As a consequence, instead of establishing peace and neutralizing potential threats, it created more terrorists than before those already existing in 9/11.

Thus while we used to have a bipolar system from the end of World War II until the fall of the Union of Soviet Socialist Republics (URSS), in which the US and the URSS were the two main powers, conflicting between them, we then came into a unipolar system with the US as the main hegemonic power (Jervis, 2009). Recently, due to the crisis that the international order is facing, it is as if we were building up a new international order, and scholars are still trying to figure out what it will look like, if it really ends up changing so much. Most scholars agree that it is not likely we are facing an establishment of a unipolar or bipolar system, but it is yet to be seen whether the new structure of global order will be based on a multipolar, multi-partner or multi-order system.

Flockhart (2016) explains the difference between the multi-partner narrative and the multi-cultural narrative. While both acknowledge that global cooperation will be necessary to solve different global problems, such as those related to climate change, international crime or migration, the multi-partner narrative trusts that this cooperation will be forged according to Western principles. The multi-cultural narrative, on the contrary, maintains that the liberal order is not the only one organizing the world and is not so optimistic on the leadership of the West. Both narratives agree that different actors - Western and non-Western- will take part in the emerging global order. This new order will be more diverse, and power will be more diffused. However, the multi-cultural narrative acknowledges the importance of regional institutional frameworks and culturally specific governance arrangements.

The author also explains to much detail the varieties of international systems and orders and gives her vision on how the new order might be structured. While some scholars believe that the next generation will be shaped by a multipolar system in which more than two great powers will influence global order, she defends a multi-order system, that which has more than one international order. That is, the primary dynamics will take place between different orders and not between states. She argues that while in the primary order relationships would

still be between sovereign states, in the second-order system they would be between inter-organizational or supranational entities, taking place between regional institutions, non-state actors, and public-private partnerships. For instance, they would take place between the EU and ASEAN, or international organizations like the Asia-Pacific Economic Cooperation would grow in importance.

Burke-White (2015: 5-6) has even talked about a new type of system, the "multi-hub"[2]. He identifies three basic characteristics of this new power structure. The first one is power diffusion, as he states that there is more than one state amassing a significant amount of power. Secondly, power is disaggregated, as some states are more powerful than other depending on the type of power that is being measured. For instance, some have more military or economic power, while others manage better soft power. Their amount of power within the different spheres produce different effectiveness in different areas of the law. Thirdly, power is asymmetric in the sense that it is distributed differently, creating power advantages over others on an issue-specific basis.

All in all, he asserts that a multi-hub structure is different from a multipolar system because there is not a fixed group of great powers engaging in rivalry and balancing its powers with subordinate states. Instead, the multi-hub structure deals with a number of states which all play different issue-specific leadership roles more flexibly and fluidly. Thus depending on the particular situation, one state or another will play the role of the leader, acting as "hubs". Contrarily, in the multipolar system those great powers are always the most powerful ones, coercing weaker states to do what they want them to do.

After all, once this new order is established, with its main global powers at play, and its well-established new structure, we have yet to see the type of values and principles that will govern the world. Will liberalism or cosmopolitanism be the main force, or will these ideals be replaced by a return to the Westphalian model?

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[2] He recalls the first time the term was used in a similar context and attributes it to Arnold Woelfers. See: Wolfers (1962) *Discord and Collaboration: Essays on International Politics*, Baltimore: John Hopkins University Press

Some scholars like John Ikenberry (2015) defend that liberal order will remain, because the crisis is not on the liberal internationalism, but it is instead a crisis of authority. More states are now raising their voices internationally and challenge the ordering principle of hegemony, which must now be changed towards making new partnerships and soft power (Flockhart, 2016). This is the position of those defending multi-partnership as the base for this new era, a system no longer based on hegemonies, but instead built from an extension of partners taking part in the international construction of order.

All in all, the power of states and the way these will be balanced is changing. And once this crisis is over, it remains to be seen if a new international order emerges and if so, its structure is yet to be defined, but all arrows seem to point at a completely new direction, one that changes the organization of the world and its current global powers as we had understood them to this day. And this new international order will also be shaped by new developments and new events. We can think, for example, of the possibility that new pandemics appear. The 2020 Coronavirus crisis showed how a respiratory pathogen could kill and incapacitate people rapidly, while transmitting it to people across the global and to every continent very quickly. COVID-19 also highlighted the inability of the US to lead the crisis, while China craved to appear as the one containing the outbreak with success and emerging as a global leader in the fight against the virus, although being questioned by its transparency in reporting the numbers of victims. Scientists have recognized that there may be unknown pathogens that sporadically come from animals and which can affect human health and be converted as dangerous viruses causing global disruption (NIC, 2012). It seems then that we might have to face other similar epidemics or pandemics in the future.

Nuclear powers and cyber-attacks will also become an important part of the rules in the international order of the future. Iran and North Korea have now been part of the nuclear discussion for a while. And in addition to India, now Russia and Pakistan are also trying to become aspirants of states with nuclear power to compensate their political and security weaknesses in other areas. In addition to this, the development of new types of weapons and wider access to these lethal materials will also be conflictive in the future. The militarization of space, the creation of new cyberweapons, further nuclear proliferation, non-nuclear anti-ballistic missiles… The creation of new

weapons will define new forms of warfare. And future conflicts can be much more lethal than before if new nuclear, cyber and bio-weaponry is used, in addition to conventional military capabilities.

In the next years we will see an increase in the creation and accessibility of lethal technologies, including nuclear devices and cyberweapons. We could even think of synthetic biology, which can become as lethal weaponry and fairly accessible to many people in the world. The proliferation of different types of materials and arms could put at risk critical infrastructures and successively generate new security dynamics. And all of these could also be used by terrorist groups. There are plenty of concerns related to how wars and conflicts will be fought in the future, and while developing new armaments, the likeliness and risks of having more conflicts is increasing.

According to the experts of the National Intelligence Council (2012), interstate conflict is likely to grow due to the changes we are facing in the international system. They argue that the equilibrium established after the Cold War is now shifting, and with the US seeming less willing to defend the international liberal order, the world might also become less stable. As maintained by these experts, three different risks could increase the chances of an outbreak: changing calculations of key players, contention over resource issues, and making instruments of war more reachable.

The second risk, that related to friction for resources, is likely to increase as tensions have already appeared in different parts of the world, such as those in the South China Sea, and the Indian, Arctic, and South Atlantic Oceans. Territorial claims to get to exploit various areas known to be keeping resources might increase, and they will also involve developing states, as their economic growth partly depends on using these resources.

Getting into more detail, they argue that China's calculations on whether they should expand their military bases and alliances overseas might change as their interests across the globe expand. This, in turn, will show to what extent China wants to become a superpower of the international order. In addition to this, while India's economy is also quickly growing and likely to become another global economic power in the future, its relationships with China are not at its best, as India sees Beijing seeking to contain India's rise.

Climate change is already part of the international agenda and it will likely take even more relevance as years pass by, as it has become one of the defining issues of our time. Scientists admit changes are occurring at a faster rate than expected. Unforeseen climate events will occur in the coming future, which can in turn affect a country or region's ability to feed its population. Some collectives have already raised their voices against the political action -or inaction- taken so far to resolve climate issues, and as people become more aware of the consequences of not taking drastic changes to compensate the damaged caused, they are also calling on their leaders to develop efficient policies and fight for a change.

Rising climate and environmental concerns are growing, and this also affects peoples' movements. Myer's estimate that by 2050 there will be about 200 million climate migrants (Stern, 2006: 3). Current estimates fix this number somewhere between 25 million and 1 billion people by 2050 (Lovell, 2007). Whatever the exact number, what is clear is that climate migrants will become an important figure, already adding up to the already increasing global migration flows. The rise and expansion of extreme weather events and resource scarcity due to climate change will affect the lives of many around the world. And as desertification, sea-level rise ocean acidification, air pollution, rain pattern shifts and loss of biodiversity all intensify, humanitarian crises will also expand, which will lead to more people being forced to leave their homes (Podesta, 2019). Although today climate change is not usually the sole factor in migration, its consequences intensify, it will become an exacerbating factor in migrant movements.

It is clear that migration movements are stressing and will continue to stress the international system (Patrick, 2020). Migration movements have increased, but the regime governing it has shown unable to adapt to the escalation of migration flows. This has thus become one of the weaknesses of the liberal international order, as refugees have continued to suffer from outdated international protection, helpless for their situation in current times. No state can successfully manage migration by itself, and as large migration flows expand, it becomes much clearer that they can only be controlled through a global governance framework (Sasnal, 2018).

It remains to be seen what lies ahead in dealing with migration, but also in dealing with environmental protection, technological advancements, and other security matters. As the new order materialises, it will also become easier to distinct the way in which future leaders will manage these and other fundamental issues of the crisis that the international order is facing.

What we are facing today, putting together all these elements, is that the international order as it had been established in the past decades is in crisis and might suffer certain changes in the years to come, and has different impacts at different areas, and so does in the development of international law. The hegemony of the United States as a global power is not so certain anymore, with new rising powers at the expectation to take on more leadership roles. But at the same time, actors other that the state (international governmental and non-governmental organizations, multinational enterprises, civil society, etc.) also have more weight in building international norms, which means that international law is no longer dependant only on the agreement and the will of the states, but also on other non-state actors.

Furthermore, as the current body of international law was built under the leadership of the West, if new global powers are likely to emerge, it might be possible that they want to review international norms so that they also identify their own values and interests. The current idea of establishing a cosmopolitanism model in the international order and within the international legal framework might change as powers shift and as new actors penetrate the international order. Can this all mean that besides changing our current body of international laws, the development of these laws can also be altered? If there new actors come in and the globalized world as we know it, with all of its ever evolving changes, continues towards a new direction and a new order, we might consider that the rules at play and the way they are constructed can be under threat too. This explains why so many scholars[3], following this crisis of the international order, have started speaking of new ways of constructing international norms.

[3] In this sense, for instance see the work of Martha Finnemore and Kathryn Sikkink; Joost Pauwelyn, Ramses Wessel and Jan Wouters; and Caterina García.

1.2. Current trends in international law-making

Power shifts and new power balances, the structure of the international order, and issues related to climate change, migration movements, nuclear energy, and so on, are changing the world and have resulted in a crisis of the international order as we had understood it during the last decades. In this possibly new emerging order, it is interesting to consider the degree to which state behaviour is consistent with global norms. That is, if collective expectations on the way the state should behave in a given situation is consistent with the way the state should response according to international law. And in this sense, we might see that trends in international law are also changing and if norms are becoming of different nature.

Recently, studies have focused on the inherent dynamism of norms, analysing their robustness (Deitelhoff and Zimmermann, 2019), their contestation (Wiener, 2008) and whether they are strengthened or weakened in different given contexts (Zimmermann, 2017). What seems to be agreed is that the nature of international law is evolving and that we must study the ways in which norms emerge today, the ways they are formed and conceived as law, the new actors involved in the process, the new procedures followed, and so on. Thus we cannot only consider what is known as hard law to be the only source of international law. If this were the only law to be applied, it would probably not be able to express and capture the evolving nature of today's society. It would not reflect the behaviour of certain states which sometimes take unilateral measures, nor the fact that certain resolutions and declarations of international organizations can at times lead to the development of new norms at the global level.

There seem to be two main contradictory elements in today's understanding of international law as presented by recent literature and in comparison with previous definitions. From the one hand, international actors have changed and do not involve only the figure of the state, but there are other non-state actors taking part in this international order. From the other hand, the sources of international law might not be only those of "hard law" as recognized by traditional theories of international public law. On the contrary, the relevance of "soft law" is being studied now more than ever, but so are new forms of international law-making.

This adds to the latent characteristics of the law-making system, which by itself it is enough eclectic, unsystematic, overlapping, and non-coordinated (Boyle and Chikin, 2009:100). Thence altogether, these different actors and the potential swift on what can be considered the sources in international law bring us to questioning if the process of developing laws at the international level has changed. If new actors are at play, should not we consider that the procedures are also distinct from the ones we had before? If new sources are being more frequently used, should not we think of the possibility of also creating new ones? This chapter will seek to provide an overview of the existing debates in current literature, while trying to bring possible answers to these questions.

1.2.1. The pluralization of international actors

It is crucial to understand the importance of international law to be aware of the interests of the states and their power to achieve their wishes. The more powerful a state is, the more their willingness to use some portion of this power to achieve its goals (Moravcsik, 1997). Rising powers will seek to do the same, not by destroying the international system nor rejecting the body of international laws per se but adjusting international law to their own preferences (Burke-White, 2015: 3-4).

As Abbott and Snidal express (2009), while "Old Governance" was fundamentally exercised by the states, today regulatory systems are more complex, and "New Governance", while still providing states with a key role, also introduces other actors -such as civil society and entities of the private sector- which have come to stay. In this New Governance, the state is an "orchestrator rather than a top-down commander" (2009: 521), directing and supporting a much more complex network of actors who participate in regulatory activities. These authors further defend that New Governance is decentralized in the sense that private actors and state agencies are both regulatory authorities. It seems clear that most of the literature today emphasizes the role of private actors and the citizenship in shaping the law, and not only nationally but also internationally[4]. Thus in the construction

[4] For more on experts analyzing the role of non-state actors see: Büthe, T. (2004) 'Governance through Private Authority: Non-State Actors in World Politics' Journal of International Affairs, Vol. 58, pp.281-290; Hall, R. and Biersteker, R. (2002), *The*

of global norms today there are also other actors to be considered. For instance, what is exactly the role, then, of international organizations or private actors in international law-making and in which ways do they participate?

Globalization, privatization and the fragmentation of states have introduced new actors in the international legal sphere (Creutz et al., 2019), and the information revolution has participated their entrance in world politics, which is now more accessible to everyone than ever before through the technological advancements in computing and communication (Nye, 2011). International law's subjects and scope has 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 international actors in international law-making have extended, 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. This is, for instance, especially clear in the case of international organizations, which many times hire experts in specific fields to study problematics and prepare detailed reports. They contribute, through their knowledge, in the formation of the international system.

Inter-governmental organizations, such as the United Nations, the G8 or the North Atlantic Treaty Organization (NATO), work to solve international issues and operate by the consent of states. There is a need for states to cooperate with one another in certain problematics and one way to do it is through these international organizations,

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Emergence of Private Authority in Global Governance. New York: Cambridge University Press; Graz, J. and Nölke, A. (2008) *Transnational Private Governance and Its Limits*. New York: Routledge

which serve as platforms to solve common problems and discuss all types of issues affecting the international community. But these organizations are also made up of international experts in different fields who work to analyse international issues and make reports to this end. These organizations have knowledge and expertise to contribute to solving common global problems and to finding common agreement.

But their role is not only influential or instructive, they also bring legitimacy, support and reputation to the table. Thus it seems that the trend towards a private rule-making procedure is becoming more feasible. Their role in watching the correct application of international norms is also relevant if we consider the work that some civil society organizations and non-governmental organizations exercise in controlling the correct application of international norms. They monitor and bring to justice those who do not comply with the law (Creutz et al., 2019).

Another way to participate within the international scene is through non-governmental organizations. Well-known NGOs are Amnesty International, OXFAM, Human Rights Watch, among many others at the local, national and international level. Many times, these lobby to influence international organizations and the governments of states to defend human rights, social welfare, and other policies for the good of the peoples. They are increasingly being recognized in forums such as those held at the United Nations or the hearings which take place along with national governments at regional organizations like the Inter-American Commission on Human Rights.

More and more often, experts refer to the relevance of NGOs in shaping international laws. However, there is a distinction between participating in the decision-making process and participating as a pressure-group lobbying for a particular cause (Pronto, 2008). Can the latter be considered as relevant as the first? States largely interpret the role of NGOs as lobbies, while much of what has been written in recent years describes them as being part of the first. While the purpose of this text is not to focus on this issue to the extent of finding a definitive answer, it is equally important to emphasize the different debates and questions arising when analysing these actors. Furthermore, to add on to this, the term 'non-governmental organization' is used to refer to a broad constellation of entities with

different structures, hierarchies, and processes. And when we refer to them, it should also be cleared out that smaller NGOs might have a different sphere of influence and thus have a different impact on the process of norm-creation.

Different types of actors are transnational corporations or multinational corporations, which ultimately seek to expand their business interests across more than one state. This does not necessarily mean that their interests represent those of the state. These actors have become more powerful over time and have, since their relevance became manifested during the 1950s and 1960s (Ibáñez, 2016). Throughout the years, the idea that different types of international subjects besides the states has gained momentum, and sovereignty does not seem to be the determinant feature that defines an international actor (Ibáñez, 2016). Instead, characteristics like autonomy, influence, and willingness to participate in the international life have become increasingly important (Pareja-Alcaraz, 2010).

These are examples of the new categories of actors which have appeared in the last decades and found their place within the international legal system. But there are many more. Boyle and Chinkin (2009:43) enumerate a wide range of different types of actors taking part in international law-making: "*inter alia* sub-state entities and entities denied statehood, national and international issue-based NGOs, individuals, 'kitchen-tablers', the corporate and business sector, shareholders, churches and religious groupings, trade unions and employees, academics, think tanks, consumer groups, para-military forces, professional associations, including those of judges, lawyers, parliamentarians and law enforcement agencies, expert communities, sport associations and criminal and terrorist organisations". They are all fundamental subjects to take into consideration in the formation of international public law today. And since the international system no longer depends merely on the presence of states, and since the international order is no longer made by a society of states but it is rather a pluralistic society made up of different groups and individuals (IOs, NGOs, private entities, etc.), they must all be considered international actors and important units in the shaping and formation of international law today.

But if the international order is in fact currently changing, will the role of these international actors vary? What will be the role of the state?

The role of non-state actors has actually changed because of these changes in the international order. As explained before, the consequences of different phenomenon such as the rise of China and new powers and the effects of globalization, among other changes, have formed a new scenario within the international order. Amid these consequences, in this debate the hegemony of the liberal democratic order was questioned, and the rise of Westphalia was also at stake. When considering the role of non-state actors, we may also wonder what will happen to these players, since these new rising powers seek to strengthen state power in the international system and stress the importance of sovereignty, while Western countries move away from the traditional view of the role of the state. The role of the state will obviously not disappear, and it will still be crucial in international legislative procedures. However, there seems to be wide recognition that hybrid governance frameworks have been established and the interaction between state and non-state actors will not cease, but instead enlarge.

Roberts and Sivakumaran (2012) introduce a category between state and non-state actors to help explain how certain subjects can also be part of the process of international law-making with certain empowerments ceded by states, although not being states either, a category he has called "state-empowered entities". They argue that while the category of 'non-state actor' forcefully includes all actors that are not states, we should think of a category in-between to include "entities that States have empowered to carry out particular functions" (Sivakumaran, 2017:346), such as the International Law Commission (ILC), the UN Human Rights Committee, and the International Committee of the Red Cross (ICRC).

Building on their work, they argue that while states remain the principal lawmakers, they sometimes create an entity or empower one that is already in existence to carry out particular key functions. Thence they are not merely organisms through which states act, and they are not truly non-state actors in their nature, but instead they fall somewhere in the middle. According to them, "State-empowered entities shape hard law, through actions like the development and interpretation of treaties or the identification of custom, and also shape soft law, through actions like the creation of principles or guidelines" (2017:358). In other words, some of these state-empowered entities have a mandate to interpret, amend and develop

treaties - such as the Conference of the Parties (COP) to the UNFCCC and the Meeting of the Parties to the Kyoto Protocol (MOP)-, others identify the existence of customary norms, some develop soft law -such as the Guiding Principles on Internal Displacement which were developed by the UN Secretary General on Internally Displaced Persons-, others develop international law as such – such as the international Law Commission which, among other duties, has the mandate of codifying and progressively developing international law[5]-, others interpret and apply international law -such as international tribunals like the International Court of Justice-, among other functions. The outcome of their work, be it judgments, draft articles, guidelines, interpretative statements or others types of documents, can be binding or not depending on the nature and authority of the entity, the link between the output and the states, the way in which the international lawyers receive the particular outcome (Sivakumaran, 2017: 366).

Following on these lines, state-empowered entities are a perfect example to explain the way in which actors other than states play a key role in the process of making and shaping international law. Not only do they develop new norms, but they also interpret and apply international law, identify customary international law and conclude soft law. Therefore, it is easy to find examples of these processes and outcomes of international law-making, which serve to see that states are not the only ones making international norms, but instead new actors are participating in this process more significantly and more frequently.

It is clear that the role of states and the strength of hard law are unquestionable. Nonetheless, the role of international organizations and private actors can substantially reinforce the relevance of soft law within the international legal system. A said by Ibáñez (2016), "if we accept that there are many bodies from which norms bearing authority derive, the unity of international public law will logically be affected by the proliferation of actors and authorities which carry out global governance activities, be that in competition or cooperation with States". We can discuss whether these entities are all legal subjects and legal actors or not. And if we agree that states are not the only international actors -although some believe that legal personality

[5] See Article 1(1) of the Statute of the International Law Commission adopted by the General Assembly in Resolution 174 (II).

corresponds only to states-, and that other non-sate actors are also key to defining legal norms at the international level, how do we establish a criteria to define who can in fact inflict international law? Where do we draw the line? Theorists of international relations and international law have not agreed on how to define these subjects and what their exact role is in defining international norms.

Nevertheless, from all that has been said, it seems clear that in the literature today many scholars believe that international public law is no longer made only by states, as the traditional international actor at play, but also from a wide range of other actors of different types which have gained relevance in the exercise of international law-making and are thus active parts in these processes. The proliferation of international actors in the past decades has changed the formulas of participation in the international legal order, and non-state actors, including the individual, have now entered into the theories of many scholars as they are considered active parts in shaping international law.

All in all, it is clear that international law-making seldom involves a single source. Instead, it is a product of the combination of multiple actors, besides state actors and besides international organizations. Public-private partnerships, multilateral corporations and civil society are part of these actors who also contribute to the shaping of the international legal system in the 21st Century. Thus instead of speaking of an international system and international society as being only made of states as defined by Hedley Bull (1977), we should instead talk about an international community as according to Oriol Casanovas (1998) or a world community according to Mark Leonard (2002).

At the same time, it is equally important to emphasize that the live of norms is continually evolving. This means that they do not remain static. Sometimes they are contested, and sometimes this may lead to reshaping the original form of the norm. This, in turn, may mean that the norm is subsequently modified, or that it can even lead to a new norm, or to new norms.

1.2.2. The growing relevance of Soft Law

As Whytock (2016) states, "International law's sources are not completely static, but they probably are more stable than international law's subjects and scope, which vary across both time and geographic space". It has already been pointed out that several actors are now part of the process of international law-making and participate in world politics and global governance. The arrival of these new actors also implies the flourishing of new procedures, so it is equally interesting to explore whether the ways of creating international law have changed and if so, to investigate which ways of constructing international law are being used today.

But before new ways of international law-making are analysed, we must still study an already existing source of international law, which many times has been forgotten, and that is soft law. On the other side of hard law, sources of soft law have been underestimated and set aside because of their non-binding character. However, in recent literature, some experts have reinforced the importance of this type of law. If, as it has been argued, the approval of norms in the form of hard law are diminishing, is the case of soft law the same? Some argue that states are acknowledging the advantages of this source of the law and take it in consideration more often than ever.

The role of Soft Law is emphasized in Abbott and Snidal's (2009) article. They declare that hard law is rooted in Old Governance while New Governance relies on more flexible norms and procedures (2009: 530). That is not to say that hard law is not enacted anymore, it obviously is, as it is the only type of law that is of binding nature and thus obligatorily enforced. Nonetheless, in the current legislative scenario, there is a combination of hard law and soft law measures as they interact with each other.

As argued by Sivakumaran (2017: 390-392) there has been a turn to softer processes of law-making, which have also become more increasingly important. Experts in specific fields prepare drafts of treaties, reports, participate in meetings, and monitor compliance, which later on become the basis for new regulation. Thus the role of actors other than the state in making international law is becoming more obvious, but so is the importance of soft law, which are also

used more frequently and are turning to be the substance of newer developments in international law.

In the field of international financial law, at an initial stage, commitments are usually made through soft law instead of treaties, thus not imposing formal legal obligations. As Brummer (2012) argues, instruments in this area can be categorized in three groups: best practices, regulatory reports and observations, and information sharing and enforcement cooperation agreements. It is interesting to read what he says about the use of soft law instead of hard law in this field:

> *"Legal obligation as evidence by an instrument's technical formality is a poor means, however, of identifying the true compliance pull of any international legal standard. Even informal agreements can express "commitments". Technically, a commitment is nothing more than a promise to do something, and promises can entail various degrees of obligation (…). That international financial law is not "legally" binding in the same sense as formal international treaties does not detract from the great solemnity that accompanies the making of these instruments, whatever specific form they take" (2012: 139-140).*

There are a variety of reasons to lean towards soft law instead of hard law outcomes, such as treaties. The case of international financial law is a particular one becomes, as Brummer says, since most international financial law is concluded between regulators, which do not have the power to unilaterally enter into international treaties, informality becomes a necessary element for them to conclude agreements. In other cases, there are also many reasons to choose using soft law. Martin-Joe Ezeudu puts together (2014: 114) five different arguments to explain why, at times, soft law is a preferable option. Firstly, international actors generally prefer non-treaty instruments because soft law procedures are much simpler in form. They become much easier to negotiate and are also a more flexible foundation for their future relations. Secondly, states are less eager to sign treaties because they are more likely to result in problems, both related to their formation and termination, many times due to their attached formalities. Thirdly, soft law mechanisms are easier to amend or replace in case there is a new instrument that wants to be established

or new measures to be added. Fourthly, the forums that are held to create soft law allow for greater ways to express one's interests and to clear out one's expectations. Lastly, this type of instruments count on a bottom-up approach which allow international actors to adapt to the diverse circumstances and contexts and lower the cost of contracting between parties.

This author also conducts an interesting study between the hard law-soft law dichotomy in international law through studying the creation and application of the Kimberley Process Certification Scheme ('Kimberley Process'). This process came into force in 2003, and it was created to prevent illegally mined diamonds from being traded in the international market. These "blood diamonds", as they are commonly known, sometimes get to the hands of rebel or criminal groups and help sustain their viability and armed rebellion.

As Ezeudu argues, while this regime can be classified as soft law by the way in which it was created, it has nonetheless hard law obligations that enhance its juridical force and make it very much similar to those binding obligations of treaties and conventions, making this process a unique piece of international law. There are signs of this 'softness' throughout the document, using phrases like "participants recommend", or "are encouraged", or "should ensure", differently from those which establish clear obligations in a treaty (Schram, 2007). However, the Kimberley Process, like other modern political agreements, should be viewed as a starting point for ongoing legal processes, becoming an instrument to implement a framework for the future. With this intention or building a framework for the future, they are no different than treaties in their goals, whether or not they resort in binding obligations like dispute settlement (Price, 2003). Furthermore, states have developed directives and regulations and enacted domestic legislation to apply what is developed in the Kimberley Process, thus showing that it has in fact the force of law, "as individuals have changed and will change their behaviour to avoid violating its commands" (Feldman, 2003).

Besides controversies on gaps within the process and other criticisms on weak points of this scheme, it is still interesting to talk about the Kimberley Process as one which has combined the qualities of soft law and hard law, thus assigning it a peculiar juridical nature, and as an

interesting piece to study in the light of different outcomes resulting from particular international law making procedures.

However, the excitement that some have shown towards the development of soft law instruments does not necessarily mean that their relevance will increase exponentially and surely. In some cases, it should be studied the extent to which these mechanisms work in favour of international actors facilitating the negotiation process, adoption, and further adaptation through time, but in others, they might be used as a tool to avoid the signature of a document with binding obligations.

Another recent example of a document of soft law nature is the Paris Climate Agreement, which entered into force in November 2016. The document's aim is to strengthen global cooperation towards solving the threat of climate change. Among different intentions, the main goal of the Agreement is to keep the global temperature rise of this century below 2 degrees Celsius. Whether or not negotiations should have led to a hard law document is debatable, but it was easily seen that common agreement towards this end would be hardly feasible. Countries like the United States, who need approval by two thirds of the Senate or by Congress to adopt binding legal obligations domestically, were pushing for an agreement containing no legal obligations so that it could be approved through executive action (Byrnes and Lawrence, 2015). Lack of support to make of this agreement an obligatory one made it impossible to enforce it with the power to impose sanctions, one of hard law, which necessarily led the way to the adoption of a soft law agreement. It remains to be seen to what extent the applicability and results of this particular instrument will be, but it might pose a question on whether the results would have been different if the outcome would have been one of hard law.

These examples are just a couple from a bulk of other signs which prove that, when looking at the international level, it is easy to spot easily the role and growing relevance of soft law mechanisms, since international actors other than the state, such as international organizations, most times do not have the authority to make mandatory norms and to force states to comply with them. When they can adopt mandatory rules, it is through the ratification of treaties or conventions by the states, thus these organizations do not have the power to make mandatory rules as such. However, principles, codes,

procedures and soft law, even though lacking enforcement measures and coercive measures, rely on economic and social pressure to ensure their application (Abbott and Snidal, 2009).

Furthermore, as Brummer defends, while on the domestic level hard law will ultimately emerge by implementing local regulatory standards and reforms and to be able to enforce these laws at home, at the international level certain soft law measures may remain. Thus in this larger sphere, soft law can remain and it can even increase as trust and experience solidify. That is why Brummer defends that although new institutions and regulatory frameworks arise, "many existing trends and strategies will likely continue to dominate cross-border decision making for a good time to come – including the key role of soft law as a coordinating mechanism" (2012:284).

But as stated by Zemanek (1998: 858), "the dichotomy of 'binding' and 'non-binding' is not really helpful to determining the nature of soft law". Thus even though it might not be binding upon the parties, that does not necessarily mean that what is establishes will not be followed by the states. On the contrary, states seem to be more in agreement with accepting the approval and subsequent application of measures other than hard law today. Thus soft law is no longer a matter of international organizations, but even states have used them to achieve certain multilateral interests and lately, they seem to be more keen on them than on hard law.

1.2.3. The irruption of Informal law-making

Wessel (2011) argues that the concept of 'informal international law-making' reflects this idea of international actors -other than the state-developing a particular type of international law that deviates from the traditionally well-known sources of international public law. What is understood as informal law-making is different from traditional international public law in three different aspects: the output, the process followed, and the actors involved. As defined by Pauwelyn (2010), informal international law-making is:

> *"Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international*

organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality), and/or which does not result in a formal treaty or legally enforceable commitment (output informality).”

New actors, new processes and new outputs have led to this understanding of a new form of international law, informal international law, which has superseded formal international law (also known as hard law). Today, states lean towards informal arrangements and seek for novel forms of cooperation. These forms have also changed the nomenclature to refer to them, and they have expanded ostensibly, and the terms referring to ‘treaties’ and ‘conventions’ seem to vanish over time. Instead, as pointed by these authors, we have seen the creation of the International *Conference* on Harmonization, the Proliferation Security *Initiative*, the International Competition *Network*, the Copenhagen *Accord* on Climate Change, and so on (Pauwelyn, Wessel and Wouters, 2014: 738; Ezeudu, 2014;112).

These authors also explain the reasons why formal sources of law have “become shackles”. They argue that there is saturation of multilateral treaties, which now exist in most policy issues. Thence when new regulations are to be added in a particular topic, it is hard to agree in an additional treaty or convention because of the diversity of interests involved. Negotiation at this stage is more complex due to the multiplicity of particular interests but also due to the burdensome some processes involve. At the moment, although this has not been publicly admitted, it seems that states are not so willing to continue negotiating and binding themselves through treaties and conventions anymore. At the same time, states have become more and more reluctant to binding themselves through written agreements as they believe there is an invasion of their sovereignty and their domestic legal system, since many times international law superposes domestic legislation in hierarchy.

Furthermore, hard law is usually also ‘hard’ in the sense that it is difficult to change over time and adapt to the changing circumstances of the current globalized world. Treaties are extensible negotiated; they follow a certain procedure by which states expose their interests and try to find a balance and common point before it can be signed. Putting together the interests and goals of the different governments

participating in the process can be complex sometimes, and thus can take time. Different from this is the process of informal international law-making. Because the actors participating are not only states but can be made of a variety of public and private bodies, such as private transnational organizations -and enterprises, private organizations, etc.- they are much more flexible and can much better adapt to changing circumstances if needed. Taking strategic decisions becomes much easier and faster than with public institutions, and this informality, which also means more flexibility, thence is an advantage when it comes to correcting the rules and adding certain changes (Abbott, Green and Keohane, 2013).

In addition to this, the actors which participate in this informal law-making process are more diverse. While Article 7 of the Vienna Convention on the Law of Treaties specifies the actors representing the state, which are in turn those signing the treaties and thus making treaty law, informal law-making does not engage traditional diplomatic actors, but a wide range of other public and private sources. It can include sub-national entities (such as local governments), private actors, independent agencies, international organizations, and so on (Duquet et al., 2014). The list is long, much longer than that of the traditionally understood conventional international actors, which basically includes the state.

This diversification of actors adds on two progressions compared to hard law. First, more diversity means that once the norm is accepted, there is more consensus both during the time these norms are being developed and also once they are to be accepted and applied. Secondly, if there is also more representation and more types of actors involved, the output is more carefully elaborated and coherently designed. As Pauwelyn, Wessel and Wouters (2014) show in their study, with a wider variety of actors, consent is more likely to happen which in turns makes the process more inclusive and efficient.

While international lawyers face more difficulties accepting new forms of international law-making beyond treaty law, customary international law, and the general principles. Still, the idea of global governance seems to better reflect current trends led by globalization which have inter-connected nations, international organizations, non-governmental organizations, enterprises, civil society, and the individual altogether, shaping world politics.

In this sense, it is important to highlight that although 'governance' is not the same as 'law-making', which in turn is not the same as 'legislation', Wessel argues that informal law-making is yet a form of international law which contributes to shaping world legislation (2017: 257-261). Because even though it might not be legally binding and be made through the formal procedures that formal rules follow, they still contribute to creating public order, which means that, as long as it determines the acts of individuals, private associations, enterprises, states or other public institutions, the actors making these norms are exercising public authority, which is a necessary element to make public order (Von Bogdandy et al., 2010).

The mere fact that these outcomes coming from informal law-making procedures fall on the non-law as traditionally understood, does not necessarily mean that they are regulated by law or have to be justified under law. Thence an informal law instrument, even though not being "international law" as such, it can still have legal effect and/or be regulated by law (Pauwelyn, Wessel and Wouters, 2014). As Wessel further contends on the concept of informal law-making:

> *"(…) If these decisions by international organization [such as those of the UN Security Council] are to be seen as 'world legislation', with similar effects as 'domestic legislation', it then makes sense not to disregard other developments in global governance (…). Acknowledging this form of 'world legislation' reveals that we have moved beyond public international law as the counterpart of domestic private law (primarily based on contractual relations in the form of treaties) and face the emergence of a true international public law, in which international public authority is exercised over the various participants in a global society" (2017:265).*

Scholars like Pauwelyn, Wessel and Wouters defend that there is nothing 'soft' in informal law-making, since the development of these rules is "highly regulated and strict, based on consensus, and the expectation as to compliance with these norms is extremely high" (2014: 743). This is the reason why this type of source requires more consultation and input from stakeholders than hard law, as the actors need to be convinced of following whatever is established in its

content (Duquet et al., 2014). What characterises this type of law-making is not its non-binding essence (which is what defines soft law), "but rather that they are outside traditional international law altogether" (Pauwelyn, Wessel and Wouters, 2014).

Furthermore, non-binding instruments cannot be precluded from creating legal effects. In Dansk Rorindustri, the CJEU ruled that the Commission's Guidelines were binding since they created legitimate expectations between the parties. In Kasikili/Sedudu, the ICJ stated that these informal instruments were also relevant to study and determine the interpretation of other legal acts. And in another statement by the same court, it established that General Assembly resolutions, although not being a recognized source of international law as such, they were still relevant to be used as evidence of customary law (Kassoti, 2016).

Breaking down informal law-making can serve to explain if there is a specific criterion or not to justify whether this type of law-making is based on the rule of law or not. Different authors have set out different criteria to explain their conceptions of the rule of law. For Lon Fuller (1969), law should be at least general, publicised, prospective, clear, non-contradictory, compliable, consistently applied, and reasonably stable. Over time, new elements like transparency, participation, independence and accountability have been added to the list, but the requirement of being legally binding has never been included (Duquet et al., 2014).

A specific procedure is not defined in this type of informal processes, thence norms cap be adopted in different ways and without following any particularly defined steps. In turn, this also means that the outcome can take different forms. Whatever the process and whatever the outcome, the fact that there are no specific and uniform rules defining the steps to be followed does not mean that they cannot be established at a later stage. In this sense, Article 38 of the ICJ Statute does not specify that any particular processes have to be followed for a norm to be part of the international legal system. But more importantly, it does not mean that the outcome cannot be considered as law and that it cannot be binding. In this sense, the authors defending informal law-making processes argue that "Article 38 of the ICJ Statute does not offer an exhaustive list of the sources of international law nor does international law require that a particular

process be followed to create international norms or that international law can only emerge out of particular for a or IOs" (Duquet et al., 2014; 85).

Besides these changes in the actors, procedures and outcomes in the making of international norms, law schools continue to teach only the traditional sources of international law, and it is hard for some international lawyers to accept that the realms of international public law are expanding and moving towards new forms of international law-making. Concepts like "informal law-making" are hard to attain to their minds. Still, new forms of cooperation within states and international actors are taking place, and so are the processes and outcomes of that result from this cooperation or negotiation. The need to look *beyond* what has been long taught and understood as international law might seem to be necessary in the future.

1.2.4. The breakdown of the classical doctrine of sources

Harlan Grant Cohen[6] developed a new doctrine of sources based on opinio juris as the main element to consider a norm as part of international law. This section will expose his proposal as another way to rethink the construction of international norms. As it has been studied in the previous pages, some authors have positioned themselves in favour of attributing more relevance to soft law. Others have come up with new sources of law, which is the case for informal law-making, and others, as Cohen, have placed the debate on changing the entire doctrine of sources and thinking of a new hierarchical structure based on different elements.

Cohen argue that while the positivist view of the doctrine of sources is based on state consent and formality, additional developments in this matter have started focusing on the process of norm internalization and legitimization to explain which rules can be considered as law by international actors. He specifically focuses on opinio juris. This element of customary law, which creates this type of source along with

[6] He has exposed his theory in Cohen, H. (2007) Finding International Law: Rethinking the Doctrine of Sources', *Iowa Law Review*, Vol. 93, pp. 65-129 and has further developed it in Cohen, H. (2011) 'Finding International Law, Part II: Our Fragmenting Legal Community', *New York University Journal of International Law and Politics*, Vol. 44

state practice, is for him what makes a rule become internalized by international actors. Opinio juris, as the belief that a rule is obligatory, will then be the core element of international norms without which there cannot be law as such. State practice, in this scenario, losses its relevance and moves to the background.

This does not mean that state practice is not taken in consideration, but it will not have the defining nature it corresponds to it today. At a practical level, this theory would enhance the authority of international norms based on the construction of opinio juris by international actors, and state practice would only become a manifestation of this general acceptance. That is, while there is certain scepticism today towards international norms due to their lack of enforcement, which in turn results in states not following the dictate of international rules, the revised doctrine would fill the gap between rules identified as law and rules treated as law. If basing what is construed as international law on opinio juris, the new doctrine "should help tear down the distinction between the 'law on the books' and the law that matters" (Cohen, 2007: 73).

This would also mean that treaties would have a new role in this hypothetical doctrine. Today, treaties are a source of international law, but in this new conception of the doctrine, they would become evidence of the existence of customary international law. This would materialize in three different ways. First, treaties would codify customary international law. Second, they would represent the process of "crystallization" of a rule of customary law. Third, they could contribute in generating new norms by providing focal points which can later escalate and result in custom. This reconceptualization of this particular source would adapt the role of the treaties to the state of affairs in the current world. International treaties have remained rather static over time. While this can be beneficial in terms of having a solid source to rely on that is not affected by destabilizing forces, it also can become a challenge to reflect today's society which is characterized to be continuously evolving.

This also leads to another point, which is that the mere existence of a treaty, although being international law, does not always lead to causing effects or to changing the intention nor the actions of states. Goldsmith and Posner talk about non-compliance of international human rights treaties and point that their weakness is precisely

because of its limited effects, showing that there is no correlation between the ratification of a treaty and its affects on human rights practices (Goldsmith and Posner, 1999; Cohen, 2007). Ratification of a treaty does not necessarily mean that the state actually wants to bind itself by the document. And even when it does, the Reservations, Understandings, and Declarations (RUDs) that many of these instruments contain show the lack of willingness to be bound by it from the very start. Thus considering the treaty not a source of international law by itself but instead a reflection of opinio juris would resolve the problems that current treaties face.

Cohen draws his theory taking Harold Koh's theory of transnational legal process as a premise. For Koh, international law is created when international actors internalize rules and norms. Thus the process is threefold, there must be interaction, interpretation and internalization (Koh, 1998). This basically means that norm entrepreneurs force interactions with one another which lead to interpretation of the rules that, later on, are internalized. This internalization happens when "a legislature may enact legislation, a court may issue a holding, an executive may issue an order, or a bureaucracy may adopt regulations" (Cohen, 2007: 99). The proposed rule by norm entrepreneurs has thus become national law and has thence been internalized. As this process happens elsewhere, and the rule internalization expands, the transnational legal process of the creation of an international rule takes place. The nations have adhered this specific norm in their domestic legal systems and have come to obey it. With this sense of obligation, and opinio juris, and by internalizing the norm, acceptance of this norm arises at the international level and shapes the norm as an international one.

Once this new understanding of what defines a norm in international law -opinio juris- has been accepted, we can begin to define a new hierarchy of sources depending on whether and to what extent they have been internalized in the international system. Starting with the premise that the problem of international law is not with the system as a whole, but as the means of identifying it, Cohen proposes a new doctrine of sources. Thus instead of the well-known organization of sources in treaties, customary international law and general principles, this proposed construction would be formed by three different foundations: (1) Core International Law, (2) Legitimated Rules, and (3) Aspirational International Law.

Starting with the first, Core International Law, it would consist in two different types of norms. From the one hand, 'Process Values' norms within the international system about making rules. From the other hand, 'Core International Law' would be internalized norms, that is, widely accepted norms which have been adapted within national legal systems. The second type of source would be Legitimated Rules. These would be compound of treaties and custom supported by strong Process Values. Counting on this support, they would become law because they would be considered sufficiently serious and well-developed to convince international actors that they are meant to be legally binding, or they could be backed up by enough general practice and opinio juris recognizing them as customary law. The third category, Aspirational International Law, would be rules written down in treaties which do not count with sufficient opinio juris and thus have no sufficient legitimacy to be considered international norms but which, on the other hand, can reflect legal aspirations of some international actors. In this case, this type of source would be determinant in the process of crystallization of a norm, as it would help get a rule established based on previous intention of making it a binding norm.

In summary, what this doctrine would consider is not whether a norm is followed in practice or not, but whether it has been internalized. This internalization would demonstrate whether the rule is treated as law at the national level or not, which would show the legal value that international actors award to the norm. Thence evidence would not be based on state practice, but it would instead focus its evidence on opinio juris. This would alleviate the existing gap between what is considered to be a source of international law and the practice following this norm, a practice that sometimes does not go in accordance with the content of the norm.

This theory is a hypothetical reconceptualization of the current doctrine of sources of international public law. Whether it can be widely agreed upon or not, what it shows is that once again, scholars are focusing on new ways of thinking about international law. As most agree that the role of treaties is diminishing and that we might be witnessing the rise of new sources within the international legal body, another way to redirect the international legal system to fit within the needs of our globalized world is to redesign the doctrine and the

hierarchy of current sources. This is what Cohen does with his theory on rethinking the doctrine of sources, as he makes up an entirely new system of sources based on a different foundation, which is opinio juris. Experts in the field clash when exposing their ideas on whether the system should be entirely redefined or not.

Is an already existing but previously forgotten soft law now taking more relevance? Are new sources and processes, such as informal law-making, arising? Or should we tear down the traditional doctrine of sources to rebuild a new one? While these questions are hard to answer today, and it is not the intention of this chapter to find a common agreement or solution to the debate, what is interesting is to understand that what we might be witnessing is the crisis of the international legal system as we know it, and that these changes will lead to the system taking a new form, whether it is with new additions or with an entirely new face. While going under a crisis, it is hard to see how we will come out of it, and only the future will tell. What seems to be clear is that while the structure of the legal system as he had commonly and historically known it, had remained intact and indisputable, is it nowadays going under a change that would have been unconceivable before.

CHAPTER 2
THE CONSTRUCTION OF INTERNATIONAL NORMS TODAY

Today, global norms are not only framed in treaties or found in customary international law. They are also implicit rules and patterns that govern the behaviour of state and non-state actors (Nadelmann, 1990), and with the spur of new players in the field, both as subjects and objects of international law, it is indispensable to determine the processes by which norms are constructed. Today, we can think of three different processes related to international law-making: norm emergence, norm adaptation (or norm change) and norm substitution. In this chapter, the three procedures will be examined to understand their functioning and the ways in which they take place. But before going deeply into the topic, an overview on the concept of international norms and the elements that compose them, and other related subjects such as their legitimacy, will be discussed.

However, before analyzing the different ways in which a norm can arise at the international level, it is important to first know what it is exactly that we consider as a norm. What are its elements? Who makes them? What can we determine as law and what is not? How are they made? Questions on their content, the actors making them, the addresses, their legitimacy, and the reason they are obeyed are all key to understanding the process of making norms. Once the foundations have been established, we will move to the international level to study the different ways in which an international norm may arise.

But before digging into these ideas, it is equally important to clarify the perspective from which I depart. While it is necessary to establish certain foundations on norm theory to appreciate the traditional perceptions of the elements of norms and the general debates on who makes them and how, it is also necessary to emphasize at this point that my personal understanding of the structure and content of norms may differ from the traditional conception of legal norms. Thence as much as it is required to refer to them before digging into the debate on international law-making -as they are clearly relevant for my approximations-, it is also necessary to clarify that my conceptualizations of these processes do not depart from the classical

elements of a norm. While, as we will see during the following lines, the conventional conception of norms departs from defining what is law than what is not, my interpretation of global norms today does not lie in establishing such differentiation. Instead, from my point of view, the line between legal and non-legal norms easily blurs, both for the consideration of what a norm is and for the processes that make them.

We have recently seen an emergence of a wide range of different the processes of law-making, and many are deviating from the traditional theories of international law. While some have argued for the growing relevance of soft law, others have called for a rethinking of the hierarchy of the sources. And to a larger extent, some have argued in favor of new informal law-making procedures, thus completely drifting away from the long-established beliefs of international legal theory. The point here is not to argue against these conceptions, but to open the door to new potential interpretations of the concept of global norms and to the processes by which they arise. This being said, this first section will explore some of these more typical understandings on the concept of norms, to then decipher new understandings of global norms through the lens of contemporary approaches of international law-making.

2.1. The making of norms

Following Katzenstein's (1996) definition of a norm as "collective expectations for the proper behavior of actors with a given identity", Finnemore and Hollis (2016) separate four core elements in a norm: (1) identity, (2) behavior, (3) propriety, and (4) collective expectations. According to their analysis, identity refers to the actors to which the norm applies. First, it is important that these actors identify themselves with the norm and that they are aware of the norms refers to them, so that the norm can create effects over them. Behavior refers to the specific actions -or omission of actions- required in the content of the norm. Depending on the rule at stake, this will create obligations to do something, or prohibitions from doing something, while others constitute new rights or even new actors. Thus the content of the norm is relevant to the extent it determines what is expected from its application and from the actors involved. Propriety, on the other hand, refers to the appropriateness of the norm. That is,

whether it is considered to be appropriate or not based on religious, political, cultural and/or professional standards. The norm can also be (in)appropriate taking in consideration the legal context. Lastly, collective expectations refer to the social construction of the norm built by the actors, who make the norm exist because they believe it exists. This element thus refers to the intersubjective character of the norm. Altogether, these elements form the norm and shape its existence.

Definitions of the notion of a norm may differ from one scholar to another, but what seems necessary at an early stage is to refer to the debate on what is law and non-law. Scholars have approached this question from different perspectives, thus what I will try to do here is to recollect different views on this subject in order to find a useful definition before we analyze how they come out.

There are different approaches which can be taken when considering the distinction between what is law than what is non-law: the effects-based approach, the substance-based approach, and the one combining both (Kassoti, 2016). The first one was mainly developed by José Enrique Alvarez (2005), who suggested that to see whether a rule is part of law we have to determine whether it affects the behavior of its addressee. This theory is then based on compliance. It does not require the norm to fulfill certain procedural requirements, but it instead focuses on whether actors follow it in practice. Of course, this idea faces the contradiction that once practice does not follow what the rule says, there is no rule anymore, and its existence is completely dependent on the willingness of the parties to comply with it, which means that compliance determines validity. On the contrary, compliance should not define the legal character of a norm, but the norm should be instead the one guiding the conduct of the actors, thus this approach does not seem to be the most suitable one to determine a norm's existence.

The second approach is the substance-based one, based on the legitimacy of those making the norm. According to Franck (1990; 2006), legitimacy is made of determinacy, symbolic validation, coherence and adherence. In other words, the fact that a norm can induce compliance is what will determine whether we are in fact dealing with a norm. However, the concept of legitimacy is in itself hard to define, and it has a strong subjective connotation which would

make it hard to define what is law than what factually is not, since it would not really depend on an objective standard (Kassoti, 2016).

The effects and substance-based approach seeks to englobe the two previous theories. In this sense, what is important is to see if the norm can generate strong adhesion (Kingsbury, Krisch and Stewart, 2005), that is, if it can promote accountability in practice (Kassoti, 2016). Authors supporting this approach (Kingsbury, Krisch and Stewart, 2005) consider aspects like transparency, participation, consultation and review mechanisms as to determine what is law. They argue that global administrative law is an example of a legal mechanism that along with supporting social understandings promotes accountability to global administrative bodies.

Considering these different approaches, one realizes that the separation of what is law from what is not is not so clear, and that the issue of determining legal norms is not such a simple task. Furthermore, if we consider the evolving nature and changing circumstances of our current globalized world, with new international actors taking part in the process of law-making, and different sources and criteria as to how to make the law, it is even harder to find a commonplace from which experts can agree. What seems to be clear is that behavior and legitimacy seem to be important factors when analyzing norm compliance by addressees. As Nadelmann (1990: 480) said:

> *"It is difficult and often impossible to determine whether those who conform to a particular norm do so because they believe the norm is just and should be followed, or because adherence to the norm coincides with their other principal interests, or because they fear the consequences that flow from defying the norm, or simply because conforming to the norm has become a matter of habit or custom".*

Following the idea of the substance-based approach which focuses on legitimacy, and Franck's arguments on the importance of legitimacy in international law, it seems necessary to study this concept and its implication in the making of international norms. The concept of legitimacy refers to the justification and acceptance of a political authority (Beetham, 1991), or in other words, that a legitimate

institution is that which has the right to exercise authority (Bodansky, 2012). According to Franck's definition, "The legitimacy of governance is determined by the degree to which those chosen to exercise power do so in compliance with the checks and balances of right process" (1999:7). Legitimacy then is key in the making of law, although not necessarily following the substance-based approach, because those making the law have to be legitimately allowed to do so.

The question on the actors when dealing with international law-making is not only important in the sense of determining the actors, but also because of the legitimacy they possess. This is because norms and actors interact with one another, or in other words, "norms are not simply perceived as outcomes, but also as dialectical processes" (Pareja-Alcaraz, 2019:3). This is the reason why it is so important to establish the processes by which they are made, changed, and why. And questions like those related to compliance and effectiveness are many times linked to their legitimacy. And at the international level, since many times rules are not enforced and there is no coercive power, it is key that the actor or institution making the law is seen as legitimate by the rest, as compliance and effectiveness will be intrinsically linked to this perception.

It is interesting to see the description given by Jutta Brunnée and Stephen Toope (2001), in which they see the law from a constructivist standpoint where law is generated through interaction instead of pre-existing hierarchical systems. In their understanding, law is a mutually generative process by which law influences the actors' behavior, identity and interests and in turn institutions are re-shaped through interaction with these actors with new identities. Following this definition, and assuming that the law is in fact capable of influencing state conduct, how is this is this influence generated? The obligatory nature of norms is definitely an important reason why states change their behavior. But as Brunée and Toope argue, "bindingness cannot simply be assumed" and it is important to determine what it is that makes the law powerful. According to them, "law is persuasive when it is viewed as legitimate", meaning that it is a combination of two things: an internal process value being accomplished plus a basic social understanding justifying these processes. Thence for these authors, what is most important in a norm is that is legitimate, because only then one can assert that certain aspirations that are met with a wide acceptance of these actors in the system.

Keohane (1997) details a collection of perspectives on the different understandings of legitimacy: the instrumentalist optic and the normative optic[7]. The first refers to interests and argues that rules and norms will matter if they affect the calculations of interests of actors. This optic is useful when the actor can anticipate the conditions of future strategic choices, but it lacks some anticipation on what happens in today's world when society is so frequently evolving. In this sense, this theory does not adapt so well to the changes in interpretation, and it is hard to anticipate certain future conditions as, if these change, actors cannot predict the consequences of their own actions precisely. On the other side, the normative optic focuses on the process that creates legitimacy and its consistency with general norms. Through this understanding, those norms which are coherent have greater compliance than those which do not. Norm interpretation happens all the time, and it is important that these norms set the terms themselves of the interpretative discourse. What is important here is that the interpretation of the norm follows a dialogic process which has been extended over time, and thus does not lead to "self-serving interpretations". Keohane admits that both optics are relevant, and he specially acknowledges that it has been demonstrated that the instrumentalist optic applies, as states modify their conduct depending on the existing rules. They might not always fulfill them, but it has been shown that reputation is important when considering whether states obey rules or not. However, he argues, this optic does not seem to be enough to talk about legitimacy, and the two of them seem to be necessary and complementary in order to talk about legitimacy in full terms.

Galán (2018) has a different understanding of legitimacy, and deviates from the more typical division between the descriptive and normative parts. Instead, he contends that legitimacy is purely evaluative and that, as a consequence, it does not hinge on the descriptive elements and so cannot fulfill its presumed explanatory role. He argues that it is impossible to trace empirically a relationship between legitimacy and

[7] Bodansky (2012) talks about the normative perspective and the descriptive/sociological perspective. The first is linked to arguments about moral, political and legal theory, focusing on empirical and explanatory arguments on whether an institution objectively has the right to rule considering qualities like democratic pedigree, transparency, expertise. The latter refers to what the actors subjectively believe about the institution as in whether it has or not the right to rule.

order, as the concept is too broad, and it is hard to detect when a particular social change is due to legitimacy or not. That is why he focuses on legitimation instead of legitimacy, to put the emphasis on the *process* by which legitimacy is asserted. Thus for him, the "dynamic aspect of legitimacy", legitimation, is of crucial importance.

Koh (1997) puts together these different conceptions of legitimacy with the reasons why nations obey the law, as this is another widely discussed question in international legal studies. He argues that while Franck defends that if nations perceive a rule to be fair they are more likely to obey it, other authors like Abram and Antonia Handler Chayes defend that when states have to justify their actions because they are bound to do so by treaty norms, they are more likely to voluntarily comply with them. In both cases, Koh argues, the key factor in compliance is *internalized* compliance. This internalization happens when after an interaction between nations on the interpretation of a particular norm has taken place and one of the interpretations is forced and thus makes the other party internalize the new interpretation of the norm into its domestic normative system. There is not only the intention to make the other to simply obey, but to do so because it is part of its internal value set: "The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms, and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process".

The factor of compliance is thus an important part to indicate the influence of international law, but this does not mean that the rate of compliance is directly linked with stronger international rule of law (Dunoff, 2019). In the last years, international law has been subject to a wide range of changes, from the decline of the signature of new treaties and conventions, to an inclination by some towards soft-law and the emergence of informal arrangements. Under these ongoing developments one may wonder if this is all an indicative of a regression or diminishing of the international rule of law. However, some attribute this debate on whether international law is in 'decline' to 'treaty saturation', thence arguing that there is no such downturn in the rule of law internationally, but instead, there is a shift towards different types of instruments and procedures. Furthermore, as Dunoff (2019:183) states, "Dramatic changes in the international

order often give rise to new, and often stronger, versions of international law". In the next section, the processes by which international norms arise will be analyzed, to see whether and to what extent they emerge, adapt or substitute one another today. At the same time, this analysis may also be useful to determine whether international law is in fact reinforcing itself through new processes or whether its existence and/or strength is currently under threat.

2.2. Processes in international law-making

While in the first part of this section we will look into three different processes by which the content of the global norm is designed, in the second part the concept of 'norm diffusion' will be explained. While the two processes -that of the creation of the norm and that of diffusing the norm- are exposed in separate ways, we must not forget that they are very much interconnected.

Norms are in constant evolution (Pareja-Alcaraz, 2019). As it will be seen, a norm can either emerge, change or substitute a pre-existing one. And these three processes are the ones which result in the creation of new norms. However, the three of them can also go through a process of diffusion. That is, the process by which a global norm lands to the domestic system and spreads throughout different nations across the globe. Because while a global norm may emerge for the first time at the international level, it then has to translated into national domestic legal systems of a wide range of countries, and the same is the situation of the norm which changes or is substituted by a new one, thus in all of these processes it is very much likely that the norm goes through a certain degree of diffusion.

This being said, we will first describe the three ways in which norms can be designed in terms of their substantive content and we will then see the incision of norm diffusion in international law-making.

2.2.1. Designing the substantive content of norms

When we refer to the act of making international law, there are different procedures to consider, depending on whether we are talking about the creation of a new norm or one that has gone under a

process of "re-shaping" and derives from an already existing one. In the first case, we are referring to "norm emergence", that is, the process through which a new norm arises in the international system. One of these norms, after a longer or shorter period of time, can be subject to changes to adapt to different circumstances, interests or to a new reality. That is what we call "norm change" or "norm adaptation". A third and different process is that of "norm substitution", which takes place not when a specific norm undergoes changes, but when it is replaced (substituted) by another norm.

To understand the complexity of all these processes, we will now go over the three of them, highlight its main characteristics and dissect all of its steps. Making sense of these three different legal exercises will be useful later when we try to define which is the process (or processes) by which the securitization of migration takes place.

2.2.1.1. Norm emergence

When referring to the "life cycle of norms" it is fundamental to mention the theory developed by Finnemore and Sikkink (1998). These authors have been key in elaborating an explanatory process by which norms arise and expand by establishing that a norm's influence goes through a three-stage process. First, there is "norm emergence", when norm entrepreneurs try to convince a critical mass of states to embrace the new norm. Then there is "norm cascade", a dynamic in which norm leaders attempt to socialize other states to follow the same provision. And lastly, "norm internalization", which occurs once the norm has acquired a "taken-for-granted quality" and is widely accepted and no longer discussed. While other scholars have later on contributed to furthering into the topic, it is important to acknowledge that much this section will be based on the grounds established by these authors.

But before we continue on the life cycle of norms, let us now pause for a second and dig into the first moment in which the norm emerges. We come from discussing the concept of norm and when it is generally considered to become law. Following this understanding on the notion of global norms, the process of norm emergence has to be seen here as a flexible and fluid process by which different types of global norms can emerge. This being said, some norms emerge

spontaneously, without any particular norm entrepreneurship guiding the process of creating a norm. When this is the case, it is understood that a norm arises because of social interaction which leads to repeated behavior that creates expectations from others and thus ends up resulting in a norm. This is similar from the idea of international customary law, which appears when states repeat a certain practice over a long period of time which then, along with opinio juris as the sense of being bided by a particular behavior, creates an international norm. However, most of the norms that arise are created because of the interest of certain parties acting with the purpose of making a new norm. These norm entrepreneurs are then the ones leading the process from the beginning, and trying to promote the norm. They can be individuals, firms, multinationals, NGOs, international organizations, states… (Finnemore and Hollis, 2016).

Thence norm entrepreneurs have an important role in this process. Firstly, because they are the ones tackling a specific problem and thus choosing a determinate area from which the norm will later on emerge. Secondly, because they frame the issue at stake. That is, they choose how to refer to the problem and they interpret it according to their opinion and interests. In the words of Finnemore and Hollis (2016): "Framing defines the problem involved in a particular way and tells us who should do what to tackle the problem so framed". This part related to interpretation of the norm is very important, since this will be what will decide the behavior that will be required in a given situation, which will in turn define collective expectations about what it is expected from the norm.

The motives laying behind norm entrepreneurs have also been addressed by these authors. They argue that altruism, empathy and ideational commitment are the main reason why these actors promote norms or ideas, since they believe they have the capacity to influence and participate in other's ideas and because they believe in the value of the norms they seek to promote. And the ways they follow to promote these norms are through "organizational platforms" like NGOs, international organizations or large transnational advocacy networks to facilitate the expertise and capacity of these platforms to address other actors and be able to change their behavior. These platforms are also interesting to incorporate in the process so that norms are institutionalized in specific sets of international rules and organizations. Achieving this means gaining adherence by other

actors, which makes it more likely that they go to the second stage; that of norm cascade (Finnemore and Sikkink, 1998: 898-899).

Once the particular norm has emerged, there are different tools to promote its development and to make sure it is adopted by all actors, as collected by Finnemore and Hollis (2016; 449-452). While norm entrepreneurs may create organizational platforms from which they promote their norms, it is crucial to gain some critical mass or tipping point from norm adherents so that the process of norm cascade becomes successful. One way to achieve this is to *incentivize* them. Strong actors, those having more resources, are more likely to be able to offer positive inducements to convince the other parties of supporting the norm. Incentives can also take the form of coercion. Through bribes and threats, a strong actor can force others to do what otherwise they would not. However, it is questionable the extent to which this norm will be successful in the long term since if there is no belief that the norm should exist, then once the incentives decease, support to the norm will vanish away. A second way to promote a norm is through *persuasion*. In this case, the actor will try to cause the other to believe in something -in this case, in the particular content of the norm- through argumentation. Through this method, information becomes key, but it must be acknowledged that many times this is not the most successful way to achieve norm promotion. Thirdly, we have *socialization*. This refers to the process by which patterns of social interaction arise. Here, identity is the core element. There might be acceptance over a norm because of the ties and relationships that one actor has with the one promoting the norm, thus support to it is only based on a valued relationship. Or because the affected actors belong in the same community or share the same values and thus support norm emergence in respect and compliance with norm entrepreneurs. From the other side, it can also be the case that a state, for instance, perceives another as successful and copies its actions believing that behaving the same way will also award it with certain degree of success. These three different approaches are those which can be taken to promote a norm. Depending on norm entrepreneurs and those having to accede to the norm, as well as the context and circumstances in which the norm can be promoted, one way may be more likely to succeed than the other, thus actors will take the measures they believe will be more efficient to achieve their goals.

Besides studying the way in which a norm emerges and what actors do to promote it, it is also interesting to point out that there can be other actors specially working against it. Some might disagree with it from the beginning and thus deny its content, refusing its applicability and compliance. In the case of norms advancing human rights, non-democratic governments have often used violent repression against norm promoters (Finnemore and Hollis, 2016: 455). Issues like climate change are difficult to tackle in the sense that it is hard to reach common agreement considering this is a global issue affecting all countries. But in other cases, not affecting such a big amount of international actors, such as when what is looked for is to promote transitional justice and strengthen democracies, it is also difficult to promote norm adoption. This does not mean it is impossible to reach an agreement, and besides its complications, it is still possible to find a common place from which norm promotion can depart.

To put in practice this thesis, these authors have studied the emergence of cybernorms in the international legal scenario. As they accept that the current international legal framing in this subject lacks solidness to adapt to the constant evolution of technology, they find it necessary defining the ways in which new cybernorms should be conceived. They envisage this process as one characterized by 'strategic social construction', in which new norms will have be taken considering strategical points like the context, the elements of the norm, and the tools of influence (between incentivizing, persuading, or socializing). They argue that norm promoters should specify the problem that wants to be tackled to define a concrete context in which the norm would facilitate a solution. Could not this be also the case of the securitization of migration? Should international actors consider the emergence of this norms considering the influence and impact they make cause in determinate groups of people?

After norm entrepreneurs have achieved the goal of persuading a critical mass of states to adopt a particular norm, we can refer to the norm having reached the "tipping point". But when are there *enough* states accepting the norm and thus having "tipped" the process? They argue that, according to studies, this happens when at least one-third of the total states in the system have adopted the norm. On the other hand, ascertaining *which* states have adopted the norm is also relevant, since there are "critical states" depending on which issue the norm refers to, and without the acceptance of the norm by these critical

states, the norm can be compromised. Once enough states or critical states are following this new norm, there is a move to the second stage of norm cascade (Finnermore and Sikkink, 1998: 901-902).

At this stage, most of the normative change has already occurred. During norm cascade, states being to adopt new norms following the content of this international norm that has been accepted and "tipped" the process. Katzenstein (1996) argues that they do so because they want to be part of the international society, and as members of this society, there is a certain feeling of identity that shapes state behavior. States comply with norms to show that they have adapted to the social environment and that they belong in it (Axelrod, 1986). They might also feel the pressure of the international society expecting them to comply these norms (Fearon, 1997). As explained earlier in this chapter, there are different reasons, such as the different approaches on legitimacy according to Franck, Keohane, Brunnée and Toope, among others, on why states decide to obey international law. What is important at this point is to understand that norm cascade is precisely this process by which states decide to comply with global norms.

When a norm is widely accepted and internalized by states and other international actors, then we can talk about the third stage of the process, which is that of "internalization". In this phase, the norm "has a 'taken-for-granted' quality that makes conformance with the norm almost automatic" (Finnemore and Sikkink, 1998). At this moment, the norm is not very much discussed as there is wide acceptance by actors of its existence and its content. This concept, along with that of "norm diffusion" will be further discussed in section 6.3 of this chapter.

Shawki (2011) analyses how far the norm on the Responsibility to Protect is in the lifecycle of norms established by Finnemore and Sikkink (1998). This norm is relatively new, since it was introduced by the International Commission on Intervention and State Sovereignty in 2001 and adopted by the member states of the United Nations in 2005[8]. Let's remember that the responsibility it refers to is basically

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[8] See Resolution 60/1 adopted by the General Assembly on 16 September 2005 as a result of the World Summit Outcome (https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf)

addressed to national governments, which are responsible to protect civilians from mass atrocities and violence. However, the international community ultimately has to ensure this protection if the government fails with its obligation to protect its citizens, even leading to the use of force in extraordinary circumstances. The extent of this prevention and to the reactions attained to exercising this obligation to protect is not completely clear, which has resulted in a major misunderstanding surrounding the exact content and limitations of the norm. This does not mean that the norm does not exist as such or that it is at an early stage of emergence, but this lack of consensus along with the areas that remain controversial can be used to affirm that it has not yet reached the norm cascade stage yet. However, the fact that the norm was endorsed in the World Summit of 2005 meant, through the lens of the lifecycle of norms, that the norm had reached its tipping point (Shawki, 2011: 182). Back then, the heads of state or heads of government of almost all countries in the world endorsed the norm, which is proof that the stage at which this norm is found is far beyond that of its simple emergence.

Lack of specification in certain points of the content of this norm make it hard to apply in certain circumstances, and consistent practice across all relevant cases and by all states is difficult to achieve. One of the questions that has to be cleared up is at which point international intervention is necessary where there is a conflict (Bellamy, 2008). Still, the Shawki (2008) argues that the norm has already transitioned from the stage of emergence to that of cascade. Issues like specificity/determinacy will be the ones which will have to be addressed from now on to make sure it is more widely accepted and used to guide international action in cases of mass violence.

2.2.1.2. Norm change or adaptation

Different from the idea of norm cascade is that of norm "cycles". Sandholtz and Stiles (2009) argue that new norms always emerge because of conflicts with other existing norms. This means that, to a certain extent, the creation of norms is dependent on the context in which they emerge. It is dependent on the social context, but specially on the legal system in which it wants to integrate. As Sandholtz (2008) notes, "Normative structures (…) cannot stand still". He has developed the concept of norm change extensively and has exposed

the idea that tensions between norms and between norms and behavior results in a constant norm change and thus norm development. Both at the domestic and international level, these frictions and constant evolution along with the request from actors to change the content of what these norms allow or restrict, results in the development and constant creation of new norms.

There are two features of rule systems which lead to disputes and thus in norm change. Firstly, because of incompleteness. Incompleteness is impossible to avoid, since for every general situation, there can be multiple and unique particularities which demand for a specific ruling. As a consequence, some actions are difficult to assess in terms of rules: rules can be too wide, have an open texture, be too vague, or there can even be legal gaps. And thus acts become disputable. Secondly, there can be internal contradictions due to the tensions and contradictions between different rules in the same rule system. The legal system is made of hundreds of rules that, in some cases, can generate tensions between them (Sandholtz, 2009).

Following this idea that norms are subject to change throughout their lives, we can separate two waves of constructivist literature on norm diffusion and on norm change (Reidel, 2015). From the one hand, we have those scholars focusing on the adoption of foreign norms at the national level, with authors like Martha Finnemore, Kathryn Sikkink, Michael Barnett, Peter Katzenstein and Margaret Keck. In their cases, the role of international norms and transnational actors is analyzed to see the way state interests are shaped. From the other hand, there are those focusing on the agency and structures involved at the domestic level. Part of this thinking include authors like Amitav Acharya, Jeffrey T. Checkel and Jeffrey W. Legro. This second group pays greater attention to the way states adopt international norms, trying to discern why states recognize foreign norms in different ways and to a different extent. While the first theorists maintain the importance and influence of international norms at the national level, the latter seeks to predict whether a foreign norm will be successfully integrated in a particular state considering, among different elements, the existent political structures and the "cultural match".

Sandholtz (2008), for instance, has developed a four-stage process through which norms change. In the first phase, there is a normative reasoning. That is, the actor, who ultimately seeks to maximize its

benefits, foresees the costs and benefits of various actions and calculates how other actors will respond to this behaviour. To predict the other's reactions there is a certain calculus based on the pre-existing norms of the legal system and thence there is a 'normative reasoning' behind this action. Of course, looking at previous behaviours and seeing how the actions were accepted or condemned can be useful to know what to expect from a particular behaviour. In this sense, case law may result very useful. However, when we get to the international legal arena judges are not always the ones resolving the cases, and instead some international players, mainly states, seek to convince the others with their understanding of what a particular norm implies. The second phase is related to the fact that all systems are incomplete and have internal contradictions. Because of this, some acts will clearly be against what is established in the norms of a system, but in other cases, it will not be so clear to draw the line between what is admissible by the norm and what is not. This vagueness is what will generate an internal contradiction as the same action can cause different effects depending on how we interpret the given rule. At a third stage, even though there has been a previous normative calculus and some intent to foresee the consequences of an action, there might be an action that causes opposition, and right there, a dispute has arisen. In the fourth and last stage, these disputes and the arguments pro and against it will result in the modification of certain rules.

When analysing these phases, it is also interesting to address the issue of norm violation. The fact that a strong or powerful state violates a norm does not mean that there is norm change. Actually, the effects of this violation depend on the justification it is offered by the state and the reaction of other states. Hence if the justification lays on enough argumentation and convinces the rest of the actors, it can even serve to reinforce the norm as this act will simply be considered as a permissible exception of the norm. On the contrary, if most states condemn the conduct, it will clearly be a case of violation of the norm. It is only in the case of repeatedly similar behaviour than the one that resulted in the violation of the norm that we can speak of a pattern of conduct which can serve as evidence of an emerging norm. It is clear then, that the mere fact that a powerful state violates a norm does not develop in norm change. Instead, other states must also be persuaded to support the norm change at issue (Sandholtz, 2008).

According to Sandholtz (2009) will be determinant to persuade other states to change a norm are the following factors: power, foundational norms, and precedents. Power has to do with communication resources. Again, as it has just been explained, we are not referring to material, economic, or military power, since these types of power will play a role in the case a state violates a norm. But when we are referring to rewriting a rule and persuading others to do so, what is necessary is the power to influence others ideas and information (through the media, diplomatic relations, presence in international organisms, etc.). A second factor refers to the foundational metanorms of international society, that is, whether norm change affects norms that are foundational and which therefore are affirmed across most of the world and which underpin a wide range of other rules, or not. If this were the case, norm change would be far more difficult to occur than in the case of non-foundational norms. A third and last factor is that of the precedents. If there is a similar case in which the norm being asserted was similarly applied, it will be much more coherent to change the norm. In addition, it will also reassure the consistency and stability of the system, which is necessary for providing steady expectations. Following these ideas, it is evident that not only state action is relevant to justify norm change, but the power to persuade and convince other states that a particular action/behaviour/conduct is justified will be determinant to result in norm change.

An example of norm change which followed cycles of dispute is that of slavery. It departed from antislavery rules in the mid-1700s and the creation of human rights for the first time, to the creation of a new dialogue regarding the extent to which anti-slavery norms could apply and the actions that could be outlawed (Stiles, 2009). In some cases, a norm can evolve for centuries, which is what happened with the case of piracy norms, thence it is fundamental to take into account the historical context in which the norm has evolved. In the case of slavery, norms changed due to long-term social and political movements; in the case of piracy, norms evolved through cycles of dispute and argument. In other cases, it could also be the case that norms changed because of triggering events. Wars, technological innovations and large-scale political upheavals such as revolutions can lead to challenging existing norms. All in all, this shows that cycles of norm change should not be studied in isolation since a historical

perspective is indispensable for understanding the evolution of a norm and its changes throughout time (Sandholtz and Stiles, 2009:324).

In this field, it is interesting the case study of Laura Reidel (2015), who analysed the multicultural approach to governing state-minority relations in liberal democratic states (particularly, those of Canada and the Neatherlands). She found that while the national governments of these two countries have taken an approach to move further from multicultural integration and its underlying norms, sub-state actors of these territories (such as Utrecht's municipal government) were nevertheless using their jurisdiction over integration and settlement programs to maintain this multicultural approach and thus to protect these minoritarian ethnic and religious groups and immigration in general. While arguing that the constructivist literature on norm diffusion should take a multilevel governance perspective, she affirms that it would also provide an answer to the question on how normative change occurs. As she says: "The constructivist literature on norm diffusion tends to assume that states are the main gatekeepers of normative change but these cases show that , if we peel apart the levels of governance, it becomes apparent that other levels can play key roles" (2015:329-330). She is in fact right in arguing that most scholars have focused on internalization from the point of view of national entities, and as a consequence, we have failed to regard sub-state actors as also being part of the process.

Initiatives at the local level pressed national forces to change the new approach or support the sub-state approach. Examples of these actions are the refusal of Utrecht's municipal government to comply with part of the national-level integration program and the PNSG project launched by Mississauga, which derived into the creation of the LIP program in Canada. These local strategies drove reforms at the national level and were clear signs of what constituted actual practice at the sub-state level. Considering that norms, including global norms, must be interpreted according to local practices to count on legitimacy and authority, the contestation by local entities of the different approach that was being taken at the national level is proof that change can occur in a different level than the national one. Thence the local approach and the interplay between levels are important to consider in order to construct and readapt national and international norms Reidel (2015).

Consequently, we should not view local actors as merely the object of global governance, but at the lower levels global governance is also construed. Domestic actors are actually the ones who contest, translate and adapt global proposals to local realities, sympathizing or opposing to them. Their reactions are part of the negotiation process and guide the application of global norms nationally, reshaping the strategies of international actors and guiding the global governance process through the bottom level (Kauffman, 2017).

Kauffman further develops this idea by designing what he calls "grassroots global governance". He argues that this model explains how global and local governance interact between actors from different levels (foreign, national and local) and it goes through a three-step process. In the first phase, transnational governance networks diffuse global ideas to the local level. Then, local actors experiment with these global ideas and negotiate and combine different elements from them with new features considering their own legal system and practices. At last, seeing what local actors have developed nationally, international actors change their discourses and strategies to tackle global problems. As Kauffman argues, through all of these steps one can see that there is an "evolutionary learning" that goes from the emergence of global ideas, their original elements, the experiments and conclusions of local authorities, and the evolution of it all at the international arena. At times the process may break down, while in others it endures. This will all depend on the ability of the transnational governance networks and the strategies employed.

Continuing on this line, Acharya (2004) argues that states do not only adapt their legislation to the content of international norms (and re-design them so that they are concordant with the national context), but that both international and local norms are readapted to be congruent with each other. Consequently, there seems to be a twofold adaptation: one to adapt the global norm to the social context of each particular country, and another relating to the adaptation to the legal system to this new existing norm. That is, at the domestic level, other legal norms that might be in conflict with the new provision will have to be re-adapted or erased, and the same will happen at the global level with the international legal system.

As it can be taken from these lines, the process of norm change or adaptation is a complex one, which combines the interplay of different

international and national actors. It is a multidirectional process defined by the exchange of information from both foreign and domestic institutions, which needs to be congruent with the social reality of every state.

2.2.1.3. Norm substitution

An interrelated process to the one of norm change is norm substitution. In short, while reinterpretation and adaptation to new circumstances derivates in norm change, in the case of norm substitution there is also a process of normative change by which a norm is contested or a new norm emerges but the old norm cannot be translated to accommodate to the norm change and thus ultimately dies. Thus in both cases, there is change. But while norm change or norm adaptation relates to processes which adapt to new circumstances, in norm substitution there is a new norm emerging which necessarily substitutes an already existing one that ends up dying.

It is interesting to highlight that the process of norm substitution is more likely to occur than that of norm change, and this is especially true when two conditions are met. First, when there is a "failure shock", meaning that wrongful application (or in-application) of the norm by various actors takes place in a short period of time. And second, when there is no longer international strong support for the specific norm among state and non-state actors (García, Pareja-Alcaraz and Rodrigo, 2019:19).

But when does norm adaptation take place and when does norm substation happen? When is a norm strong enough to remain, and when does one have to necessarily be reduced till abolition? According to Panke and Petersohn (2015) this depends on the institutional context. The reasoning behind is based on their research on six case studies on norms on international security. As they explain:

> *If a norm is not embedded in an institutional negotiation system, it is usually not abolished by negotiations, but by norm violations. In this process, the configuration and strength of the actors involved play a crucial role for the prospects of successful norm challenges. If the challenger is weak, the validity of the norm*

remains untouched. However, if the norm challenger is strong, the norm may be replaced, significantly weakened or even completely abolished. Which of these specific outcomes of norm challenges occurs is largely contingent upon the characteristics of the norm. While a vague norm is most likely to be weakened (e.g. limited applicatory scope), a precise norm is more likely to be abolished (2016:4).

These authors have developed three hypotheses by which they determine when challenges result in norm death while in others the norm is untouched or only reduced in terms of their applicatory scope. The first refers to norm challenges, the second to the prospects for the success of norm challenges, and the third to the specific outcomes of successful norm challenges (Panke and Petersohn, 2015). As they further detail, these hypotheses work together, working one at a time and consecutively to determine if a particular norm at stake fades or succeeds and to what extent it is changed or even abolished.

Following this three-step progress, at a first stage a particular norm is challenged. This can be due to the willingness to change certain elements of its content because of considerations of appropriateness or new interests. Whatever the motivation of the parties, the norm is challenge influenced by its institutional context. This does not necessarily mean that the norm automatically weakens or changes, it just means that after being followed for a certain period of time, it is now challenged confronted and/or disputed. In a second stage, it is crucial to determine how powerful the actors questioning the norm are. If the challengers are much stronger compared to those interested in maintaining the norm, it is then much more likely that the norm is under threat. At this point, it is also clear that the bigger the majority that is, the more actors supporting change, the more likely it is it is abolished.

In a previous publication, Panke and Petersohn (2011) also argue that the precision by which a norm is defined and the contextual environment surrounding it also shape the likeliness of its abolition. That is, if their aims are defined and they count on detailed procedures without complex undefined concepts and if their scope is clear, the likeliness of their rapid degeneration is different than the cases where a norm is vague. When the norm is vague -or partly

vague- and an actor infringes it, it can be argued that although it has indeed violated the parts of the norm that were vaguely defined, it did not intend to disobey the norm overall. Furthermore, the environment surrounding the norm is another of the elements to consider since if there is an unstable environment it is also more probable that incentives for defection appear which lead to violations and fosters up a degeneration cascade of the norm. On the contrary, in a more stable environment it is less likely that norm challengers and norm defectors arise. If we combine both elements together, authors reach the conclusion that "norms are likely to be abolished swiftly if the environment is unstable and rapidly changing and if norms are highly precise. In contrast, norms are likely to become incrementally degenerated if the environment is relatively stable and if norms are imprecise. Both processes lead to norm substitutions, provided that competing norms are present. If rival norms are absent, norms simply disappear without being replaced".

Thus when a norm is challenged, and when this challenge is backed up by strong states, it can result in norm substitution. This is what has happened previously with the abolition of international norms such as those permitting slavery, the restriction of its applicatory scope (i.e. the anti-mercenary norm) or the renegotiation and substitution of old norms for new ones (i.e. the norm of forcible intervention) (Panke and Petersohn, 2015). But in most of the cases, international norms do not die but instead persist or are subject to change and reinterpretation, thus norm adaptation is more likely to happen than norm substitution. There are cases in which a norm may survive despite instances of non-compliance. In these cases, while the norm is infringed at times -such as the case of nuclear non-proliferation norms- it is not undermined or abolished (Panke and Petersohn, 2011). Thence a norm can be violated, or an actor may be persistently unwilling to comply with it, and states will still not mimic its non-compliance behaviour. And as a consequence, although the norm is being challenged, it does not necessarily lead to being substituted.

As Glennon (2005) further states, when there is excessive violation of a rule, this ends up being replaced by another one permitting the restricted action. Desuetude is the situation in which stat practice of disuse can produce a new rule which replaces an earlier one. For instance, a treaty can establish a rule, but a later treaty or custom may signal a different intent to that of the previous rule. This does not

mean that all violations result in desuetude, thence there would be no rule being binding. But desuetude occurs when "a sufficient number of actors join in breaching a rule, causing a new custom to emerge" (2005:939).

On the other hand, Kutz (2014) has looked at the issue of norm substitution (or norms' death) in regards to those provisions concerning particularly the state use of force in national security policy. He argues that a norm does not have to "die" as such, since they can simply disappear and be latent at times, to then resurrect. For instance, the anti-torture norm was again enacted during Obama's presidency in 2009 to prohibit cruel, inhuman, and degrading treatment of detainees. That is way he refers to the "weak presence" of norms as a waning process which weights the norm and leads to its invisibility and possible decay. He separates this process of decay in four different transitions (which do not always have to occur, but are nonetheless likely to happen). The first is the emergence of discussions of different policy options that were previously excluded from deliberation; the second is the moment in which this discussion of norms in categorical terms changes to one of weighing terms; the third transition refers to the discussions in which the norm and its mechanisms figure as obstacles to be minimized and avoided; and the last stage is that in which the norm ceases to exist. The path to a norms death is not always uniform and it may vary depending on the particular case, but Kutz argues that it is likely that these four transitions happen in the process of "norm death" (or as he calls it, weak presence).

Glennon (2005:989) argues that "in the end, when the conditions for effective law are not present, a rule will fail and the rule of law will be the ultimate loser". However, if a norm fails because it stems in disuse, or because its "presence is weaker", and is then substituted by a new one, it does not necessarily mean that the rule of law is eroded. If all norm substitution occurred because of state violation or because a single state or an insignificant group of states wanted to change the rule, the role of international law, its legitimacy, and its efficacy would be highly contested. However, when a norm is substituted by a more recent one due to a change in the contextual environment and a change of the circumstances or common interests at stake, it is natural for a norm to perish and leave space for a new one adapting to the new social reality to emerge. International law, as in all fields of law,

must be a mechanism that regulates state conduct in accordance with the values of the international society. And naturally, this implies that as societies evolve, the law must adapt to this maturing progress. Thence in the same ways as norms emerge and change over time, norm substitution should not be seen as an evaporation of norms because of their non-compliance, but instead its death should be viewed as the closing moment of a life cycle of which, who knows, might resuscitate again in future times.

2.2.2. Norm diffusion

Having looked over the different ways in which norms can develop internationally, it is equally necessary to examine the process by which international norms land to domestic legal systems. At the same time, it is imperative to highlight that international norms not only arise at the international level and through international actors, but they are also made nationally and regionally by a wide range of local authors (from national authorities and politicians to local initiatives and individuals). This section will go over these ideas and take a look at the concept of "norm diffusion". Since global norms are also developed at the national level, we can assert that there is a two-level process of international law-making. It is then crucial to understand the creation of international law through the relationship between international and domestic processes of interaction.

A crucial step in all of these processes related to the creation of norms is norm diffusion. Diffusion refers to the way in which global norms "affect and constitute particular domestic agents, be they states, individuals, or groups" (Checkel, 1999). Or as put by Strang (1991: 325) "any process where prior adoption of a trait or practice in a population alters the probability of adoption for remaining non-adopters"[9]. Thence it refers to how an international norm spreads through states and "translates" into their national legal systems.

Jörgens (2004) distinguishes between three different "mechanisms of global governance", arguing that diffusion, along with harmonization

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[9] Another influential definition is that given by Everett Rogers in *Diffusion of Innovations* (1995, New York: Free Press) defining diffusion as "the process by which an innovation is communicated through certain channels over time among the members of the social system".

and imposition are the three ways in which international political factors affect domestic policymaking. As we will now see, these mechanisms differ in their mode of operation, the level of obligation, and the motivations of national policymakers. Although uses these three mechanisms to figure out in which ways international environmental law and politics affect domestic policies, his analysis can be useful to go deeper into the definition of norm diffusion. First, by *multilateral harmonization*, he refers to the conscious modification of internal policies because of the formulation and implementation of multilateral agreements of supranational organizations (such as the European Union). Through these supranational entities, "a set of countries cooperate to solve problems that they are collectively confronted with" (2004:251). Thus the principal reasons why states engage in this process is because they want to solve problems that trespass territorial boundaries and cannot be solved by one country alone. Once an agreement is reached by these group of states, there is a certain level of obligation to fulfil what has been decided and thus must comply at the domestic level with the international decision. Then there is *unilateral imposition*. In this case, the level of obligation is also high, but it differs from the prior process because the motivations and targets no longer coincide. That is, through imposition there is an individual state or particular organization which uses its power to dictate the policies of other states. The country which is obliged to change its policies or adopt new ones is thus less powerful and is thus forced to comply with the requirements of the stronger nation or entity. Lastly, there is *cross-national diffusion*. As it has already been said, diffusion refers to a process of imitation where the policies of a country influence the adoption of similar ones in another. This mechanism is of decentralized and unconnected nature and it is different from harmonization and imposition in the sense that there is no obligation to adopt these policies.

And how does a norm "diffuse"? The mechanisms through which diffusion works can be divided into four categories (Gilardi, 2012): coercion, competition, learning, and emulation. Coercion is the means by which one imposes a policy to other organizations or countries; competition is the way in which countries influence one another because they want to attract or obtain certain benefits (be it economic resources, greater power capacities, international influence, etc.); learning means that the experience and results given in a country can become useful information for other actors with similar context-

situations or problematics; and emulation makes reference to the attribution of greater importance to normative and socially constructed characteristics rather than the objective consequences.

As the literature on the mechanisms which empower norms at the national level explains, there are two ways in which diffusion can take place. From the one hand, there is the "bottom-up" process by which non-state actors support a particular international norm and put together their efforts to compel the government to comply with it. The second case is the "top-down" process, in which case decisionmakers are the ones adopting prescriptions embodied in international norms and thus internalizing them.

Checkel (1999) argues that the use of one or another depends on the domestic structure of the state, which he divides in four different categories: liberal, state-above-society, corporatist and statist. He argues that in the liberal structure, policy is formed more through the bottom-up process since individuals and groups are the ones holding a stronger role in policymaking. A different case is that of the state-above-society structure, where the state exercises a considerable control over society. Here, the role of decisionmakers is more central than that of the individual, and thus diffusion is characterised to be a top-down process since it depends almost entirely on the political elite. In the corporatist structure, decisionmakers play a larger role than in the liberalist structure, and they count on larger powers to change the normative system, but without implying that they can impose their preferences on the citizens. In this case, it is both the state and society those making norm empowerment. Lastly, in the statist structure decisionmakers play a much more dominant role than in the liberal and corporatist ones since the organization of social interests is weaker than in other structures. Thence according to him, norm diffusion will be shaped according to the kind of structure of each particular state, and this will determine whether it is more likely that there is a bottom-up or top-down process to assimilate and internalize international norms.

This theory does not escape criticism though, as Landolt (2014) has pointed the 'state-above society' example used by Checkel of the Ukrainian case is a fragile one and that the author relies too heavily on social explanations rather than on material factors. Anyhow, the point here is not to discuss the structure of the state and its relation to

diffusion, but to provide different insights on how diffusion works and why it does so differently depending on the case. What is important as a means of diffusion is to understand the role of persuasion and coercion, as through these practices, states achieve their goals to internalize a global norm. Still, even though a norm is adopted at the national level, it has to be fully institutionalised domestically for it to be formally and completely internalized (Landolt, 2004). If this institutionalization of the norm does not take place within the state, then the norm has not emerged as such or has not replaced nor changed other existing norms within the domestic legal system.

It is interesting at this point to refer to this factual implementation of the international norm at the domestic level. While Keck and Sikkink (1998) use as an example the case of women's suffrage to examine norm emergence, they assume that when a norm has universal adherence, it will not -or is less likely- be contested. However, as Landolt (2014) also contradicts, even when authoritarian governments adopt formal rights, this does not mean that they will be applied practically. That is why the domestic process by which a norm is internalized, with its formal adoption including contestation, interpretation and implementation are all important steps to be fulfilled to be able to completely argue that the norm has successfully been internalized.

A case-study on the process of norm diffusion is that of Prantl and Nakano (2011), who study the diffusion and implementation at the national level of the responsibility to protect in East Asia, and more particularly in China and Japan. They argue, after the study of these two nations, that diffusion is not so much a top-down process as many believe, but it looks more like a "feedback loop". The norm, they argue, instead of running from the global to regional and national level, has been "reconstructed and deconstructed at the regional and national levels and fed back into the global discourse". In the particular case, this has taken place through the July 2009 General Assembly Informal Debate and the subsequent September 2009 consensus resolution on the implementation of the responsibility to protect. Through these reconstructions and contestations, Asia and the Pacific regions have been able to integrate more positively this norm, and it has more successfully been diffused since 2005 precisely because it has gone through a mechanism for feedbacks and self-

correction by adjusting those parts of the norm which differed from the designed outcome.

Similarly, other studies such as that of Brown (2014) study diffusion through the lens of global health policy and defend that traditional analytical frameworks on norm diffusion somehow underplay the role of national actors. He also is of the opinion that top-down diffusion overlooks some aspects of internalization. First, he argues, global norms are not fully adopted until there is an "infusion of local customs and practices", since it is crucial to understand how the particular national political system works and translates into effective health policies. Second, and related to the first, the role of national actors -such as legislators or the government- is an important one considering they will be the ones implementing health outcomes which will determine whether they are successful or not. This does not mean that the design of the global norm is overlooked, but instead, while it designs the norm and establishes its content, national actors will be the ones adapting the norm to their national system and its social context.

In this sense, one could also agree that the consolidation and the establishment of the limits of the norm are not required for a norm to be diffused. On the contrary, the lack of precision on the delimitation of the content of the norm and its restraints make it much easier for this to be widely accepted, since more actors will be willing to integrate it besides norm entrepreneurs (García, Pareja-Alcaraz and Rodrigo, 2019).

Arising from this argument, we can see how the process of diffusion is an interactive and multidirectional one, with norms "being regurgitated and spat back up to the global level where further iterative processes take place before they are rediffused" (Brown, 2014: 883). Following this idea, it is coherent to affirm that norms can be internalized while at the same time be subject to reinterpretation according to the domestic context of the specific country where the global norm is being adapted. While some may perceive these changes as a case of "diffusion failure", because the exact content of the norm has changed, the fact that a global norm is adapted nationally should be considered part of the normal process. And this is especially true in the case of health governance, where the national context plays an important role in the adaptation of global norms to the states' system,

infrastructure, and social situation. As Brown (2014: 876-878) puts it: "Although the influence of global policy can play an important guiding role, health norms are never transcribed straightforwardly into national systems and a central element to successful health governance remains vested in the nation and the leadership role it exerts".

In fact, these conclusions reinforce the idea given by Landolt that diffusion and thus the internalization of norms in each state should go through a consistent process of contestation, interpretation and implementation, to be able to effectively talk about the norm *being part of* the domestic legal system. However, as Finnemore and Sikkink (1998:893) add, "domestic influences are strongest at the early stage of a norm's life cycle, and domestic influences lessen significantly once a norm has become institutionalized in the international system", thus the impact of the role of national actors may also vary depending on the stage in which the norm is at.

But in addition to this, we must not forget that not all global norms arise internationally, as in some cases, they can also be the result of local or regional movements "where local demands drive change at the global level" (Brown, 2014). When they arise nationally or regionally, they are then spread in the form of 'cascade' across other national legal regimes and institutions. And this diffusion at the national sphere can take place from a wide range of actors, from public and private figures, leading to instruments, standards, institutions, policy models, ideational frameworks and institutional settings (Gilardi, 2012). As Brown explains, an example of this development is the case of the Global Code of Practice on the International Recruitment of Health Professionals (the CODE), which was adopted by the World Health Assembly in 2010, after a group of African countries started requesting the creation of an ethical code of practice in this matter due to an ongoing human resource crisis.

The way in which norms -either nationally or internationally- appear and change existing ones, and then spread throughout other territories may make one wonder what it is exactly that determines whether there is norm change, substitution or diffusion, and what it is exactly the interplay between them. As put by Pareja-Alcaraz (2019), we can conceive "normative change and normative diffusion as two poly-centric, multi-directional, non-cumulative and plural processes that shape each other". And what is more, they are intertwined processes

that shape each other. He makes an interesting description of their inter-relation:

> *If you allow me, this complex interaction mimics the behavior of flexible objects spiraling in a hurricane or a rapid whirlpool described by Material Mechanics. As a result of the multiple forces and pressures they receive, flexible objects in these situations suffer some deformation that allows them to adopt a more ergonomical shape, to spiral down in the hurricane and make it to the ground, where they go back to their initial form over time. If they are inflexible, not flexible enough or they suffer severe pressures, though, these objects surpass their yield strength or elastic limit and either break or they lose their initial form. More importantly, they are trapped in the hurricane, not making it to the ground, or even worse, they are shot out of it at zoom speed.*

All in all, it seems that the literature on diffusion has been quite successful in defining this process, but it has also demonstrated that the mechanisms that drive the process as well as its bottom-up or top-down process are more complex than it may seem at first sight, with different insights being developed, and thus contributing further to the general debate on norm diffusion. Integrating and thus internalizing the global norm domestically is key to the norm's success, but equally important is the process of "internationalization" by which domestic initiatives generate new international norms. Both "internalization" and "internationalization" are processes which can take place within the international society. They do not necessarily have to be parallel process that happen altogether, but in some cases one will be preceding the other. At times, the initiative to create a new norm will come from the local level, and at others it will arise from the international community. Whatever the case, what seems to be clear is that whatever the process by which a norm arises, and whoever the entrepreneurs in the process, the diffusion of the norm and its internalization within the domestic system or its internationalization, are an important part of the integration of the norm within the internal legal system so that the global norm becomes successful.

2.3. Evaluating norms' success

Norms are important not only for legal theorists or political science, but they are vital for other social sciences as well: from sociologists studying the way societies are organized; to psychologists analyzing how people influence each other; and economists seeing the way that markets operate considering their behavior based on standards (Axelrod, 1986). Thence acknowledging their functions and relevance across different fields, it seems equally relevant to determine which will be the norms that will have greater potential to influence society and change an actor's (or group of actors) behavior.

Determining which norms will be influential in world politics is also a key point to study in the construction of new international norms today. Resolving who, when, where and how actors accept norms is fundamental to determine a norm's success (Finnemore and Hollis, 2016: 427). Which are the conditions the norm has to fulfill? Is it its content or is the process it has followed to be approved internationally what establishes its success? And, above all, what do we mean when we talk about the *success* of norms? Does this mean that norms are complied with, that they are effective, that they influence other actors' behavior, or all of these qualities together? When is then a norm successful?

While different opinions have been exposed in academia with no general agreement, it is interesting to at least try to determine what are the elements or qualities in a norm that make it 'successful' according to different scholars. For instance, Finnemore and Sikkink (1998) refer to the norm's influence. They argue that this influence is dependent on three different criteria. From the one hand, it can be based on its *legitimacy*. If we look at the international level and agree that states want to enhance their reputation internationally, those which are insecure about it or need to reinforce it, will be more likely to embrace a new norm. A second hypothesis is that of *prominence*. The fact that some norms are more likely to become international than others can be due to their quality or to the quality of the states promoting it. That is, if the states promoting the norm are widely viewed as successful and as some type of role models, they are more likely to become prominent and thus to have more influence diffusing a norm. A third and last hypothesis refers to the *characteristics* of the norm. These can be divided into two claims: those which stress the importance of the

formulation of the norm (its clarity and specificity rather than ambiguity and complexity) and those stressing its substance (its content). This last characteristic makes reference to whether the norm has a clear direction and can contribute to some "historical efficiency"[10].

The first of the elements given by Finnemore and Sikkink, that of legitimacy, has already been developed in the first section of this chapter, along with the concept of compliance. Both components have been many times discussed by scholars in legal theory, and the point here is not to discuss the different opinions on them again. However, it must be noted that for some, legitimacy and compliance can be elements to contemplate when studying the success of law.

The success of a norm depends on who, where, when and how accepts it (Finnemore and Hollis, 2016). The importance of the who is relevant today more than ever, as explained previously in this chapter, since today's international actors are different from the typical state actor known to exist decades ago. Nowadays, we count on different actors at the international level and they are part of a wide range of different areas, from private multinationals and freestanding stakeholder groups to activists in non-governmental organizations.

Finnemore and Sikkink (1998) also highlight prominence as another element to consider when analyzing a norm's success. However, I find it interesting to add that it is not only how international a norm can become what is relevant here, but we should also consider the "internalization" of the norm. Thus instead of thinking big -globally- an interesting perspective is also that of the adaptation of the global norm within the national system. As explained in the previous section, diffusion is a crucial process in the making of international law. In this

[10] James Lee Ray refers to the formulation of new norms referring to their substance in terms of "humanization" or "moral progress", while Margaret Keck and Kathryn Sikkink base this substance on protecting "human dignity". It seems that different authors have different views on what kind of substance will be more or less influential for a new norm. For more delve into this debate, see: Ray, J. (1989) 'The abolition of slavery and the end of international war', *International Organization*, Vol. 43(3), pp. 405-439; Keck, M. and Sikkink, K. (1998) 'Transnational advocacy networks in international and regional politics', *International Social Science Journal*, V
ol. 159; Boli, J. and Thomas, G. (1999) *Constructing World Culture: International Nongovernmental Organizations Since 1875*, Stanford: Stanford University Press.

process, some global proposals may adapt well to national interests and legal systems, while others may wither. The country's national context -including cultural norms, legal rules, practices, and political institutions-, also influences the ways in which transnational networks expand and diffuse global ideas domestically. In some cases, these elements may fluctuate and adapt well to a new global norm, while in others, the national context can lead to a cultural clash and act as a "firewall", causing the norm to fail (Kauffman, 2017). Of course it is almost impossible to find a perfect match between the global norm and the national context, but what is most desirable is to find a high degree of congruence (Checkel, 1999). If the difference is too great, national actors will reject the norm, but if the difference is moderate, the norm can more easily be integrated into the national system (Kauffman, 2017). Thus diffusion could also be part of a norm's success, as some global norms may better adapt to domestic legal systems than others.

With this being said, the first sign of an international norm having domestic impact is the moment in which it appears in domestic political discourses. It can come from diverse actors, they do not have to be only state actors, thus civil society groups could also be the ones asking for political reforms. In fact, the organization of these societal groups and of working groups from part of the government would be proof of growing willingness to adopt these political changes coming from an international norm. It is clear that institutional reform does not take place unless the necessary laws at the domestic level have been approved in order to adapt legislation to international law. However, this first sign of domestic impact through discourse is interesting as it is the very first indication that an international norm has arrived at the national level (Cortell and Davis, 2000). Diffusion then, can take place more easily or not depending on the situation of each country, and depending on the norm being at issue, and thus it is interesting to consider diffusion as a relevant element in the success of norms.

Nevertheless, some can argue that diffusion will be easier or not depending on the context situation of a country. In this case, they could say that it is not relevant to the norm's success, as it relates more to the adaptability of the system and infrastructure of the country. However, one could argue that if diffusion is a multidirectional process as defended by Brown, where foreign and

national actors interpret and shape the norm, it is more than just a case of adaptation to the national system, and it is also a process of interaction between different players in which the norm is subject to changes from both sides and at both levels. Then, it is more than just a process of adaptation, and it could be said that it is also a determining process to resolve a norm's success.

Anyhow, the way in which a norm influences other states can also be considered an important part of a norm's success. That is, the capacity to influence other legal systems and thus become part of them could also be an important element that defines the strength and power of a norm. While some norms arise nationally and stay within the territorial borders of the state, others trespass frontiers and spread through other legal systems, becoming relevant also within the global sphere. Or the other way around, some norms emerging internationally and orchestrated by international actors -such as international organizations- may be more or less welcome by the international community. Some global norms may arise with a wide acceptance of its content, while others may involve greater conflict, being contested by smaller or larger groups. A norm's capacity to influence the behavior of other actors and its power to be successfully integrated and accepted by other actors within the international society is another element to consider when trying to define what we understand to be the success of a norm.

In a recent article by Blondeel, Colgan and Van de Graaf, these authors have tried to define the elements they consider essential for norms to be successful. They propose a two-tiered standard of norm success. From the one hand, there is *norm institutionalization*, which is "the degree to which a norm is discursively embraced and accepted by the relevant norm addressees", and from the other, there is *norm implementation*, referring to "the degree to which a norm induces behavioral change among norm addressees" (2019:66). Thus for them, there is not just one element to define the relevancy and success of norms, but it is instead the analysis of two different moments through which all norms should go through, their institutionalization and their implementation. They argue that some campaigns are more successful than others because they solve additional problems that are of immediate importance. If norm entrepreneurs can establish "problem linkages" between the proposed norm and the problems which addressees are facing through discourse, the new norm becomes the

solution, and thence their persuasive strategy becomes more powerful than the rest. Acknowledging that there are some norms which have been more auspiciously defended, as some norm entrepreneurs are more able to persuade actors than others to adopt a norm, and after all the elements that we have seen in this chapter on the emergence of new norms and the elements that conform them as well as the processes followed, the question on why some frames are more persuasive than others is still unanswered.

However, the ask, "if actors are persuaded by utility-based calculations rather than legitimacy-based calculations, is there really a norm at work?". Firstly, I would say that even though there are reasons of utility interest to adopt a norm, this does not mean that there are not legitimacy or ethical reasons against it, thus one is not always conflicting with the other. Secondly, depending on one's viewpoint, one will adopt a utility-based approach, one prioritizing legitimacy, or another assigning it to compliance, the quality of the norm, or even efficiency.

What is it then that shapes the success of a norm? What defines its strength? Is it its legitimacy? Is it the grade of compliance among actors? Is it its power to influence internationally? Or is it maybe the effectiveness of its content when it is put into practice? While different perspectives on a wide range of elements have been shown, there is no general consensus that establishes what is understood as the "success" of a norm. Instead, along the lines of this chapter we have seen the elements that shape a norm and the processes by which they are created to try to create a general idea of what we understand to be the process of international law-making. The success of these processes, the outcome of the work of the actors taking part in it, can provide better or worse results depending on which elements one considers the most important for the norm to be successful. While different opinions will provide different results, it is still interesting to dig into this debate to fully appreciate the process of norm-creation from its very beginning to its final repercussions.

PART II:

LINKING MIGRATION AND SECURITY

A) CONTEXTUALIZING MIGRATION AND TERRORISM

CHAPTER 3
A BRIEF STARTING POINT ON MIGRATION

Before getting to the specifics of this thesis, it is important to set the background and introduce the reader to a historical view of migration movements, the refugee crisis of the Mediterranean, and to the most recent history of terrorist attacks after 9/11. While the point of this work is not to analyse in depth why migration movements arise, the idea is to establish a base line to explain why migration has been dealt with - in certain moments in time- as a security threat and how it has even been said to be linked to terrorism in the West.

Migration movements are not a new experience. In fact, they have always been part of human history. Thence a brief historical overview of migration will be provided, but we will mainly be focusing on the most recent migration flows, especially those starting in 2015 and which have been known as the "refugee crisis". This so-called crisis has been the centre of attention of European countries for many years. European states have increased, at times, their border security, and some have even accused immigrants to introduce terrorist fighters into these countries through refugee flows. However, as we will see, increasing the burdens for migrants to enter or remain in one's country has not had such a great impact in reducing migration inflows.

3.1. Historical overview of migration movements

Early human migration began with the peopling of the world, with the Homo erectus making the first moves from Africa to and across Eurasia. There were also the Celtic peoples, the Roman and Greek empires, the Incan, Indus and Zhou powers, and European colonialism, which led to an accelerated pace of migration since the 16th Century. Mobility has always been part of human history from its very origins, and it still is today.

There have been periods in time when migration movements have been more accentuated due to different political and economic factors. The largest migration move in history was the Great Atlantic Migration,

which started in the 1840s with mass movements from Europe (Ireland and Germany specially) to North America (the United States) seeking for better lives (Britannica, 2008). The Great Depression (1929-33) is another example, when Latin Americans were massively repatriated from the United States back to their countries, and when many states introduced strong immigration policies to refrain foreigners entering the country (Koser, 2015). The Chinese diaspora in the 19th Century also resulted in mass emigration, with peoples in search for better employment opportunities abroad (Cultural Diplomacy, 2015). Other moments in history when migration rose were during the World Wars, the Oil Crisis (1973), which resulted in severe restrictions on labour migration throughout Europe (IOM, 2009), and something resembling happened with the Asian financial crisis (1997-99), when many Southeast Asian countries approved new policies to give preference to national workers to migrant workers (Koser, 2015). Other comparable situations could be the Russian financial crisis (1998) and the Latin American financial crisis (1998-2002).

It is interesting to note that if in the first half of the nineteenth century the "American dream" became the hope of many European migrants looking for better lives in the United States, the "European dream" turned out to be the popular one during the second half. This change is due to the European Welfare State, a type of state and society which many wanted to join. However, conflicts such as that of the Gulf War, the Afghanistan War and the Iraq war have increased the price of crude oil, raised the cost of production, and ultimately negatively impacted the conditions of human labour. The consequences, as in other times, were represented through cuts in public health and education, which was thence diminishing the European Welfare State (Bello, 2017a).

However, migration did not become formally controlled until the latter part of the nineteenth century (Favel and Hansen, 2002). It was then when migration was first defined, bureaucratised, and limited, and it did so through the creation of passports, visas, and border control (Fahremeir et al., 2002). The modern political order of European states emerged, making distinctions between the rights and obligations of citizens and those of non-member states, distinguishing between legal and illegal migration (Favel and Hansen, 2002). However, new restrictions have never changed the intention of those who wanted to flee their countries and trying to cross borders, now unlawfully, since

these have always persisted. But so did the economic dependence of cross-border population, and even after the end of the Cold War, Europe was no less dependant on immigration.

Significant changes arrived with the creation of the European Union and regional economic integration, as states had to give up part of their discretion to determine who is and who is not legitimately staying in their territories. International migration is a subject matter of territorial sovereignty. It is the cornerstone of political organization, as it derives from the transfer from the jurisdiction of a sovereign state to that of another (Zolberg, 1994). Thus membership in the EU became a substantial change to a state's sovereignty powers, and especially on its powers to control migration. Starting with the Treaty of Rome of 1956 and until the treaty of Maastricht of 1992, a complete new political space of European integration was created under the idea of an European citizenship (Wiener, 1997).

After World War II, industrial production in the North-Western part of Europe was booming, and so were job opportunities in the region, thus European governments of these areas started to recruit people from other countries. The main destination countries were Belgium, France, Germany, Luxembourg, the Netherlands, Sweden and Switzerland; and the main origin countries were Algeria, Greece, Italy, Morocco, Portugal, Spain, Tunisia, Turkey and Yugoslavia (Van Mol, 2016). But these same countries that started looking for foreign workforce, were also the first ones to invoke the stop of migration after the Oil Crisis of 1973 (Van Mol, 2016).

Nevertheless, the composition of the residing migrant population also changed during this period, and if at the beginning most migrants were coming from other European countries, now the share of the non-European population started growing. Unemployment and high fertility rates in the other part of the coast of the Mediterranean were the two main reasons why people from North Africa started crossing the sea to reach European shores (Van Mol, 2016), and as this happened, migration became a central topic in political debates.

During the same period of time, the number of asylum applications arose in Europe. And by 1980s, most of them came from countries of origin of Asia (37%), Europe (28%), Africa (17%) and Latin American and the Caribbean (10%) (Hatton, 2009). European applications were

mostly from Eastern European countries and the former Soviet Union, and most of these applications were the product of the events that followed after the end of the Soviet Union and the fall of the Berlin Wall (Hatton, 2009). War and conflict, dictatorships and human rights abuses set the ground for people wanting to flee from their countries. In fact, history shows that all conflicts have resulted in people's movements, and data on migration flows is proof of it. During the first and second Gulf wars in 1990 and 2003 people had to flee their countries, more than 2.4 million Sudanese have fled into neighbouring countries escaping from war (Yahya and Muasher, 2018), the Bosnian War, the conflict of Kosovo, the war against the Taliban, the secession of Ethiopia from Eritrea… These and other disputes have been the reason why many people have decided to leave their homes in search for better lives over the years.

But migration today is a far more global and larger process than ever before. According to the World Bank, the number of migrants increased from 1960 to 2013 by a factor of more than 2,6 (MEDAM, 2017). Transports have changed the way we travel, and people move from and to all parts of the world. Technological advancements have also reduced the costs of travel and communication in long distances (Czaika et al., 2014). Globalisation and technological progress have contributed to the extension and internalisation of migration, but ideological and political regeneration have also contributed to this phenomena. Thus growing social, economic, cultural and technological interconnectedness has optimised the connection between regions from a wide range of perspectives, including migration movements.

In addition to being more global, there are also more women migrating now than ever before. Women's representation among migrants has increased in the past years, and especially during the second half of the twentieth century, when the number of women who decided to migrate accelerated. In 2005 they already represented half of the world's authorised migrants in the world (Koser, 2009) and this figure has been maintained to this day, with female migrants representing 48% of all international migrants (IOM, 2018). The explanation is twofold. On the one hand, women have started to migrate in search for better employment opportunities. An important factor to consider in this sense is that in many countries women have gained in rights and freedom, they have been empowered, and are eager to look for better lives abroad. This can be also seen in the job offers in the market, which already has a

sector that is typically staffed by women (i.e. domestic workers) (Koser, 2009). On the other hand, many countries have recognised the right of family reunification, thus women and children have left their countries to reunite with their loved ones living abroad.

International migration today is a more complex phenomenon than it was in the past, as it covers a multiplicity of economic, social, political, and security aspects (Koser, 2009). Nowadays, people migrate for many different reasons, they cover a wide range of ages and backgrounds, they have their own particular skills, and the routes the use, and the origin and destination countries are more diverse than before. The scope of migration has increased, and so has the number of States involved, as we are living in an era of deepening globalization.

In this global process that migration is today, some countries are more affected by migration than others. Today, about three quarters of migrants around the world come from developing countries, and unlike many believe, numbers show that most of them migrate to neighbouring developing countries (Carling et al., 2016). Hence even though the phenomenon of globalisation is universal, it has not affected all regions equally (Czaika et al., 2014). Research suggests that while Europe used to have an emigrating population that went to other continents, it is now an attractive destination for non-Europeans. This is actually well represented by the wide range of cultures that coexist today in our societies, as migrants come from increasingly different non-European countries of origin (Czaika et al., 2014).

According to the International Organization for Migration (IOM, 2022), in 2022, the 62% of the total international migrant stock is hosted by Europe and Asia alone. North America followed with 59 million international immigrants, which is the equivalent of 20,9% of the global migrant stock, since the United States of America has been the major destination for most international migrants since the 1970s. Germany, for its part, is the number one destination country within the OECD region, and has now become the second most prominent destination. However, the number of migrants in Latina America and the Caribbean has more than doubled in the past 15 years, making it the region with the highest growth rate of international migration. On the other hand, the major origin country has been India, followed by Mexico, the Russian Federation, China and then Syria.

Of this, and according to the UNHCR (UNHCR, 2021), there are approximately 84 million forcibly displaced people worldwide, of which 26.6 million are refugees and 4.4 million are asylum-seekers. The rest are all internally displaced people (IDPs). This is the highest level of displacement on record. The agency also calculates that one person is forcibly displaced every two seconds or what is the same, 44,400 people a day are forced to flee from their homes. Of these, more than the half (68%) come from only five countries: Syria, Venezuela, Afghanistan, South Sudan and Myanmar. And the major refugee host countries are Turkey (with 3.7 million people within its territory), Colombia (1.7 million), Uganda (1.5 million) and Pakistan (1.4 million). To better understand these figures, we need to analyse more deeply the refugee flows that have emerged in the past years.

3.2. The latest refugee crisis in the European Union

3.2.1. Migration flows and transit routes

When talking about the latest 'EU refugee crisis', we first we need to establish why we call it a 'refugee crisis' and not a 'migration crisis'. According to Chetail, "Most third-country nationals coming to the EU are asylum seekers or refugees and not economic migrants" (Chetail, 2016), thus making it obvious that current mass flows of migrants entering Europe have derived –if they have derived into a crisis- into a *refugee* crisis.

Bearing this in mind, he then goes on to consider whether there is in fact a crisis at the EU level or not. According to the author, even though asylum applications have widely increased in the last years, the 1.2 million applications of asylum seekers in 2015 represented only 0.2% of the whole EU population. If we bring these figures to the broader picture, and compare them with other regions of the world, it is even more evident that the EU is not the region to deal with most refugee flows, and data shows: In 2015, the Global South hosted 86% of the world's refugees (Chetail, 2016), a tendency which has been maintained because in 2022, 85% of the world's displaced people were still moving to other developing countries (UNHCR, 2022).

Then is there really a crisis in Europe? The term 'European refugee crisis' started being widely used in April 2015, when five boats sank in

the Mediterranean Sea while trying to reach European shores. There was an estimated death toll of 1,222 people out of 2,000 of those who were in the boats (Baerwaldt, 2018). In 2015 the number of refugees traveling to Europe also increased more sharply, and thus the media, and everyone else, started paying more attention to the growing refugee flows and started referring to it as a 'crisis'.

When we refer to migration flows, we allude to "the number of migrants entering or leaving a given country during a given period of time, usually one calendar year" (UNSD, 2017). In the last decade, great flows of peoples fleeing from war, devastation, hunger and desperation have overtaken the Mediterranean. Almost 5.2 million refugees and migrants reached Europe by the end of 2016 (UNHCR, 2017a), and as they make their way to flee from their countries, they arrive to European borders and shores after dangerous land or sea journeys, where many of them have lost their lives year after year. These great numbers of peoples flooded the capacity of the asylum systems of Southern European states, and the Union in general. Transit countries such as Turkey and Libya and their national emergency responses capacities have been overwhelmed by the amount of the receiving refugees. The capacity to deal with refugees and asylum seekers of countries such as Greece, Italy and Spain has also been negatively affected, not being able to provide enough assistance to them all.

European states, vanquished by the great number of refugees arriving to Southern states and making their way up to Northern Europe, started looking for measures to stop these flows of peoples. Border controls, laws and policies to refrain from people moving freely across countries constrain the mobility of citizens, and those migrants who refuse to be deterred by new instruments and cross the border without state authorization risk their lives. And even if they succeed at crossing the border, they will often experience illegalization, oppression, and even exploitation (Bauder, 2015).

By the beginnings of 2010 it became harder to cross the borders of Greece and Italy, and the numbers of irregular migrants and asylum seekers that looked for new ways to reach Europe increased. One of the principal alternative routes was that of the Balkans, which started to see an enlargement of travellers in 2013 (Czaika et al., 2014). These newcomers entered Europe in massive flows and were able to reach Germany and other Northern European countries, until some states

decided to close their borders.

There are three main routes for those escaping from Africa to get to Europe (Frontex, 2018). The first is in the Western part of the Mediterranean sea, which people from Northern and Subsaharan Africa use to get to Spain through Morocco. Then there is a more central route, coming from Western or Eastern Africa that goes through Libya to Italy. The third is the Eastern Mediterranean, which goes from Asia and the Middle East to Turkey and Greece. According to Frontex (2018), in the first mentioned route there were 56,644 illegal border crossings during 2018. In the Eastern Mediterranean route there were almost as many as the Western, reaching 55,878 illegal crossings. The Central was the less transited, with 23,276 migrants crossing the borders. There is a fourth migratory route in the Western Balkans from Serbia to Hungary and Croatia, which attracted Syrians and Iraqis, who until then had remained internally displaced, as they saw a possible escape from their countries and a possibility to reach Europe. However, the number of people transiting this route is much lower, with only 4,327 people passing, since Hungary closed its borders and built fences on them.

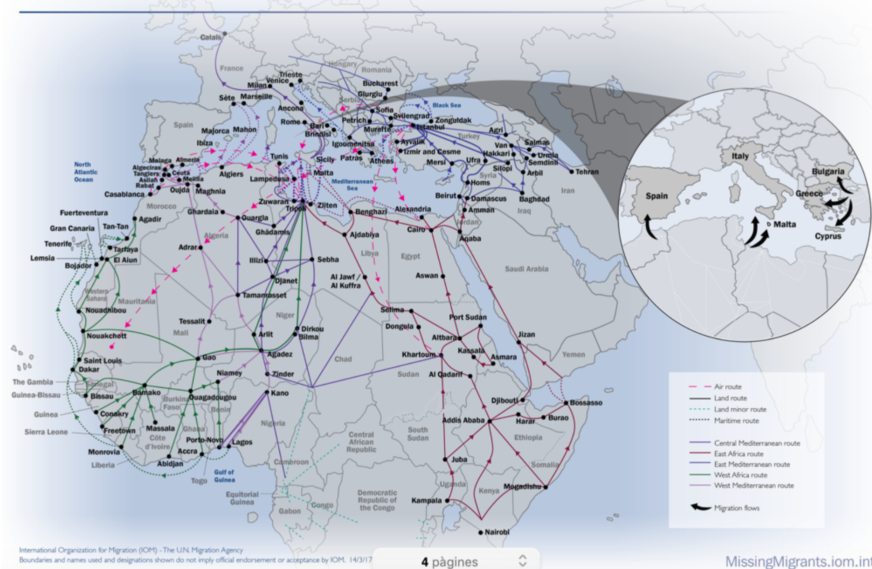

Figure 1. Routes to Europe from Africa and the Middle East
Source: IOM, Missing Migrants Project (2018)

The finding of new routes can also become a new way to put in danger migrants' lives. None of these routes, longer or shorter, are safe. Migrants come in packed boats with no security measures whatsoever, and if they encounter bad weather conditions, the chances of sinking are even higher. It is not strange then, that many of them lose their lives during these long and unsafe journeys at sea. Most of the wrecks in the Mediterranean have been concentrated in the Central route. According to the Missing Migrants Project -a project guided by IOM- one of every 29 migrants died trying to cross this route in 2016. This is basically due to the longer distance that there is between Libya and the Italian coasts, which is moreover made with overloaded and inadequate boats. The following map made by IOM shows the number of arrivals and deaths at sea between 2018 and early 2019.

Figure 2. Arrivals and deaths through Mediterranean routes
Source: IOM, Missing Migrants Project (2019)

It is alarming to think that since 2014, there have been a total of 24,263 missing migrants in the Mediterranean alone (IOM, 2022). And even though the number of death and missing per year has been lowering since 2017, in 2021 it rose again and reached a total of 2,048. Wherever they come from and whatever route they take, refugees and migrants are likely to keep trying to reach European coasts, or to travel irregularly through the Balkans, with routes varying depending on the hardness of the restrictions imposed by different states in the region and putting their lives at risk. Access to legal pathways and safer routes are necessary if Europe really wants to protect the lives of those at sea.

3.2.2 Can we call it a crisis?

The world seems to have gone from crisis to crisis in the latest times: the euro crisis, the financial crisis, the refugee crisis… According to the Liukas, professor at the University of Helsinki, a crisis is "an emergency which can be used to justify legislative or political changes".

The refugee crisis as a term started being used in 2015. It has been used to describe the large amounts of refugees arriving to Europe in a short amount of time. At the start of the refugee crisis there were over one million refugees crossing the Mediterranean to get to European shores; more than 370,000 in 2016; 185,000 in 2017 and in 2018 numbers kept lowering down, and only a bit more than 140,000 made their way to Europe (UNHCR, 2019b). Even though the numbers have largely decreased, we are still talking about a crisis. Betts and Collier (Betts and Collier, 2018) argue that in the European case, this is not a crisis of numbers, which is what most think, but instead it is a crisis of trust, as many Europeans have realised that their leaders have no real plan for handling these migration flows that are out of control.

Thus we should also consider whether this crisis is about the refugee flows themselves or about the European Union migration system, which has not been capable of dealing with this flood. From the one hand, receiving systems in Southern European states failed, and on the other, Northern European states have failed to support them. The absence of rule of law in the admission of migrants and of integration policies has undermined public confidence in their authorities management criteria, and this in turn has fuelled populists' movements with radical ideas. They untruthfully talk about the socioeconomic impact that immigration causes in their countries and in some cases the use of fake news is also the source of their discourses. Calling a disturbance a crisis can be a means to justify radical action, and this, what populist parties do in order to justify their actions (Liukas, 2018).

But what is more, this refugee crisis has also been called many times the "European refugee crisis", when 40 per cent of the 60 million displaced people worldwide come from the Arab region, and mainly Syria. Many of Syrian refugees have fled to Lebanon and Jordan, also overflowing their national systems and taking even larger numbers of refugees than Europe. Thus it seems that when we see our own countries being over

flooded by massive flows of refugees, we have a crisis, and what politicians have done most times has been to turn their back around and try to refrain them from entering European territory. But refugees are still there, and they are still fleeing their nations to go to neighbouring countries or to cross land or sea to leave further away, even though the EU has closed deals with countries of origin and transit to not let them go through EU borders.

Whether this is a crisis of numbers or a crisis of trust with the authorities' management with these numbers, there is in fact a crisis if we think of the high number of refugees leaving massively their homes to seek for protection somewhere else. What is most important, is not to forget that a refugee crisis is a human crisis, and behind the numbers and statistics there are people in despair searching for safety for themselves and for their families.

3.2.3. The collapse of the EU Asylum System

The great and growing numbers of deaths at sea forced the EU to change its policies towards migration. From the one hand, rescue operations to find and save those traveling by boats started in Italy. The government launched the Mare Nostrum operation, which involved the Italian Marine Corps and sent ships near the Libyan coasts (Czaika et al., 2014). During the first year, between 2013-2014, they rescued more than 170 thousand people. There were still about 3,500 people who died or were reported missing in the Mediterranean that same year (UNHCR, 2014).

From the other hand, the need to undertake coordinated action by the European Union became more obvious, and thus there was a first meeting to call on the Commission to start taking measures in regards of the refugee crisis that was over-flooding European member states at the European Council on 23 April 2015 (Bacic Selanec, 2015). The Commission's first decision was to increase the presence of naval forces in the Mediterranean and the adoption of the 2015 European Agenda on Migration. This Agenda contains a set of measures that can be divided in three different groups according to their material and territorial scope (Bacic Selanec, 2015): The first group of measures wants to protect the lives of those migrants crossing the Mediterranean, the second group consists of ways in which the Union can protect its external borders by

also accomplishing their international humanitarian obligations, and the third seeks to reinforce and get a better implementation of the European Asylum System.

At an operational level, the EU had already established a EU-funded agency called Frontex in 2006. This agency was created with the idea to conduct join operations using Member States' staff and equipment at the external borders of the EU (Atak and Crepeau, 2014). One of the first ideas that the EU had in mind when establishing this agency was to control the boats of immigrants trying to reach the Mediterranean coasts. In 2014, they decided to reinforce the forces of Frontex with Operation Triton, and later on with a second one called Operation Poseidon (2016) (Bacic Selanec, 2015). By undertaking these actions, and working through Frontex agency, the EU wanted to prevent the loss of lives at sea and to reinforce maritime border surveillance in order to combat the irregular arrival of migrants.

The European Commission has also established what are known as 'hotspots', strategically placed in some of the most collapsed places of Greece and Italy, as these were the two countries more overwhelmed by refugee flows. In these 'hotspots', officers identify, register and take the fingerprints of those entering the countries through the borders. Besides the EU presence, there are also international organisations such as UNHCR, the Red Cross, and Doctors Without Borders operating in these hotspots (Czaika et al., 2014).

At the international level, the EU is also trying to find the way to keep this refugee crisis outside of EU borders. To do so, EU institutions work to address the root causes of migration in their country of origins, and through cooperation with third countries, they provide international humanitarian and financial assistance (Bacic Selanec, 2015). By doing this, the EU also aims to stop irregular migration flows by controlling the borders of third countries. Hence there is a wide range of sophisticated policies and programmes to ensure that migrants are stopped in third countries, before reaching EU territory. This phenomenon is called the "externalisation of border control" and seeks to shift the responsibility to other countries outside the EU (Atak and Crepeau, 2014).

To shift this responsibility away and to stop the arrival of refugees flows, the EU has also designated 'safe third countries'. By calling other non-

EU countries 'safe', the EU has found a way to reject the asylum applications of some nationals by arguing that they already come from countries that are thought to be safe enough, and so their applications are automatically rejected as they are based on insufficient grounds. The approval of Directive 2013/32/EU has allowed this mechanism, which sets criteria to consider these third countries of origin as safe. More precisely, the text of the Directive recites that a country will be considered as safe when "the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU2, no torture or inhuman or degrading treatment or punishment and no threat by". The selected countries are listed in Annex I of the aforementioned Directive.

The EU also closed an agreement with Turkey in March 2016 with the intention that the latter kept those migrants trying to enter the EU within its territory. Those migrants that came into the EU after the agreement were sent back to Turkey with their asylum applications declared inadmissible, shifting the responsibility to assess the applications to Turkish authorities in exchange of a monetary compensation and easiness between EU-Turkish visas. This European and Turkish agreement is different from others because of the use of the 'safe-third-country' concept (Alpes et al., 2017).

Whether Turkish can offer the sufficient and necessary protection to refugees is highly disputed, and so is categorizing it of a safe-third-country. This debate is based on several grounds. Firstly, Turkey is one of the countries in the world that applies a geographical limitation to the UN Convention relating to the status of Refugees 1951 (from now on, the Refugee Convention or 1951 Convention), restricting is protection only to nationals of the member state countries of the Council of Europe (Alpes et al, 2017). Furthermore, in 2014 the Turkish government passed the Law on Foreigners and International Protection which created a special organism to process asylum applications. This law also created a new status for non-European refugees, providing them with a lawful stay in the country and calling them "conditional refugees", but in practice, most of the times migrants in Turkey do not have access to education and employment at all (Alpes et al, 2017). There is even a 2017 report by Amnesty International that examined the situation of refugees in Turkey and which acknowledged that the risk of refoulement is in fact very likely to happen in this country (Amnesty

International, 2017).

The way in which the EU has dealt with the refugee crisis has proved to be insufficient and has left much room for improvement. There is still a long way to go in terms of harmonisation of standards and procedures at the EU level, as well as with the reception conditions for people with special needs. But there are even more efforts to be made in terms of the application of existing laws and policies affecting asylum seekers and refugees across countries. In practice, the utilisation of the law has been left at the discretion of the member state, thus practice has remained uneven across nations (Hatton, 2012). There is still much progress to be made developing new and effective burden-sharing policies that are secured by all member states equally.

3.3. Explaining migration 'otherness' after 9/11

The focus on migration in the European Union is due, in part, to the centric perspective of Western states on the problems affecting them. But as we have seen in the presented data, the number of migrants trying to reach European territory as well as the number of dead and missing persons along the way show the enormous negative consequences that uncontrolled migratory routes can bring. Of the 3,900 dead and missing migrants globally in 2020, 1,448 happened in the Mediterranean (IOM, 2022). Refugees are found in all regions around the world, and the case of the European Union is only an example of the catastrophes associated with the difficulties and dangers that migrants face when trying to flee their countries and in their transit routes.

But what we have also seen in the past decades is that we have gotten used to seeing news on Latin Americans attempting to cross US borders and on migrants from African regions and the Middle East trying to reach Europe through land and sea. All of these migrants go on to dangerous journeys to cross the borders of these countries fleeing from conflict and seeking for better lives, but since the sovereignty principle makes the state fully independent to decide who can enter its territory and who cannot, most of the times choosing not to allow them in their countries, we have seen an increase in irregular crossings and more and more dangerous attempts to reach their intended destinations.

In fact, 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, 2017a). And negative public perception has also contributed to further securitizing migration. With inflation, debts and economic crisis, public health and education have been the sectors more affected by cuts, and citizens are living more unstable lives. If this happens at the same time when the rate of incoming migrants increases, the perception of migrants as threats to the security of ordinary people is intensified, and prejudices spread throughout.

These numbers are exposed to help explain the discourses used 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 media, along with political discourses, has helped present refugee flows in the Mediterranean as a crisis, and a feeling of insecurity has been developed by some.

Bello (2017a:72) explains that studies show that there are three elements in psychology which explain the perception of otherness, this feeling in societies that migrants do not pertain to their group. From the one hand there is "the social commitment to a type of identity", the degree to which a relationship with another person depends on being a particular kind of person (Stryker and Stathma, 1985: 345). There is also what is called "the available out-group", meaning that this "available out-group" has a different social identity from the host society which clearly divides them into separate groups, and which altogether can alter the formation of identity formation (Wilder and Saphiro, 1984; Turner, 1987). Thirdly, there is also the context. As Bello explains, "individuals actually decide their behaviour according to what they consider socially appropriate in a specific context", which can change the attitude toward "out-groups" and make them more or less welcome depending on the given situation (Bello, 2014a; Stryker and Stathma, 1985).

As this author details, these three elements help us understand why, in a particular context, when leaders publicly blame immigrants for the worsening of the situation of the country, those citizens who are struggling the most or agree with these ideas feel secure enough to be racist in public without any shame. "Due to the legitimization that the public discourse offers to this claim, even more persons will consider that such racist arguments hold true and could consequently start to share them" (Bello, 2017a: 73). Furthermore, there are certain elements which make more easily visible or identifiable that one pertains to another culture. The veil that some Muslim women wear is a clear example of this, and it has even become a symbolic element of conflict between the Western culture and Muslim one.

And with the terrorist attacks against the Twin Towers and the Pentagon in 9/11, and with all the subsequent terrorist attacks which have taken place in the West, some countries have started looking at these "others" not just as an economic threat, but as a security threat. Increasing security measures both at the external borders and internally within the countries have been established. The 9/11 attacks were not just an attack against the US or against the West. Instead, as Bello (2017a) puts it, "They have struck at the whole global interconnected world as it is currently shaped". Terrorist attacks are a global phenomenon which affected the Middle East during the 1980s with attacks in Lebanon, Kuwait, Israel, and Egypt, while in the following decade, South Asia was the most affected area because of various violent episodes in India. As it will be seen later in this thesis, we will study this hypothetical connection between migration and terrorism through the lens of the securitization of migration.

CHAPTER 4
THE COMPLEXITIES OF THE DEFINITIONS OF REFUGEE AND TERRORISM

This chapter analyses the different conceptualisations of *refugee* and *terrorism*. Not only is it useful to overview the understandings of these definitions to comprehend the basic terms that will be used over the next pages, but it is also interesting to overview the current debate on whether the meaning of these terms adequately reflects society as it stands today. As it will be described in the following lines, the definition of refugee has long been framed in international law but it is still being discussed to this day[11]. Similarly, the definition of terrorism has extensively been analysed by academia, but there is still no international agreed definition yet.

This chapter will start reflecting on the discussion about the term "refugee", and during the second half the shift will be brought around the concept of "terrorism". In the case of the first, even though the concept has been defined internationally and within different instruments, most definitions agree on the basic elements that distinguish refugees from other types of migrants, and most scholars take the definition of the 1951 Refugee Convention to be predominant. Nonetheless, there is an ongoing debate on how this definition forgets, for instance, climate refugees –those who are fleeing their countries because of climate devastation-, who are currently growing rapidly in numbers worldwide.

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[11] A wide range of scholars have acknowledged that the definition of refugee has become outdated and that it should include victims of economic and political instability and natural disasters. The discussion will continue in section 2.3. For further readings see: Lentini (1985), *The Definition of Refugee in International Law: Proposals for the Future*, Boston College Third World Law Journal, Vol. 5 Issue 2; Chamberlain (1983), *The Mass Migration of Refugees and International Law*, 7 Fletcher Forum 93, pp.103-104; Fragoman (1970), *The Refugee: A Problem of Definition*, 3 Case Western Reserve Journal of International Law 45, 58; Plender (1977), *Admission of Refugees: Draft Convention on Territorial Asylum*, San Diego Law Review 45, pp.54-55; Woods (1981), *The Term 'Refugee' in International and Municipal Law: An Inadequate Definition in Light of the Cuban Boatlift*, 5 ASILS International Law Journal, 39; Gunning, I., (1989), *Expanding the International Legal Definition of Refugee: A Multicultural View*, Fordham International Law Journal, Vol. 13, Issue 3

From the other hand, and while there has been some intention to define the term terrorism at the international level, there has not been sufficient agreement to adopt a formal and well-established definition, thus the main consequence of this lack of agreement is that it has remained mostly defined domestically. This in turn has meant that the way in which it has been shaped has been politicised, mostly depending on the circumstances and interests of the national government. Therefore, this chapter will seek to revise these two definitions and the controversies surrounding them.

4.1. Definition of Refugee and determination of their status

Firstly, this chapter will go over the legal concept and rights expressed in international instruments relating to refugees, and the section will close with the debate on the problematic related to the meaning of refugee in the 21st Century.

The current framework regarding the international protection of refugees dates back to the end of World War II. After the war, international conventions were revised and one of the most important outcomes was the creation of the Refugee Convention. It entered into force the 22nd April 1954. As a post-Second World War instrument, the Convention was originally restricted only to those persons fleeing from events that had occurred before 1951 and only within Europe (UNHCR, 2010). The 1967 Protocol Relating to the Status of Refugees removed the geographic as well as temporal limitations of the Convention, thus with its approval, these restrictions were removed to offer universal coverage. The Convention has been ratified by 146 States (UN, 2019), with the latest incorporation of South Sudan in December 2018. The United Nations High Commissioner for Refugees (UNHCR) is the UN agency dedicated to protecting refugees and making sure their rights are being safeguarded, hence States are expected to act in collaboration with the agency to ensure that the rights of refugees are respected and protected.

As for its content, the Convention gives a definition of refugee, describes the rights of the displaced and determines the legal obligations of States to protect them, being one of the most

remarkable principles that of *non-refoulement*. The definition is found in Article 1(A)(2) of the Convention, and it is described as any person who:

> "Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it".

This definition is the cornerstone of international refugee law and is generally seen as the minimum standard definition for the status of a person as a refugee[12]. The concept must be distinguished from other types of migrants. While a refugee is basically a person who flees his or her country because of persecution, war or violence, an asylum seeker is that who flees his or her country to seek sanctuary in another, and this sanctuary has not yet been processed. In the country of destination, they apply for asylum through individualized national procedures and must demonstrate that the fear of persecution in the country of origin is well-founded. Gaining asylum means that they are formally recognized as refugees, and thus their legal protection is also formally recognized, obliging states to give them material assistance (UNHCR, 2006). The rights of asylum seekers are also protected in the Universal Declaration of Human Rights, which states in its Article 14 that "everyone has the right to seek and to enjoy in other countries asylum from persecution". Hence asylum seekers can find protection both under human rights law and refugee law.

[12] There is a wide array of academic literature on the concept of refugee and the elements forming this definition. As an example see: Shacknove, A. (1985), *Who Is a Refugee?*, The University of Chicago Press Journals, Vol. 95, Num. 2, pp. 274-284; Weis, P. (1960), *The Concept of Refugee in International Law*, Journal du Droit International, Vol. 87, pp. 929-1001; Storey, H. (2016), *The Meaning of "Protection" within the Refugee Definition*, Refugee Survey Quarterly, Vol. 35, Issue 3, pp. 1–34; Worster, W. (2012), *The Evolving Definition of the Refugee In Contemporary International Law*, Berkeley Journal of International Law, Vol. 3, Issue 1, pp.94-160

Furthermore, asylum seekers are the ones to prove the existence of the a "well-founded fear" showing that there is a reasonable possibility that they will suffer prosecution if they were returned to their native countries, and this can be either an objective or subjective standard[13]. As to the grounds of this persecution, there has been some debate in the United States as to whether neutrality can count as political opinion for the purposes of obtaining refugee status. In this sense, this country has pronounced different decisions such as *Matter of Acosta*[14] –in which the Court decided there was no basis for persecution- and *Bolaños-Hernandez v. I.N.S.*[15] –in which persecution was considered to be proven for a former military member who refused to join the guerrillas because he wanted to remain neutral.

Refugees are also different from internally displaced people (IDP). The latter, as the name itself explains, are those who have been forced to flee but remain within the internal borders of their country. They might move to different regions at the national level, to internal camps or settlements, or even to fields and forests, but unlike refugees, IDPs are not protected by international law, and as a consequence they cannot obtain many of the rights and assistance that refugees can access because of their status. This protection is not given to IDPs because they are legally under the protection of their own country. In 2017, more than 40 million were internally displaced people around the world, 39% of them were triggered by conflict and 61% due to disasters (IDMC, 2017). Of those due to conflict, most took place in Sub-Saharan African and the Middle East, while those related with climate disasters were associated with East and South Asia, the Pacific and the Americas (IDMC, 2017). Surprisingly, 76% of the total of IDPs in the world are concentrated in just ten countries.

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[13] See *Matter of Mogharrabi*, United States, 19 I&N December 439 (BIA 1987)
[14] *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)
[15] *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1284-5 (Ninth Circuit 1985)

Figure 3. Fifty countries with the highest number of new displacements in 2017
Source: IDMC (2017)

Another and last distinction, but which is still useful to determine, is that of stateless persons. According to Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, this is the person "who is not considered as a national by any State under the operation of its law", thus to indicate when a person falls within this definition, one must see how a particular State applies its nationality law in the particular case. The most common problem for this collective is to get access to education, healthcare, employment and freedom of movement.

Globally, UNHCR calculates that there are around 10 million stateless people (UNHCR, 2017d), although there is no exact data on how many stateless people exist worldwide, and we only have some figures from certain countries. For instance, in Myanmar's Rakhine State alone there were approximately one million stateless persons of the Rohingya minority residing in 2017, and during the same year, there were another 930,000 in Bangladesh, making a total of almost two

million Rohingya stateless people in just two countries (UNHCR, 2017d).

4.1.1. The Rights of Refugees

There are certain rights which are automatically acquired by refugees, some that she acquires when she has made her asylum application, and others that are guaranteed once the refugee status has been granted or after a certain period of residence (UNHCR, 2017c). There are, amongst the most important, the protections afforded by Articles 31 and 33 of the 1951 Convention against the punishment for unlawful entry and for non-refoulement. In addition to these and regardless of their status, they also enjoy the right to religious practice and education (Article 4), to the acquisition of property (Article 13), to access to courts and legal assistance (Article 16), to education (Article 22), and to identity papers (Article 27). Once their asylum application has been submitted, these rights increase to include that of self-employment (Article 18), and to choose the residence and to freedom of movement within the territory of the host State (Article 26). Only when the refugee is staying lawfully in the country with the status of refugee or when she has fulfilled a determined period of residence (which varies depending on the country), she can enjoy the right of association (Article 15), to engage in wage-earning employment (Article 17), to practice a liberal profession (Article 19), to housing (Article 21), to access the social security system (Articles 23 and 24) and to obtain travel documentation (Article 28).

Overall, there are two main strands of international law to offer protection to refugees. On the one hand, there is international refugee law, and on the other, international human rights law. Regional instruments to take into consideration are the European Convention on Human Rights, the European Union Charter of Fundamental Rights, the African Convention on Human and Peoples' Rights, the African Convention on Refugees, and the American Convention on Human Rights. Other international instruments containing rights for refugees are the following:

TABLE 1

International instrument	Article s	Main rights acquired
Universal Declaration of Human Rights	14	Right to seek and enjoy asylum
International Covenant on Civil and Political Rights	2, 7, 9 & 12	Non-discrimination; prohibition against torture or inhuman or degrading treatment; right to liberty and security and prohibition of arbitrary arrest and detention; right to freedom of movement and residence
International Covenant on Economic, Social and Cultural Rights	2	All rights of the Convention are enjoyed without discrimination
Convention on the Elimination of All Forms of Racial Discrimination	1 & 5	Non-discrimination; prohibition of discrimination for various rights such as security of the person, freedom of movement and residence, right to leave any country and to return one's country, right to nationality, etc.
Convention on the Elimination of All Forms of Discrimination Against Women	1	Non-discrimination
Convention for the Protection of All Persons from Enforced Disappearance	2, 13 & 16	"Enforced disappearance" is considered to be an arrest, detention, abduction or other forms of deprivation of liberty (…); non-discrimination; non-refoulement
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	3	Principle of non-refoulement
Convention on the Rights of the Child	10, 22 & 28	Family reunification; ensuring protection of refugee children; right to education

One of the most important principles at the core of international refugee law is the principle of non-refoulement. It prohibits States from returning refugees to the countries where they may be subject to persecution, as provided by Article 33 of the 1951 Convention. This principle is now part of customary international law and as such, it is binding on all States, whether or not they are parties to the 1951 Convention (UNHCR, 2006). Furthermore, the principle of non-refoulement prohibits not only sending refugees back to the countries where they would be subject to persecution, but it also prohibits the mass expulsion of refugees. We can find a codification of this specific notion of the principle in Article 12(5) of the African Charter on Human and Peoples' Rights. Therefore, if a State is in breach of this principle –or any other in customary international law- the State in question will be responsible for the internationally wrongful act under Article 1 of the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts. However, we must not forget that there is an exception found in the 1951 Convention which permits States parties to deny asylum to those refugees who have committed particularly serious crimes or those who are guilty of acts contrary to the principles of the UN.

An important case in European Union law is that of *Soering v. United Kingdom*[16]. Held in 1989 at the European Court of Human Rights. It set the foundations for protection from removal under the European Convention, since the Court ruled that if the individual was removed to a third state, there would be a breach of the European Convention, as the person in question would be put at a situation where he or she would face a real risk of being tortured or receive inhuman or degrading treatment[17]. This case was a breakpoint for the European Convention as an instrument of protection of non-European citizens since not only did it forbid the treatments described in Article 3, but it also prohibited sending persons who could be put under threat of the treatments described in this Article if they were sent to third states which would likely extradite them. After the decision, Article 3 was applied to foreigners of the European Union in the cases of extradition and expulsion. Some of these cases are of particular

[16] *Soering v. the United Kingdom,* nº 14038/88 July 7, 1989

[17] Article 3 of the European Convention on Human Rights states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

interest because the Court took into consideration the status of asylum seeker of potential victims of Article 3 (Morgades, 2010).[18]

We need to keep in mind that refugee law was established to protect individuals who were dissidents from oppressive political systems (Favel and Hansen, 2002). After World War II, states wanted to design a framework to deal with mass movements of people, but it was never a framework designed to deal with the current migration flows. Furthermore, States have shown to be unable to cope with the ongoing refugee crisis and their national asylum systems have been overwhelmed by these large numbers of newcomers. As a result, many countries have many times denied responsibility for refugees, and understandings on the notion of responsibility have also differed between richer and poorer States. Mechanisms to shift away responsibility on refugees have multiplied and developed countries have tried to refrain migration flows from entering their borders both in the high seas outside their national waters or by settling agreements with other countries so that responsibility for asylum seekers is placed somewhere else.

This is the case of the readmission agreements with African countries, which have become a way to facilitate repatriation of rejected asylum seekers (MEDAM, 2017). And it is also the case of the 2016 agreement between the EU and Turkey by which irregular migrants arriving in Greece from Turkey would be returned to the later, thus alleviating the pressure of migration flows on European countries. In exchange, the EU promised economic benefits so that Turkey could establish an integration program for the Syrian refugees it hosts, as well as easiness in getting EU visas for Turkish nationals (Triandafylliou, 2017).

As Hathaway (2007) recognises, governments of developed States have erroneously challenged the protection given by the 1951 Convention, suggesting that "it sets only protection obligations of 'last resort". He explains that States have set out a practice by which they think they can send refugees away to third States, which will accept refugees without sending them back to their home countries. What they should do instead is to make sure these third States are

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[18] See *Ahmed v. Austria*, nº 25964/94, December 17, 1996; Recueil 1996-VI, *Hilal v. the United Kingdom*, nº 45276/99, March 6, 2001; ECHR 2001-II, *10 N. v. Finland*, nº 38885/02, July 26 2005, ECHR.

truthfully engaged to the obligations of the Refugee Convention and be certain that they comply with the principle of non-refoulement.

Another current established practice is that refugees that arrive without permit are considered "illegal" by many governments, despite the fact that the determination of refugee as established by the Convention says otherwise. In this sense, it is important to note that Article 31(1) of the 1951 Convention declares that States should treat refugees as non-transgressors when they enter their territorial borders. Since there has never been any type of visa that lets a refugee travel to one's territory to make an asylum claim, using it would still be too risky for the individual. Hence those arriving to the territory of another country seeking for sanctuary should not be considered as illegal, as it would be "completely inappropriate to stigmatise refugees arriving without visas as law breakers when a treaty we have freely signed provides exactly the contrary" (Hathaway, 2007).

In *R v. Appulonappa and B010 v. Canada*, the Canadian Supreme Court noted that Article 31 of the 1951 Convention meant that Canadian national law had to recognize that groups of people could try to enter a State illegally looking for refuge, and that the national government (in this case, the Canadian government) could not impose sanctions on refugees only to help others get into their State in an illegal manner. Hence even domestic courts have used and continue using international law to shape human rights law and refugee law at the domestic level.

Nevertheless, even though the 1951 Convention recognises the rights of refugees, it does not specify the process by which to concede asylum as such (Goodwin-Gill, 2014). While the principle of non-refoulement is not discussed, the terms to establish whether the terms 'persecution', or 'degrading' treatment are not defined, leaving wide discretion to caseworkers and national courts to decide whether there is a justified cause to get the status of refugee when an individual has applied for asylum in a particular country. There can be in certain situations problems of interpretation and balanced reasoning when discussing their cases (Pirjola, 2008).

Furthermore, many believe –erroneously- that refugees come to stay, which incentivises this feeling of unwelcomeness to one's country. However, refugee status is not permanent and it stands so long as the

prosecution in their countries of origin persists. Refugee law only protects individuals from the risk that they would have if they stayed in their countries and it seeks for safety in international borders as long as the threat they are escaping from persists. Thus gaining the status of refugee does not entitle to a right of permanent migration. On the contrary, what most refugees look for is a safe place while they cannot return home, and their ultimate goal is to go back to their lands. Voluntary repatriation reflects this idea, and although the right to return is only formally found in Article 5(1) of the 1969 OAU Convention, it is still a universal right.

4.1.2. Principal critiques on the concept of Refugee

There are different critiques to the concept of refugee. To start with, one of the most common criticisms is that the 1951 Convention was made for a different era. It was made after the end of World War II, taking into consideration the migration movements that were there at the time, with the experience of the Nazi-war prosecutions and the European displacements (Millbank, 2000). Hence this instrument was not thought to be used for the existing migration flows of the 21st Century.

Consequently, as time passed by, the Convention became outdated. Most recent refugee movements have started because of civil or ethnic wars, but also because of natural disasters. Every time more often, we are seeing people fleeing from their countries as a result of not being able to survive in the existing environmental conditions, affected by events such as Tsunamis or Hurricanes, to the lack of water because of dryness. Some even argue that those victims of economic unrest should also be considered as a category of refugees (Lentini, 1985). And while the Convention does not cover these groups of people, it seems unlikely that governments adapt and expanse the standing criteria. All together, it seems that it has become an archaic convention that cannot cope with the refugee movements we are facing nowadays.

Furthermore, as it has been stated in the previous lines, one of the criticisms by the standing literature is the fact that there are different groups separated from the definition of refugee (such as internally displaced peoples and asylum seekers) who are not granted the same rights as refugees. Thence even though the first would maybe qualify as

refugees if they had crossed international borders, only because they stayed within their country, they are not granted the same protection as refugees.

It is also interesting to stand out the understanding and application of the principle of non-refoulement used by the European Union. With the approval of Directive 2013/32/EU, the EU designed a serial of 'safe third countries' to stop and deal with the arrival of refugee flows, and it has become a way to reject asylum applications by certain nationals arguing that they already come from countries that are thought to be safe enough. Therefore, their applications are automatically rejected based on insufficient grounds and they are sent back to this 'safe third countries' from which they come from[19]. Thus the problem does not only rely on the Convention itself, but the interpretation given by some actors to this instrument also arises questions and challenges the use of the international framework as it remains today.

Acknowledging the controversies that arise around the definition of "refugee", that of the 1951 Convention has been the one which States have agreed to accept and are still using to define these group of migrants to this day. Hence for this paper it seems appropriate to take up the given definition to refer to refugees.

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[19] In this sense, it must be highlighted that the EU also closed an agreement with Turkey in March 2016 with the intention that the latter kept those migrants trying to enter the EU within its territory. Those migrants that came into the EU after the agreement were sent back to Turkey with their asylum applications declared inadmissible, shifting the responsibility to assess the applications to Turkish authorities in exchange of a monetary compensation and easiness between EU-Turkish visas. This European and Turkish agreement is different from others because of the use of the 'safe-third-country' concept (Alpes et al., 2017). Whether Turkish can offer the sufficient and necessary protection to refugees is highly disputed, and so is categorizing it of a safe third country. This debate is based on several grounds. Firstly, Turkey is one of the countries in the world that applies a geographical limitation to the 1951 Refugee Convention, restricting is protection only to nationals of the member state countries of the Council of Europe (Alpes et al, 2017). Furthermore, in 2014 the Turkish government passed the Law on Foreigners and International Protection which created a special organism to process asylum applications. This law also created a new status for non-European refugees, providing them with a lawful stay in the country and calling them "conditional refugees", but in practice, most of the times migrants in Turkey do not have access to education and employment at all (Alpes et al, 2017). There is even a 2017 report by Amnesty International that examined the situation of refugees in Turkey and which acknowledged that the risk of refoulement is in fact very likely to happen in this country (Amnesty International, 2017).

4.2. Definition of Terrorism

The word terrorism originated in 1793 during the French Revolution in France (COE, 2017). It was used to define the *Regime de la Terreur* or *le Government de la Terreur* (the Reign or Government of Terror) by the Jacobins, who with these words wanted to describe their own methods to fight the French Revolution against the authorities of the State, who were repressing the population and making thousands of executions without fair trial (Matusitz, 2012). This period ended with the fall of Maximilien Robespierre, a top seed of this movement, in July 1974. Robespierre described the importance of terror in one of his speeches (Halsall, 1997):

> *If virtue be the spring of a popular government in times of peace, the spring of that government during a revolution is virtue combined with terror: virtue, without which terror is destructive; terror, without which virtue is impotent. Terror is only justice prompt, severe and inflexible; it is then an emanation of virtue; it is less a distinct principle than a natural consequence of the general principle of democracy, applied to the most pressing wants of the country.*

But today the word "terrorism" and its word families are extensively heard from politicians, mass media and citizens around the world, many times using it to refer to war conflicts, oppression moves in dictatorships, crimes committed by State leaders, and other sorts of disputes. There has been so much confusion with these terms to the point that it is now hard to distinguish between what really is terrorism and what is not. The lack of agreement on the exact use of this wording can lead to erroneous or inaccurate descriptions of events, and the fact that the United Nations has not been capable of adopting a convention on terrorism is proof of these ambiguous environment surrounding the definition and limits of terrorism. The UN had the willingness to create an international instrument in this field, but its member States seemed to be unable to reach an agreement on how to define the word terrorism. The UN General Assembly, however, tends to use the following definition[20]:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

This definition given by the UN focuses mostly on the intention of the attack, which would be to provoke terror in the population, rather than on the means used to conduct it. This notion differs from that of the Security Council given eight years later, which is much more specific on the different intentions that can be pursued when committing such a crime. There can be, for instance, not only an objective of provoking terror, but also to "intimidate a population" or "compel a government", among others. And it does not only describe the intention of the attack, but also the means used (such as that of taking hostages) or the causes it seeks to inflame (such as causing death or serious injuries).

Soon after the September 11 attacks, the United Nations Security Council passed Resolution 1373, which required all States to take legislative action against terrorism, but it failed to provide a definition for terrorism (Hardy and Williams, 2011). Later on, the Security Council tried to give a definition in Resolution 1566[21], although this is non-binding and lacks authority in international law (Schmid, 2012):

Criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

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[20] 1994 United Nations Declaration on Measures to Eliminate International Terrorism annex to UN General Assembly resolution 49/60, "Measures to Eliminate International Terrorism", of December 9, 1994

[21] Security Council Resolution 1566 (2004) on Threats to international peace and security caused by terrorist acts, S/RES/1566 (2004)

Europe has also developed an instrument in this field: the European Convention on the Suppression of Terrorism of 1977. According to this, terrorist acts are all serious offences involving an attack against the life, physical integrity or liberty of internationally protected persons, as well as offences involving kidnapping or the taking of hostages (Symeonidou-Kastanidou, 2004). Hence this definition is based on the subject over which there has been an attack as well as the type of offence, but it does not consider the motive nor the damage to determine whether an attack can be classified as terrorist or not (Llobet, 2008).

Studies have found that there are more than 200 definitions of terrorism. In this sense, Schmid and Easson compiled up to 260 in The Routledge Handbook of Terrorism Research[22]. Schmid, in this sense, has also worked to reach a consensus based on the opinion of academics and other professionals whom he interviewed. They described what they thought terrorism was, and he put together the elements that were mostly agreed on (Schmid, 2011). According to his compilations, terrorism is a "form or tactic of fear-generating coercive political violence" and it is also a practice of "calculated, demonstrative, direct violent action without legal or moral restraints". Its targets are mainly civilians and non-combatants, and its purpose is to cause propagandistic and psychological effects (Schmid, 2012).

What seems to be clear is that this terror is intentionally used through violence to create fear at non-combatant targets (Matusitz, 2012), hence it is usually held on civilians and other defenceless persons who have no direct responsibility on the conflict itself. The intent is not to harm the people who have been victims of the attack, but to generate big and prompt propaganda. The echo of the attack is the ultimate goal, and creating impact is what differentiates terrorist violence from other crimes. This is because the damages it causes reach far beyond the immediate victims, but it can extend to governments, the military, and the rest of the population, even though they are not directly involved.

Furthermore, the perpetrators can range from small groups to big transnational networks whose aim is predominantly political (Schmid,

[22] Schmid, A. P. (2011), The Routledge Handbook of Terrorism Research, London and New York: Routledge

2012) although there can be other -separate or coexistent- religious and ideological reasons. Moreover, the acts usually come in a serial character, creating a climate of fear and expectation on whether other threats or violence can happen again. This is the way they establish fear within a society, which may lead to a manipulation of the political process of a country -or group of countries.

Another key difference for the delimitation of terrorism is whether this can be considered the equivalent of war crimes during peacetime. It needs to be clarified first that terrorism can occur both during armed conflict and during peacetime. The main difference is that when committed during wartime –whether these are international or national armed conflicts-, the applicable law will be that of the 1949 Geneva Conventions and their 1977 Additional Protocols. Some domestic and international judicial bodies have started applying the laws of war to peacetime acts of terrorism (Scharf, 2001), setting a precedent. This is the case of *Juan Carlos Abella v. Argentina* [23] held at the Inter-American Commission on Human Rights in 1997. This case is about an attack that took place 1989 by 42 civilians during peacetime in Argentina. After hours of fighting, the civilians asked for surrender but Argentine troops continued fighting until most of the people died or were heavily wounded. The Court ruled that this confrontation qualified as an armed conflict because it was a planned, coordinated and executed armed attack against a military objective. This case sets a precedent that lowers the requirements to consider an attack as part of an armed conflict, which might lead future terrorist situations to qualify for application of humanitarian laws (and so, the laws of war). At the same time, this conclusion might lead to consider that terrorists act lawfully if analysed under the laws of war (Scharf, 2001).

The problem of not having a comprehensive definition of the term terrorism in international law may lead to conflicts with the principle of legality, enshrined in Article 15 of the International Covenant on Civil and Political Rights, which states that criminal liability is limited to clear and precise provisions. Hence if States use vague definitions of terrorism, this might be used as a means to cover peaceful acts or to limit certain political oppositions (UNHCHR, 2008), threatening the rights of individuals.

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[23] Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V./I.95, doc. 7 rev. 271 (1997).

Establishing such a definition is not a way to punish acts that would be otherwise left unpunished, but it is a way to define those acts which need a stronger police and judicial international cooperation and to reinforce the symbolic power of substantive criminal law (Symenidou-Kastanidou, 2004).

4.2.1. Domestic perspectives of terrorism

Definitions of terrorism and terrorist organizations vary across states, leaving room for different interpretations on what to consider that a terrorist act is, and to appoint a particular actor or organization as terrorist. Thus these definitions are crucial to establish something or someone as a terrorist threat and designations will vary depending on legal delimitations of these concepts.

As a consequence, some legal definitions of "terrorism" or "terrorist act" are very much criticised. In some cases, governments establish vague or ambiguous descriptions that can lead to broad understandings of what terrorism is or should be. In other cases, states construct lists of acts that can be considered as terrorist, including attitudes or performances that fall far from what the UN General Assembly or the Security Council have stated as terrorism. While there is no single definition of terrorism under international law, most of them are centred in the use of violence and the political ends, and the most widely accepted one -even though it is still non-binding today- is that of Resolution 1566 of the Security Council. Therefore, in this section we will overview some of these controversial interpretations and the reasons why they have been reproved, analysing the elements on which they are constructed, and comparing them to the definition of Resolution 1566. To this end, I have selected some domestic definitions and classified them according to the extent to which are written according to the definition given in the aforementioned Resolution.

A) *Closer* approaches to the international definition of Terrorism

Some of the definitions at the domestic level which more truthfully imitate that in international law are those of the United Kingdom, for instance, and even that of organisations such as the European Union.

Starting with the first, the United Kingdom's definition of terrorism can be found in Article 1(1) of the Terrorism Act 2000. It is established that terrorism is either a threat or action designed "to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause". Subsection 2 continues as follows:

> (2) Action falls within this subsection if it—
>
> (a) involves serious violence against a person,
>
> (b) involves serious damage to property,
>
> (c) endangers a person's life, other than that of the person committing the action,
>
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
>
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

Although the definition is still found within the 2000 Act, the Terrorism Act of 2006 sought to extend a list of offenses such as glorifying terrorism or distributing terrorist publication (Setty, 2011). From 2000 onwards, the British parliament has passed several Acts in the field of terrorism, all of them significantly influenced by the 9/11 attacks and the 7/7 bombings in London (European Parliament, 2017). Although the definition of terrorism remains the same, in these subsequent Acts, new powers have been given to the police beyond those related to ordinary crime.

The European Union's definition would also fall within this section. It is somehow closely related to the September 11 attacks. Shortly after these events on the Twin Towers in New York, the European Commission published a Framework Decision on Combating Terrorism (2002/475/JHA) (hereafter "Framework Decision"). This legislation, which was published in 2002, was made in order to harmonise the treatment of terrorist attacks at the domestic legislation of Member States. Article 1 reinforces this idea that the acts described within the Article (points *a* to *i*) are defined as offences under national law.

It is in this first Article where the definition of terrorism given by the EU is found. It establishes that those acts that "seriously damage a country or an international organisation where committed with the aim of (1) seriously intimidating a population, or (2) unduly compelling a Government or international organisation to perform or abstain from performing any act, or (3) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation" are terrorist offences so long as they are deemed to cause at least one of the nine points described in the second part of the Article. Hence if these three acts are committed intentionally, they will be considered terrorist attacks, thus the element of intention must be present for the basis of the existence of a terrorist offence (Borgers, 2012).

In 2017, the Framework Decision was replaced by the Directive on Combatting Terrorism[24] and its paragraph (5) states that offences related to foreign terrorist fighters and terrorist financing should be addressed more comprehensively by Member States due to the evolution of the terrorist threat and offenses relating to this topic. In this sense, another descriptive act was added to the 9 that were previously described in the Framework Decision of 2002. The new letter (i) now includes illegal system and data interference. Besides this change and the alteration of the order of the definition, the content of this remained basically the same.

[24] Directive (EU) 2017/541 of the European Parliament and the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

B) *Extended* approaches to the international definition of terrorism

The United Kingdom's definition of terrorism has influenced those of Canada, Singapore, Israel and Australia, among others (Walker, 2013; Ananian-Welsh and Williams, 2014a). Looking at the latter case, under Australian law instead of defining the word terrorism they define "terrorist act"[25]. This definition includes an *action* or *threat of action* where:

> **(a)** the action falls within subsection (2) and does not fall within subsection (3); and
>
> **(b)** the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
>
> **(c)** the action is done or the threat is made with the intention of:
>
> > *(i)* coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
> > *(ii)* intimidating the public or a section of the public.

This definition, although inspired by that of the UK, has some differentiations. One of the first things to stand out from this definition is that it does not include those acts causing deaths or bodily injury, which are in fact two of the most common elements of most terrorist definitions. The acts described in the Australian provisions are characterised to coerce, influence or intimidate the government or the public, but there are no specific descriptions on the measures taken to reach these goals.

Martin Scheinin, the former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, reported in

[25] Section 100.1 of the Australian Criminal Code Act 1995

2006 on the counter-terrorist measures and the protection of human rights in Australia[26]. Among other criticisms, he urged to reconsider the broad definition of "terrorist act", as it did not distinguish properly the difference between a terrorist conduct and an ordinary criminal conduct[27]. He also argued that there was no element of intention[28], which is essential when talking about terrorism as already stated by the Security Council, and that the Australian definition also includes "acts not defined in the international conventions and protocols relating to terrorism"[29].

Another country to introduce to this category is France. The French definition of terrorism is found in Article 421-1 of the Criminal Code, and it consists on a list of acts that are considered as terrorist, whether they are committed individually or collectively, and as long as their purpose is "seriously to disturb public order through intimidation or terror". Hence we can already find a difference here between the UK's definition and that of France, which is that the latter does not mention the purpose lying behind the attacks. More concretely, it does not indicate whether there is a political, religious, or other type of goal, and it only states that there is an intention to create "intimidation or terror".

Amongst the offences listed in this Article there are murders, kidnappings, abductions, extortions, the production of explosives, hijacking of planes and vessels, etc. The following Articles have also included other actions such as the financing a terrorist organisation in any way. However, a more controversial provision is found in 421-2-1, which determines that "The participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles shall in addition be an act of terrorism". This formulation is more vague than the others and may lead to indiscriminate arrests and detentions of suspects[30]. Another

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[26] *See* the 14 December 2006, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on Australia (A/HRC/4/26/Add.3)

[27] *See* para. 16 of the Report

[28] *See* para. 27 of the Report

[29] *See* para. 15(b) of the Report

[30] In this sense, see also the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/40/52/Add.4). She recognised that even though France had a deep

problematic stipulation is that related to introducing substances liable to imperil human or animal health into French territory (be it the atmosphere, ground, soil, food or waters)[31]. This type of "ecological terrorism" can also be disputed because of its vagueness and lack of further specific description. The French case, with its addition related to "ecological terrorism" is an example of a definition that has been brought to the domestic level and has reincorporated new elements based not only on national perceptions of terrorism, but also on new contemporary threats that would have not been thought of years ago, bringing new and more modern approaches to the "traditional" international definition of terrorism. Nonetheless, vague and overly broad terms remain, leaving room for the definition of much improvement to be more closely related to that given by the Security Council.

Russia has in its hand a definition which also goes further than that of Resolution 1566. Its definition of "act of terrorism"[32] includes explosions, arsons or other actions to intimidate the population, and also the "infliction of significant property damage". This latter part broadens the scope of application of this Article allowing authorities to take action against what could merely be an altercation or act of vandalism. The definition continues to include "other grave consequences", leaving out the meaning of what should be considered to be "grave" unexplained and opening the room to use this part of the definition to a wide range of acts that would usually be left out of what is thought to be terrorism. All these actions, according to Article 205, must have "the intention to influence the taking of a decision by authorities or international organisations" or the threat to do so.

A far more troublesome conceptualisation of terrorism is that of Zimbabwe[33], which would be considered a type of definition that goes

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experience in managing terrorism through a rule of law-based approach and in respect of upholding human rights obligations in their legal framework, challenges remain, such as those related to definitions of "terrorism" and "apology for terrorism" found in the Strengthening Internal Security and the Fight against Terrorism (SILT) law, as she maintained that they remain "overly broad and ambiguous".

[31] Article 421-2-2 of the French Criminal Code

[32] Article 205, Chapter 24, of the Criminal Code of the Russian Federation

[33] *See* Section 23(1) of the Zimbabwe Criminal Law (Codification and Reform) Act (Chapter 9:23), also known as Act 23/2004

far beyond the elements that are established in Resolution 1566. Their national description of terrorism reads as follows:

> (1) Any person who, for the purpose of
>
> (a) causing or furthering an insurrection in Zimbabwe; or
> (b) causing the forcible resistance to the Government or the Defence Forces or any law enforcement agency; or
> (c) procuring by force the alteration of any law or policy of the Government;
>
> commits any act accompanied by the use or threatened use of weaponry with the intention or realising that there is a real risk or possibility of-
>
> (i) killing or injuring any other person; or
> (ii) damaging or destroying any property; or
> (iii) inflicting substantial financial loss upon any other person; or
> (iv) obstructing or endangering the free movement in Zimbabwe of any traffic on land or water or in the air; or
> (v) disrupting or interfering with an essential service;
>
> shall be guilty of insurgency, banditry, sabotage or terrorism, whether or not any purpose referred to in paragraph (a), (b) or (c) is accomplished (…)

Even though the preamble of the Zimbabwe's counterterrorism act of 2011 recognises that "national liberation movements" are not to be considered as part of the law's objects, the law itself does not specifically exempt these groups (HRW, 2012). The preamble goes on to explain that those acts which are part of the exercise of a "legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces… shall not, for any reason, be considered a terrorist activity"[34].

A comparable case to the Zimbabwean one is that of Ethiopia, which can also be categorised as an *extended approach* to the international definition of terrorism. Section 3 of the Proclamation No. 652/2009 (Anti-Terrorism Proclamation) of Ethiopia establishes a list of acts that can be considered as terrorist attacks.

> Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:
>
> 1) causes a person's death or serious bodily injury;
> 2) creates serious risk to the safety or health of the public or section of the public;
> 3) commits kidnapping or hostage taking;
> 4) causes serious damage to property;
> 5) causes damage to natural resource, environment, historical or cultural heritages;
> 6) endangers, seizes or puts under control, causes serious interference or disruption of any public service; or
> 7) threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article;
>
> is punishable with rigorous imprisonment from 15 years to life or with death.

As Human Rights Watch recognises (HRW, 2012), the definition within this law is so broad that it could be used "to prosecute a wide range of conduct far beyond the limits of what can reasonably be considered terrorist activity". Clauses such as (4), (5) or (6) can be used discretionarily to detain people in a wide array of circumstances, not being considered as anything close to terrorism in other jurisdictions or in international law. The broad application of case (6)

[34] Suppression of Foreign and International Terrorism (Chapter 11:21) Act 5/2007

can lead to condemning actions such as peaceful demonstrations obstructing traffic as terrorism. Likewise, the understanding of causing "serious damage to property" is too vague and may be interpreted as to qualify a wide range of acts as terrorist.

Ethiopia has created a terrorist narrative that controls critical speeches both on digital and traditional media (Workneh, 2019), making it hard for those opposing to the government to make critiques and participate in the political discourse. To sum up, it seems appropriate to maintain that Ethiopia has an overly broad definition of terrorism that can easily be used to condemn conducts that should not be considered within the conceptualisation of terrorism.

4.2.2. Principal critiques to the concept of Terrorism

In the absence of a common universal definition of "terrorism", for the purpose of this thesis, the definition that will be used to refer to this phenomenon will be that of the Security Council Resolution 1566. As it has been outlined before, this is the most global and widely accepted definition in use today, thus it seems appropriate to agree to take this as the most proper definition during the following lines.

Needless to say, having a common definition of terrorism is useful and necessary for States to develop solid cooperation measures, focusing specially on reinforcing the police and judicial sectors. And furthermore, terrorists take advantage of any legal differences in the treatment of terrorism between States, making it even more necessary to frame a legal definition of terrorism and to offences relating to it.

Symenidou-Kastanidou (2004) argues that the formulation of special offences shows that the intention to define terrorism is not only a matter of strengthening police and judicial cooperation, but instead it also "connotes mainly a desire to use the symbolic power of substantive criminal law". In this sense, she points out three main goals that States follow when making use of this definition: (a) *the manifestation of an illusion of potential safety*, (b) *the enhancement of their authority through the legislative activity*, and (c) *the legalization of special anti-terrorist measures that are being planned or suggested or have already been put into effect, and that have a negative impact on human rights*. Hence the intention

of the State in defining terrorism is the first element to take into consideration when analysing these type offences and their grounds.

There is also an element to take into consideration, which is related to the varying forms of terrorism. For instance, Walter Laqueur (1999) suggests that the character of terrorism has changed through history, and he talks about "old" and "new" terrorism. Old terrorism would be the kind of terrorism that strikes only selected targets, while new terrorism is that which is indiscriminate and seeks to cause casualties to largest extent possible. He argues that terrorist acts have changed not in terms of their demands, but in relation to the destruction they seek to cause and the "elimination of large sections of the population". This terror has evolved "from being a means to an end, to becoming the end in itself" (Morgan, 2004). Following Laqueur's definitions, Matusitz (2012) explains that terrorism has changed because there has been a "paradigm shift". The paradigm –as he defines as "a way of interpreting the world which has been accepted by a group of people and that can be useful for politicians and thinkers to design policy agendas"- this worldview, has changed, and this paradigm shift has also changed the dynamics of terrorism[35]. These evolving perceptions of terrorism throughout time have taken many transformations and facets, which have in turn complicated the establishment of a proper definition, making it much harder to find a complete definition of terrorism as such.

And what is more, since September 11, many states have changed their approaches to counter terrorism, and what was usually strictly a matter of criminal law, has now become replaced in much part by the use of military means (Murphy, 2011). Many oppose to this modus operandi and reproach that taking this view may mean a threat to human rights. Nevertheless, those supporting the military model contend that criminal law is not enough to fight against the terrorist threat.

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[35] To read more about the evolving nature of terrorism and its current forms, see John Murphy on "International Law in Crisis: Challenges posed by the new terrorism and the changing nature of war" and Paul Wilkinson's work "Terrorist Targets and Tactics New Risks to World Order", where he develops the idea that there are different factors which shows that terrorist attacks are more indiscriminate today, such as the saturation of media images of the consequences of these attacks, the fact that attacking civilians also means lowering risks for themselves, and changing political perceptions to the "vengeful and hard-life fanatic" perspective.

Authors such as Hardy and Williams (2011) argue that one of the main concerns with domestic definitions of terrorism is related to the principle of legality[36]. They argue that the principle of legality has to comply with two different senses. From the one hand, the principle is linked to the Latin maxims *nullum crimen sine lege* ("no crime without a law") and *nulla poena sine lege* ("no punishment without a law"). The second one is that which refers to the compliance with human rights treaty obligations[37]. Thus this principle is linked to the obligation of states to specify crimes in advance using language that is sufficiently precise, unambiguous, and narrowly focused on the prohibited conduct, and which is strictly construed and not extended by analogy (Duffy, 2009). Otherwise, imprecise and overbroad definitions, very commonly adjudicated by states to the definition of terrorism nationally, may be in breach of the principle of legality and might lead to increasing the risk that governments target, supress or prosecute individuals, associations, or opponents to the government in general who have no real connection to terrorist activity; arbitrarily detaining individuals; and other negative actions associated with abuse of power.

All this debate surrounding the definition of terrorism perpetuates an atmosphere of a lack of certainty both at the national and international levels. The way in which states perceive and face severe national security threats is what defines terrorism domestically, and how they apply these definitions in practice. The lack of a comprehensive definition at the global level has opened the room to deviate from human rights principles and treaties and the rule of law, and has led to overbroad and vague definitions which are many times associated with military action. To fight the terrorist phenomenon, it is imperative to enact laws that adjust to the current needs to counter terrorism based on examination and scrutiny, considering the weight of the human

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[36] In this sense, Article 15 of the International Covenant on Civil and Political rights is especially relevant since it is the one which codifies this principle, as affirmed by the International Commission of Jurists (*Legal Commentary to the ICJ Berlin Declaration: Counter-Terrorism, human rights and the rule of law* 16, pp.72-74 (2008), the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism, Martin Scheinin (*Protectionn of Human Rights and Fudnamental Freedoms While Countering Terrorism*, 42, General Assembly, UN Document A/61/267, 16 of August 2006), and the United Nations Office of the High Commissioner for Human Rights (*Digest of Jurisprudence of the UN and regional organizations on the protection of human rights while countering terrorism* 63, UN Document HR/PUB/03/1, 2003).

[37] Further development of the relationship between counter-terrorism measures and their impact on human rights will be developed in Chapter XX.

rights implicated, legal protection and the rule of law to ensure that the definition of terrorism is found to apply.

B) THE LEGAL FRAMEWORK OF THE SECURITIZATION OF MIGRATION

CHAPTER 5
THEORETICAL UNDERPINNINGS OF THE SECURITIZATION OF MIGRATION

In academic literature, it has been widely recognised by many scholars that today migration has an intimate link to security studies. Immigrants, including refugees and asylum seekers, are perceived by some as a threat to public safety and social stability. And what is more, since the September 11 attacks and the subsequent terrorist acts perpetrated in other West countries by ISIS, migration has also been associated with terrorism, which has in turn placed it as one of the main security problems of this era.

Because the perpetrators of these acts match a specific ethnic profile (Karyotis, 2011), migrants have been considered a security issue. Migration has been associated with certain existential threats (social, economic, and political) but now they have also been associated with terrorism. That also explains why recently migration has not only been handled through politics, but also using security tactics. As a result, migratory issues have now become part of the national security agendas of many countries. It is interesting in this sense to study the theory of securitization, which in the last years has been studied by academics as a phenomenon concerning migration, not only nationwide, but also internationally.

In the first part of this chapter, we will overview the concept of securitization and the elements surrounding this concept. Secondly, a debate on the critiques of the conception of securitization will also be brought up in order to put in contrast the different views some academics have shared relating to this phenomenon. Thirdly, an approach to securitization and the law will be analysed, to explain in which ways migration has been securitized within different legal frameworks. And finally, other examples of ways to securitize migration outside the law will also be explored.

5.1. The concept, factors and actors of Securitization

Securitization is understood to be the process of integrating non-security issues "into a security framework that emphasizes policing and defence" (Bourbeau, 2014) as a consequence of securitizing speech acts (Messina, 2014). Or as put by Waever, "it is by labelling something a security issue that it becomes one" (Waever, 2004:13). Through securitization, extraordinary measures are applied in order to protect from a particular threat. This concept is not to be confused with that of the politicization of immigration, which refers to making the subject of immigration from restricted networks and bureaucracies to the public arena[38]. This process can be neutral and even lead to positive benefits. However, that of securitization, as we will discuss in the following lines, is most of the times neither of them.

There are two logics in the process of securitization, according to the literature (Bourbeau, 2014). From the one hand, there is the logic of exception, proposed by the Copenhagen School, which postulates that security is designed to combat existential threats via exceptional measures. And on the other hand, the logic of routine sees those measures related to security as patterned practices, not responding to exceptionality but to routine. Most scholars argue for one of the logics or another -although Bourbeau defends that we should focus on their commonalities rather than differences-, but there is no global agreement on how we should understand the process of securitization today. Thence it is necessary to determine the moment when the securitization of migration arises to further understand the reasons why it appears in the first place.

Most would think that it is after September 11 that this phenomenon appeared, but most scholars agree that the so-called "war on terror" strengthened an already existing concept of securitization. That is, migration policies already provoked certain insecurities and uncertainties at the domestic and international level, but 9/11 further legitimized the security rationale that has prevailed in Europe since the late 1970s (Karyotis, 2011; Chebel d'Appollonia, 2012). As a consequence, it seems appropriate to affirm that the securitization of migration is an "old phenomenon" (Nagtegaal, 2011) that has not been created in the 21st Century but has rather reborn. If this is the

[38] To read more on this subject see: Bourbeau, P., 2011, *The Securitization of Immigration: A Study of Movement and Order,* London, UK: Routledge.

case, and immigration was already strategically linked to national security before 9/11, then one may wonder what it is exactly that connects migration to security today. Following the logic of the Copenhagen School, the political elite *deliberately* connect issues related to migration to those related to terrorism so that the public fear's on immigration exploits and is then able to transfer immigration out of the realms of conventional politics to the domain of emergency politics (Messina, 2014; Boswell, 2009).

For Roe (2004) successful securitization is based on three elements: first, the capacity of the actors to make socially effective claims about threats; second, the forms of these claims so that they are recognized and accepted; and third, the factual factors or events which they are referring to. Some authors place special emphasis on this first element referring to the actors of securitization. They argue that the construction of a security frame does not depend so much on the perception of the issue as a threat, on the fact that because it is presented by the political elite as such (Buzan, Waever and Wilde, 1998; Karyotis, 2011). These elites in power are the ones defining the existing risks in a determinate period of time, while also selecting the means through which these threats must be neutralised (Estevens, 2018). Therefore, elites persuade the public with their best resources so that an issue is perceived as an existential threat that needs of security action to be controlled, marginalizing other alternative responses (Van Dijk, 1993). In other words, securitization takes place when elite actors "inject *low politics* public policy issues into the domain of *high politics* by adopting the rhetoric of existential threat" (Messina, 2014), thus successful securitization is based on the intersubjective establishment of an existential threat (Roe, 2004). Accordingly, a topic becomes securitized not because of its nature or potential threat, but because it is conferred this image by the political elite, so that the public has the perception that it needs of a special and extraordinary response in order to be overtaken. Once the claim is widely accepted, the issue can be transferred from conventional politics to emergency politics. This can in turn dangerously be used as a governmental technique that can give any issue the category of a security one. In the words of Waever (1995):

> Security is not of interest as a sign that refers to something more real; the utterance *itself* is the act. By saying it, something is done (as in betting, giving a promise, naming a ship). By uttering "security", a state-representative moves a particular

development into a specific area, and thereby claims a special right to use whatever means are necessary to block it.

It is interesting to study the approach taken by Balzacq (2005) who studies the possibility of considering securitization from a strategic and pragmatic approach instead of seeing it as a speech act. If following this view, he argues, we must then also analyze the contextual and non-linguistic clues such as physical gestures or the social context. We should then also study other implications when analyzing securitization discourses, since the element of the speech act as such would not be the only one to consider, but other factors such as the actor's capabilities, the ontology of their interactions and the social field in which the discourse takes place also takes force. This leads to a much deeper analysis, since this discourse is important for its grammatical and syntactical rules of the language, and for the contextual elements such as analogies and metaphors that move emotions and reach more deeply into the audience. But so is the power position of the actor, her social identity and her capacity to target the audience are taken into account. If considering all of these elements together, securitization becomes a meaningful procedure as a whole, and all of its parts are relevant and equally affect the probability of success of the message being sent. Concurrently, the pragmatic approach of securitization, as opposed to one of universal pragmatics (speech act), shows that securitization is a strategic practice which seeks to determine "the universal principles of an effective communicative action of security" (2005:192).

Thence in practice, securitization is largely based on power and the capacity to build something as a social and political threat (Taureck, 2006:3). But if that is the case, is it then certain that many -if not most- security threats are built on unmanageable and incoherent decisions? As put by Aradau (2001) securitization becomes a technique used by the political elites to create a sudden rupture in the ordinary life of a particular society by "fabricating an existential threat" or, in other words, it is a mechanism that seeks to create fear by "a mythical replay of the variations of the Hobbesian state of nature". If the reasoning behind securitization is that it is depends on power and capacity, then we should be thinking on strategies to determine who is a legitimate actor to securitize, and if he or she is following a legitimate goal. We should then have a more restrictive view of securitization.

Many scholars have argued against the need to securitize, and there is certain disagreement on whether this is in fact a positive or negative process. For instance, the perception of securitization theory given by Aradau is mostly a negative one, since she perceives that using extraordinary politics leads to fast-track decision-making ("process") and categorizes a particular threat as the enemy ("outcome") (Aradau, 2004; Roe, 2012:249).

Following her division of *process* and *outcome*, the reasons to consider securitization negatively are based on two ideas. First, and dealing with the *process*, it is believed that securitization alters the proper functioning of democracy by using panic politics which diminishes the openness and accountability of the legislative branch of liberal democracies. This understanding is based on the idea that securitization represents the failure of normal politics, since the government should be able to protect its citizens from any threat without elevating the procedures to extraordinary measures only to deal with specific threats (Buzan, Waever and Wilde, 1998). If they have to do so, these fast-track legislative processes and the use of extraordinary measures represent a privilege for the elite who uses them since there is not the same level of scrutiny as in ordinary legislative procedures. Securitization, then, is negative because it does not hold the government accountable for its actions as it would be in a normal situation (Roe, 2012). When it comes to the *outcome*, Aradau (2004) views security as separating "us" from "them" and thus establishing a negative line between the two. Securitization is then based in a sense of hostility and on the necessity to protect from the other and thus to "exclude" the other.

However, not all scholars agree on this negative perception of securitization. Floyd (2007, 2011) has a different opinion and argues that any judgment trying to determine whether securitization is a negative or positive process is very much issue dependent. Roe (2012), on the other hand, emphasizes that extraordinary politics do not involve an abandonment of legislative mechanisms, since even when the legislative process being used is an accelerated one, it is still being scrutinized. In today's liberal democracies, there is a commitment to stick to the laws and the actors taking these decisions are legitimate ones since they are part of an elected government. Thus securitization, according to them, does not necessarily have to fall

within negative politics, showing a certain disagreement among scholars on how to treat securitization and on whether this is a good or negative process.

But even after an issue has been taken to the security arena, the moment and way in which we bring it out of the realms of security and back to ordinary politics seems to be determinant too. And here is where the theory of "desecuritization" as explained by Waever (Buzan, Waever and Wilde, 1998) comes at play. Desecuritization, on the other hand, does not necessarily involve a negative perception of securitization theory since it does not "attack" the process of securitizing an issue, but it is based on the idea that once the threat is gone, the emergency situation should cease and we should go back to ordinary politics. This author supports that securitized issues should be reversed and moved out of "the threat-defence sequence and into the ordinary public sphere" where they can be dealt with the normal procedures and rules of the ordinary politics of the democratic political system (Waever, 1995; Floyd, 2007). This was an initial view of securitization dynamics as understood by the Copenhagen School (Bourbeau, 2012). Other authors, later on, have seen desecuritization as a counterbalance to securitization in processes related to contestation and resistance (Vuori, 2011). Bourbeau and Vuori (2015) maintain that while most scholars have agreed on desecuritization as a "post hoc move" of a securitization process and that it is an strategy thought to readjust to a situation that is already securitized, it does not always have to take place *after* securitization has occurred. On the contrary, they propose that desecuritization and "resiliencization" moves cay follow security at times, but also precede it in others.

Security policies, and thus securitization, have to do with exceptional cases -and thus exceptional measures- of considerable and major threats affecting society. That is why it is then preferable to solve issues through diplomacy and trade, since these situations are normatively preferable to a security reality (Waever, 1995). Since the optimal situation is the latter, when we find ourselves having securitized an issue, it is preferred to desecuritize it so that it loses this restrictive and exceptional nature to go back to ordinary politics. In this sense, Bourbeau and Vuori (2015) are of the opinion that "active desecuritization efforts can be made to block the escalation of a contention" (2015:14). As an example, they study the posture of the People's Republic of China since the late 1970s in avoiding other

actors' securitization threshold. The country realized that a threat reputation would sabotage their intentions of becoming a great power, thus the political moves of the authorities were based on avoiding security responses. The Chinese approach has been to bring all their international activities to the economic, social and political sectors, instead of treating them as national security concerns. A clear example of a political strategy to desecuritize problems before they can be taken to the security sphere.

Nevertheless, the treatment we have given to migration in the past years is not the same case. On the contrary, the securitization of this field has been a response to different elements -such as massive refugee flows, the incapacity of the West to respond to them, to terrorism, etc.- which have led to an increase of speeches linking migration to national security. Discourses linking migration to terrorism have not only proliferated but have also consolidated the perception of migration as a threat to both social and cultural identity (Toğral, 2011). The securitization of international terrorism led by the elite in the US, for instance, is an example of how new security policies pushed the promotion of human rights, environmental sustainability and human governance to the sidelines of the international security agenda (Williams, 2008; Charrett, 2009). In this sense, a question that arises is that of the reasons behind the aim to securitize migration. It seems that most scholars agree that Western politicians engage in this kind of discourses that link migration to a security threat for self-interested political reasons and/or in order to increase and enhance the legitimacy of their privileged positions (Karyotis, 2007; Messina, 2014). The securitization discourse legitimizes the application of emergency measures and other non-conventional measures that in a normal situation would be hard to implement. And when the public widely accepts something as a security threat, these measures are considered as necessary to combat the potential threat and maintain national security. Furthermore, it also represents a chance for the political elite to reinforce collective identification and generate "greater loyalty and patriotism by defining a particular issue as a common threat" (Boswell, 2007), and this works particularly well with migration, since the "issue" we are referring to is in regards to people with different cultures and values, disconnected from the national identity. Altogether, as Messina (2014) emphasizes, it matters very much whether decision makers act *purposefully* when

linking migration to security. This whole process is summarized by Aradau (2001):

> There are positions of authority within the state, from which 'security issues' can be voiced. This multiplicity of positions from which security discourses can be voiced leads to struggles between competing discourses to gain legitimacy and to become *the* discourse. The securitization process is not reduced to simple rhetoric, but implies extensive 'mobilization' of resources to support the discourse. It depends on the capacity of actors to produce a 'power/knowledge' that brings together threats from different sectors (terrorism, crime, unemployment etc.) in the image of the immigrant. The 'power/knowledge' links all the threats in a coherent discourse that provides an explanatory grid of the world. The actors come up with statistics, relate them, establish on 'scientific bases' the 'truth' concerning immigration. Those actors who are endowed with both the 'symbolic capital' and the capacity to inter-link heterogeneous discourses are the 'professionals of security'.

These speech acts are nevertheless not only expressed through the political elite -although this is the most prominent one in the process of securitizing migration-. But we also need to consider the role of mass media in this process, as their discourses have also become part of the exercise to create an awareness of securitization (and insecurity) throughout the audience. And extensively, they have also helped consolidate the phenomenon of securitization. However, for some scholars, there is no proof that the media's impact in influencing the public has made the latter feel more unsafe or insecure (Messina, 2014), being the role of the media more modest in the process of securitization than other academics affirm. In my opinion, the role of mass media has collaborated in increasing the negative image of immigrants within host societies, and although they are only partial actors of the configuration of securitization -holding the political elite a more prominent role-, their discourses are still relevant and bear special attention.

Once the specific actors in place have securitized an issue, the application of extraordinary measures can take place. This process can be, in many cases, channelled through the legal system by enacting new laws, and thus alter the structure of the national legal system (Bright, 2012). And even though the procedure to make these

legislative changes follows what is established in the law, the content of these new laws would not have passed if it were not because of the existence of this particular exceptional threat (Aradau and van Munster, 2009). This is, according to Dück and Lucke (2019) the "institutionalisation of securitization".

When talking about securitization, it is also interesting to study whether this happens at the national, regional or international level. It seems evident that this process takes place nationally, since the political elites we were referring to are in many cases, the national political elites talking to the national audience and applying exceptional measures within their territory. However, this does not mean that the process does not take place within a wider sphere.

Within the Copenhagen School there is the concept of *security constellations*, which refers to patterns that exist in the overall social structures of securitization (Buzan, Waever and Wilde, 1998). This concept refers to security issues that take place mostly at the national level, but which have an effect at the regional level. In the case of India and Pakistan, for instance, their rivalry is situated in the context of the Cold War above, and religion and ethnic divisions below (Buzan and Waever, 2009). Furthermore, Buzan and Waever (2009) also use the concept of *macrosecuritizations*, to refer to those referent objects higher than those at the middle level, and thus have a wider international scope. Macrosecuritizations put together multiple lower level securitizations and identify a common existential threat that needs an exceptional measure in response. These securitizations are placed above the state and national level and put together lower level security issues within the larger framework, consolidating them as global threats to security. Due to their nature, any reaction will have to compromise liberal values and will be considered securitization, but these actions are justified since they are widely accepted as global security threats affecting civilization. Buzan (2008) puts as an example the Global War on Terror and the events following 9/11, projected by the US as a macrosecuritization[39].

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[39] For further discussion on this subject see: Buzan, B., 2004, *The United States and the Great Powers: World Politics in the Twenty-First Century*, Polity; Buzan, B., 2006, *Will the 'global war on terrorism' be the new Cold War?*, International Affairs, Vol.82(6); Buzan, B., and Waever, O., 2009, *Macrosecuritisation and security constellations: reconsidering scale in securitisation theory*, Review of International Studies, Vol. 35, pp. 253-276; Buzan, B., Waever, O. and Wilde, J., 1998, *Security: A New Framework for Analysis*, Boulder: Lynne Reinner

From my point of view, migration could be considered as one of these issues that lies within the sphere of macrosecuritization. Not only do we have political and media discourses referring to migration as a security problem nationally, but we have also witnessed international actors referring to migration as a global issue. As Bigo (2006) argues, internal security today cannot be separated from a country's foreign policy and it relies upon foreign collaboration. And this is much clearer in the European Union's case, where the internal security of a country is connected and in part depends on other EU countries. There is a process of "Europeanisation" by which EU governments have changed the way they control their populations: European police collaboration has been strengthened; the range of activities has increased; there are clubs like the Bern Club, the Vienna Club, and the Quantico group (conducting different meeting with Western intelligent services) evaluating the transnational networks of diasporas as a threat to security. In issues like migration and counter-terrorism, the EU has joint forces to protect its borders. As it will be explored in a later chapter, there are different ways by which we can find an externalization of securitization.

At this point, however, it is also necessary to highlight some of the problems that some scholars have perceived in these macrosecuritizations. Since these security threats are first perceived at the national or lower stage, security actors sometimes match their own local problems to the international level, which means that there may be a problematic vagueness of ambitious universalisms (Laclau, 1996). Thus since the different levels of securitization may overlap sometimes, lower levels of security moves pass to the international arena, meaning that domestic security problems can become part of macrosecuritization. As said in the previous paragraph, since the Global War on Terror, most Western countries, along with Russia, China and India, have viewed international terrorism as a common security threat. But the potential rewards from building up macrosecuritization are many; it can demonstrate and consolidate legitimacy and leadership, it can be used as a means to apply exceptional measures in detriment of certain rights, and it can facilitate the formation of alliances (Buzan and Waever, 2009). Again, the case of the US in the fight against AlQaeda at first and the Global War on Terror in general afterwards, implied a substantial shift not only of their national security agenda but also of the international security

agenda and is an example of macrosecuritization (Buzan and Waever, 2009).

5.2. The debate on securitization in current literature

The concept of securitization was first introduced by Ole Waever in the mid-1990s and more fully developed in *Security: A New Framework for Analysis* (Buzan, Waever and Wilde, 1998). Since then, it has been agreed upon and further analysed by other scholars[40] but it has also been subject to debate. Some authors[41] have argued that the security approach developed by the Copenhagen School is problematic and some question whether there is in fact a securitization of migration today. I will now overview both critiques, starting with that on the concept of securitization.

Security is, for the Copenhagen School, a subjective construction. As stated previously, securitization theory is based on the idea that security is built from a speech act, that alone by uttering 'security' something becomes security (Waever, 2004; Floyd, 2007). It is, in sum, an intersubjective construction -it does not depend on an "objective" threat- and is initiated by the speech acts of political actors, which ultimately serves to justify the application of exceptional measures. The idea then is to show how through securitization, politicians and decisionmakers stimulate arbitrarily the perception of something as a threat, and thus make awareness that national security policies are not founded naturally (Knudsen, 2001).

A different conceptualization of security is given by the Paris School[42]. According to these theorists, security is construed according to a series of routinized practices rather than specific speech acts (McDonald, 2008). For both schools, the conception of security is critical in the sense that they do not consider security as a material condition, but it is instead built according to social and political practices (Buzan, Waever and Wilde, 1998). Nonetheless, they differ

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[40] Some of the most remarkable ones are the works of Barry Buzan, Ole Waever and Jaap de Wilde.

[41] In this sense see, for instance, Boswell, C. (2007), Chebel d'Appollonia (2012) and McDonald (2008)

[42] *See* Bigo, D. (2002), *Security and immigration: Towards a Critique of the Governmentality of Unease*, Alternatives 27 (Special Issue), pp. 63-92

in the ways they interpret these practices, since the Paris School's understanding is more pragmatic and pays closer attention to the security practices and particular tools that allow for a subject to be transformed and thus securitized (Naumann and Schiele, 2016). Hence instead of only focusing on the political discourses, securitization should, according to them, be based on practices such as those related to surveillance and border control.

Besides the different perceptions of security within security studies, it is also useful to stand out those critics of securitization[43]. McDonald (2008) has argued that the securitization framework is narrow for different reasons. From the one hand, it is narrowed in its *form*, as he argues that the actors on which the Copenhagen School authors have centred the form of the security discourse is basically that of the political elite, excluding other forms of representation as, for instance, images and videos of other "key securitizing actors" such as the media. He also highlights that the aforementioned concept of securitization is based on a particular moment in time instead of constructing securitization over time through various processes and representations, thus being limited in regard to its *context*. Lastly, he argues that the framework of securitization is also narrowed in *nature*, as it defines security in terms of threats and dangers instead of considering security as normative goals and core values.

Balzacq (2005) on the other hand, and as explained in the previous section, critiques the focus on the speech act, arguing that the speech act approach reduces security to a conventional procedure and that, on the contrary, securitization should be seen as a strategic practice that occurs when certain circumstances take place. Hence it is "context-dependent" in the sense that the "psycho-cultural disposition of the audience and the power that both speaker and listener bring to the interaction" are more determinant than the speech act, is crucial.

Different authors have also studied the political and media discourses of different countries and have come to the conclusion that there is no such hard evidence showing that there is in fact an intention by the political elite to securitize migration. In this sense, for instance,

[43] See Messina (2014), Chabel d'Appollonia (2012), Boswell (2007) for examples on scholars who stand that there is no objective evidence constituting the existence of the securitization of migration

Chebel d'Appollonia (2012) affirms that even though there is evidence that securitization has occurred in a number of cases, neither the United States nor European countries substantially changed their policies after the 9/11 attacks, and instead they only reinforced existing measures. Boswell (2007) further argues that while there is some evidence that securitization of migration is happening, there is no reason to believe that politics will be "driven exclusively by an interest in encouraging public unease or introducing more stringent security measures".

For the purpose of this thesis, I will follow an approach of securitization closer to that of the Copenhagen School mainly to defend that migration is securitized when politicians and law-makers utilize the existence of there are existential threats through speech acts in a particular time, which to justify the application of measures outside the regular proceedings established in the law. However, not only a theoretical approach will be conducted, but also a more pragmatic one to show through practical examples the ways in which security practices have been used to securitize migration. Thus my perception of securitization, although agreeing with Copenhagen scholars that starts being manifested through speech acts, it is nonetheless materialized -and completed- only when specific public policies and legal come into play. Consequently, the speech act is the previous step to the process of securitization, but this is not concluded until it is formalized through specific changes in the law or policy fields. According to this idea, the following definition of securitization given by Buzan (1983) as claimed by the Copenhagen School, would be completed this way:

> Securitization is the process by which ostensibly non-security issues, such as immigration, are transformed into urgent security concerns as a result of securitizing speech acts *and its formalization through the development of new or reframed laws and policies.*

5.3. Securitization and the Law

There are, according to Lavenex (2001), two approaches relating these two fields of study: the realist approach, which perceives migration as a threat to national security, and the liberal policy frame, which has a more humanitarian perspective and treats migration considering above

all the protection of human rights. The selection of one of the security frames is extremely important to build a process by which the State enacts laws and policies in the field of migration, as this frame will be the standard way to define an issue within the security framework. Some analysts conclude that it is the realist approach what has driven the securitization of migration at the expense of human rights and humanitarian considerations (Geddes, 2003; Huysmans, 2006; Karyotis, 2011).

But the securitization of different social issues such as migration is in fact a "failure" to deal with issues through "normal politics" (Buzan, Waever and Wilde, 1998). Bringing these issues to the emergency arena, requiring of extraordinary security responses, can endanger the protection of the human rights of migrants. And securitizing actors, typically political elites, should have a sense of responsibility with their discourses linking migration to national security.

It is important in this sense to also refer to the "internationalization" of the securitization of this sector, since it is no longer a phenomenon that takes places only nationally, but it has also been externalized. Boswell (2003) also recognized that member states of the EU have exported migration control instruments such as those relating to border control, not only to the EU level, but further beyond. She gives different arguments to explain this. Firstly, these were exported to sending and transit countries, and secondly, future member states were obliged to accept the Schengen *acquis* into their legislation (such as stringer border control and asylum policies). Another element of externalization comprises instruments facilitating the return of asylum seekers and illegal migrants to third countries, as well as other readmission agreements and provisions on safe third countries of transit. Thus securitization, as much as it has been debated, it is in fact a phenomenon that is happening at the international arena and concerns states at the globally.

These measures to securitize migration can take place in different sectors -and I will also give examples in the following section- but one of the ways in which securitization is channelled is through the legislative process, which I will develop at this point. The securitization of migration through the law is what it is known as the "institutionalisation of securitization" (Dück and Lucke, 2019). Enacting new laws and changing existing ones are examples of how

this process can take place. It is then clear than this securitization goes beyond the 'discursive practice' and it materializes in a set of heterogeneous practices (Aradau, 2001). The securitization of migration has actually been perceived in a wide range of areas, one of them being, for instance, border policy. The case of the United States is quite clear. Donald Trump acceded to presidency with the repeated message throughout its campaign to build a wall across the U.S.-Mexican border and stop illegal migration from entering the United States. Although many have argued against it, the Trump administration called strongly in its favour from the very beginning and on January 25, 2017, he signed an executive order ("Border Security and Immigration Enforcement Improvements") to include plans to militarize the border and demanding the construction of a wall along the more than 3.000 kilometre border.

The European Union, on its side, has also participated in the dynamics of constructing walls to bolster border control. The Schengen agreement of 1985 already introduced measures calling on States to reinforce external borders as part of the requirements to become part of the European Union's area of free movement. And after the 9/11 attacks, the EU also announced new actions to securitize its borders. The 2003 European Security Strategy ("Europe in a Better World") established a relation between globalization and local security, and although migration as such was not mentioned, border control was a relevant part of the new strategies (Ruiz and Brunet, 2018).

Migration is also frequently linked to crime, and increasingly punitive laws have been spread throughout in the past years. In the United States, for instance, the criminalization of immigration has lately been reconsidered to the point where a "criminal alien" has been redefined using "increasingly stringent definitions and standards of 'criminality' that do not apply to U.S. citizens" (Ewing, Martínez and Rumbaut, 2015). This allows for U.S. immigration laws to create more "criminal aliens" and for these to be detained and deported in larger numbers as well. Furthermore, post-9/11 policies were introduced as part of the fight on the "war on terror" and in relation to immigration as part of a wider effort to enhance national security (Ewing, Martínez and Rumbaut, 2015).

In fact, only eleven days after the 9/11 attacks, the Office of Homeland Security was created, and its first director appointed. This office, which became a stand-alone cabinet-level department in 2003, was designed to oversee and coordinate national security strategies "to safeguard the country against terrorism and respond to any future attacks"[44]. This bureau, also in charge of citizenship and immigration services, has enacted new anti-terror legislation and other related policies (Dücke et al, 2019). The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, the Homeland Security Act of 2002, and the Enhanced Border Security and Visa Entry Reform Act of 2002 are examples of some of the laws that were enacted and which "illustrate the accelerating criminalization of the immigration system" (Miller, 2005). Moreover, not only do they establish a link between crime and migration, but they also make a tighter connection between terrorism and migration. As Miller argues, the relationship between criminal law and immigration law was strengthened after 9/11, and specially to those who had not passed through the criminal justice system such as asylum seekers and undocumented immigrants. Let's remember that the PATRIOT Act in particular allowed federal officers to apprehend and detain "non-citizens on immigration grounds without legal review and without public disclosure of the specific charge for a period of seven days, or for a maximum of six months if the case is deemed a national security risk" (Coleman, 2007).

Another legal area in which migration has been linked to security concerns is that of nationality and citizenship. Some countries have enacted laws by which persons with dual nationalities who have engaged in terrorism can be removed their citizenship. This is the case of Australia, which introduced the Australian Citizenship Amendment (Allegiance to Australia) Act 2015 to the Australian Citizenship Act 2007 allowing removal of Australian citizenship in these cases. Human rights organizations contested the new provisions alleging that international human rights law requires that any limitation on rights - including citizenship- must be reasonable, necessary and proportionate, three requirements that according to them are not met in these amendments. Involuntary removal of citizenship is a very serious matter and the new provisions are in clear detriment of the rights of migrants. Unfortunately, other countries such as Italy have

[44] https://www.dhs.gov/creation-department-homeland-security

followed the same path and amended national legislation allowing the revocation of citizenship in the same circumstances (see Art. 14 of the 2018 Decree Law[45]).

It is also interesting to note how surveillance and police powers have been expanded because of the so-called "war on terror". In this sense, a law to stand out is the Investigatory Powers Act 2016 (IPA) of the United Kingdom. This law requires communication service providers to store internet connection records of their users for up to one year so that these can be accessed by security agencies and public bodies provided there is a warrant or if it can be connected to a 'serious crime'. It also grants interceptions in different institutions, such as immigration detention facilities (Section 51). The human rights organization Liberty[46] has criticised the Act as they argue that it is incompatible with the European Convention on Human Rights. Among other interferences, the law allows security services and other agencies to access intimate data including usernames and passwords, cell site data to locate a person at a given time, the individual's internet browsing history, etc. Although the law is not intrinsically linked to migration, it serves as another example of securitization and the broadening of surveillance powers related to the fight against terrorism and the reinforcement of national security strategies.

5.4. The nexus between Migration and Security Studies

According to Floyd (2011), a three-element criteria -inspired by just war theory- is the basis to determine the moral rightness of securitization. Firstly, there must be an existential threat, that is, a threat that compromises the survival of an actor (or society). Not all existential threats are matters of security. Some are brought to other non-security areas or are even ignored. The key here is to have a powerful actor that defines a determinate issue as a security threat, and that the threat is an objective existential one. But how do we differentiate an *objective existential* threat from a *perceived* one? Floyd defends that what distinguishes the first from the latter is that in the first case, the aggressor really intends to attack a referent object, and

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[45] "Decreto-Legge 4 ottobre 2018, n. 113" which entered into force on October 5, 2018

[46] See their campaign "Reject Mass Surveillance" (https://www.libertyhumanrights.org.uk/our-campaigns/reject-mass-surveillance)

that, at the same time, it has the means to do so. If the intentions and the capabilities of the aggressor are fulfilled then we might be facing something more than just a perceived threat, but a "real" one.

Secondly, the referent object of security must be morally legitimate, meaning that it must be conducive to human well-being. Here it is important to understand well-being as an objective element instead of a subjective one that could lead to a much wider and fluctuating understanding depending on the person. The author refers to this human well-being as "human basic needs", referring to having individual options thanks to being part of a liberal democracy and having human rights. Liberal democracy, in this sense, is intrinsically linked with autonomy in the sense that it inseparable from certain individual liberties. And human rights are essential because everyone is entitled to live the life she chooses without infringing the rights of others and based on the principle of equality of all people (Floyd, 2011:432).

And thirdly and lastly, the security response must be appropriate according to the particular existential threat. In this latter case, she contends that for a response to be proportionate this must be measures in accordance with the capabilities of the aggressor, and the securitizing actor must be sincere in her intentions. Thus if the response requires breaking the established rules to ensure the referent object's survival, then they can be justified but only because that is what is necessary to contend the threat. However, securitization is not always build on the basis of the need to protect from a threat, but it also used to favour the agent to further her ends with no intention of securitizing actors being consistent with her own terms. Thence to know whether she is profiting from securitizing a particular issue, one must compare what the securitizing actors says and what she does, what Floyd calls the "securitizing move" with the "security practice" (Floyd, 2011:433). With her proposed theory in mind, it is then interesting to study the potential link connecting migration to the field of security to see if the three criteria are -or are not- fulfilled.

Since the Geneva Convention relating to the protection of refugees 1951, its protocol, and the development of customary law, the principle of non-refoulement has become a weakness of border control and a risk to the integrity of national security systems (Guild, 2007). The State no longer has the power to reject a refugee under

international law, even with the massive entries of irregular migrants that we have seen in recent years into Western States. This principle categorically prohibits States from returning refugees to any territory where their security might be jeopardized, yet this principle stands in sharp contrast to state practice today (Donnelly, 2017:256). Western countries have regarded the forced migrant as an important security threat. As Guild (2007) explains:

> "The forced migrant becomes the one individual (other than citizens) who has a right in international law to breach the security of the border. Thus the forced migrant is the individual who must be kept as far as possible from ever arriving at the border."

As explained by Bello (2017a), security threats today are based on *potential* threats and *perceived* threats. We have already seen what a perceived threat it according to Floyd, and its distinction from a real one. It seems evident that the element of perception is important indeed, but as Bello argues, and along with the line of differentiating what a *real* threat is, today we are dealing more with potential threats, that is, those which are characterised by their unpredictability. The clearest example is the terrorist threat, which we never know precisely when, where, against what or who will take place. And while years ago we were more used to seeing terrorism as a phenomenon taking place at the national level – Euskadi Ta Askatasuna (ETA) in Spain, the Irish Republican Army (IRA) in Ireland and with the Brigate Rosse in Italy, for instance- today it is distinguished for being international; we have seen ISIS attacking countries in different continents and against different civilian objectives.

Migration flows can affect security at different levels. Individually, the security of irregular migrants and refugees can be endangered both during the displacement and at the destination country. Not only do they face risks by trying to cross borders illegally in order to not be caught by the police, but many times they also have to rely on criminal groups such as smugglers to find alternative and more dangerous ways to leave their country and find a way to get into another. National security is also affected by migration in the sense that some countries may perceive the arrival of large numbers of people as a threat to their political stability, economic well-being, public order, and cultural and

religious values. At the international level, these migration flows can also lead into tensions between States and their bilateral relations and regional stability (Lohrmann, 2000).

Today, it is particularly interesting to refer to internal and external security agencies, which also play an important role in the securitization of migration and in pointing at particular threats. When talking about these agencies, I will refer to the explanation given by Bigo (2000). External security agencies, he argues, such as the army and secret services, "are looking inside the borders in search of an enemy form outside", thus looking for threats related to, for instance, immigration. From the other hand, internal security agencies (such as national police forces, the national military, border officers and customs authorities) "are looking to find their internal enemies beyond the borders and speak of networks of crime. In this case, Bigo points at examples like migrants, asylum seekers or refugees, Islamic people who supposedly have links with terrorism and all kinds of criminal offences. This convergence between internal and external agencies and the identification of potential threats, such as migration, has justified the creation of new structures and higher cooperation between agencies to tackle transnational flows and to surveillance borders both within and from outside. And once again, it reinforces the perception that migration as a problem.

Furthermore, Bigo (2002: 29-31) suggests that the distinction between internal and external security is not clear anymore. Thence it is more than just the work of internal and external security agencies which is mixing up, but the boundaries between the two types of security have now blurred. Political leaders are unsure on how to react to immigration issues and border control. Who are the ones responsible for coping with migration related issues? Police officers, the military, specialized agencies, or the interaction of all of them at the same time? Military practices, such as those related to screening, controlling and information gathering among others are linked to new technologies, and when it comes to controlling massive population movements (to follow the flows of refugees for instance) the latest technology must be used. The use of this technology along with the deployment of forces to the borders has led to the creation a huge market for the security industry, and it is being used in the name of controlling drug trafficking and border surveillance, but it is also directed to the civilian

population and to controlling the moves of vulnerable groups like migrants and refugees.

In fact, securitization theory is linked to the interaction between the securitizing actor and its audience. And if that is the case, designating something as a security issue can be done in a wide range of sectors of social life (Balzacq, Léonard and Ruzicka, 2015: 496). As long as something poses a vital threat to the community, may this threat pertain or not to the military domain, the issue can become securitized. As explained before, migration may be subject to this securitization in a variety of ways; from discourses of the political elite and mass media, to enacting new laws, public policies, and other security measures. In this section, the point is not to conduct a deep analysis of the wide array of securitization initiatives that can be found across the globe, as this will be done in another chapter, but this section can serve to detail the existing signs and evidence of this phenomenon and the reasonings behind them. To this end, a set of grounds to securitize migration have been collected in order to understand the reasoning behind the actors that securitize migration. I have divided them as "threats" which fall into six different areas: (1) threat to national identity, (2) threat to the economy, (3) threat to the welfare state, (4) threat to bilateral relations, (5) threat to the public order, and (6) threat to national security. Acknowledging that the differentiating line between some of these factors may blur, and that areas like the welfare state and the economy of the country are very much interconnected in the way we understand today's societies, I have decided to put them independently to emphasize that migration can be considered as a distinctive "threat" based on arguments referring to particular elements of the organization of the state. Thus I believe it interesting to study each of these factors individually to examine to what extent they can become an independent case in favour or against the securitization of migration.

Firstly, securitization is a response to the threat that migrants pose to the **national identity** of a society[47]. Nowadays, social and political integration of migrants within host societies is a challenge, and

[47] See the discussion in Huntington, S., 1996, *The Clash of Civilizations*, Simon & Schuster. In his book, for instance, he talks about the discourses that link multiculturalism and social disintegration. Migration is perceived as a danger to national tradition and societal homogeneity against the preservation of western civilization.

multiculturalism collides with the idea of nationalism and the conservation of the local cultural identity. Supporters of the first confront with those seeking to preserve the latter, and permanent migrant settlement are looked on to be undermining the collective identity. During the 1990s many Western societies embraced multiculturalism, accepting different cultures as an enrichment to society and as a mark of a truly liberal democracy. However, since 9/11 and the fact that some terrorists emerged from these migrant communities, has led to the portrayal by some of migration and cultural diversity as resulting in fragmentation and to the undermining of national security (Browning, 2017).

In Switzerland, for instance, political discourses against migration and towards the protection of Swiss national identity have raised progressively throughout the last years by using the *Überfremdung*'s concept in public debates to refer to "a foreign overpopulation threatening the Swiss identity" (Riaño and Wastl-Walter, 2006). In the United Kingdom politicians have also used the campaign's discourses to claim that the "uncontrollable" flow of migrants should be stopped as it has become a security threat to the UK due to its magnitude, putting an emphasis on the protection of UK's welfare programmes. Campaigns like these are those such as "Vote Leave, Take Control". Karyotis (2012) collected different examples by the Greek media where they treated a number of high-profile criminal incidents involving foreigners which contributed to rising negative stereotypes image of migration in the country and reinforced the already prevailing video that migration and crime are related.

Even worse is the case for migrants who reside in a territory with ethnic divisions. When there is an ethnic conflict and the society is fragmented, it is even harder to accept a foreigner from another culture who may add to the already existing cultural confrontation. For many people, religious beliefs and practices are a fundamental part of their life and it is what defines their cultural identity, thus being inseparable from social existence. And this is part of the citizens of the country and those immigrants coming from abroad. This cultural clash may not be troublesome in some countries, but it can be a risk in those countries with ethnic, religious or cultural conflicts. Nationals may see their languages, values, norms and customs challenged with the arrival of immigration, and even more if part of the population - like ethnic or religious minorities- already saw them at risk. If

immigrants are not successfully integrated in the hosting society, instability is more likely to happen, and this is more aggravated in fragile societies. All in all, this threat to the identity of the country is perceived as a societal security threat. Thence more than a threat to the integrity of the nation and its territory, it is a threat to the society of the country.

Secondly, migration can be seen as a **threat to the economy.** Immigrant movements have increased in the past decades, as many migrants are looking for better economic opportunities far from their countries of origin. However, it is not rare to see negative opinions in the media and during social gatherings accusing immigrants of "stealing the jobs" of nationals. But do they really steal these jobs? During Trump's presidential campaign, one of his promises was that he would implement new immigration policies to improve the US economy and job market, contributing to the belief that immigrants were stealing jobs from Americans. However, most argue that this idea is not what happens in reality, since most undocumented workers often do the jobs many natives are not willing to do. But adding up to this, during a period of recession, this antipathetic view of immigration is widely spread throughout, leading to a disapproval and negative consciousness towards migrant communities. The perception of immigrants as an economic burden may develop in an unfavourable reaction from the citizens towards them. This, in turn, affects their integration into the new society, as they are seen as an unwanted competence that takes the job opportunities of the nationals and which take an unfair advantage of public goods.

Moreover, migrants can also be perceived as a threat to the economy depending on the existing political regime. While one of the things that is implied with globalization is the movement goods, services and capital, but also of people across borders, the motivations of migrants and the institutional constraints within one's country is what ultimately determines this movement of peoples. Another element to take into consideration when talking about these movements, is the type of political regime of the country. Most may think that democracies are the ones receiving more migrants, and that these are coming from non-democratic countries. However, a study by Breunig, Cao and Luedtke (2012) shows that democratic regimes accommodate fewer immigrants than autocracies and that more people emigrate from democracies than from autocracies. What is more, it is in most

liberal democracies where there is a higher anti-immigration feeling, probably because other types of regimes are able to grant fewer rights to foreign workers since they are less concerned with civil rights, but also because they have more flexible labour markets. That is why many looking for jobs go to autocracies, since these offer more guest worker programmes and because those ruling the country are less constrained by popular xenophobic demand. On the other side, these types of regimes are less likely to allow their citizens to leave the country but instead try to retain them. As the authors of this study say "At the individual level, the search for economic well-being trumps any aspiration for the political freedoms offered by democracy. At the macro-level, it is important to recognize that democracies tend to block entry and allow exist, while non-democracies tend to block exist and allow entry".

At the same time, the interests on migration of the governments are what may determine migration as a threat or not. As it has been discussed, it seems that in non-democratic regimes immigration does not have such a bad outlook. Immigrants go to these countries looking for job opportunities and their priority is to improve their economic stability, and the rules of the country are interested in increasing their economic profits, while not having to accede to granting civil rights. From the other hand, the viewpoint of liberal democratic regimes is that the arrival of migrants may mean the scarcity of social and economic benefits for its nationals, and thus they are more likely to perceive the arrival of immigrants as a threat. All in all, the political regime is another factor to take into consideration when talking about migration movements and when considering migration as a threat, as depending on the type of political regime we are dealing with, views on migration will differ.

Thirdly, and connecting to the previous point, migration is also perceived as a **threat to the welfare state**. And in periods of economic recessions and of higher unemployment rates when there is more scarcity, immigrants are discerned as the competitors of nationals on the fight of social goods. Some locals see them as illegitimate actors having no right to access national social assistance. And when all of these circumstances are put together, an issue like migration is successfully securitized and the application of extraordinary measures is justified to make sure the national population is protected. Instead of facing migration as a human rights

question that should be resolved through human rights instruments, it is turned into a security problem that needs to be resolved through security policy to protect the state. And with exceptionalism[48] -the application of exceptional measures- political elites can further their interests and give grounds for the undermining of civil liberties (Aradau and van Munster, 2009). As Karyotis (2011) puts it, "securitization does not create a safer society but one that lives in permanent fear from real or perceived threats". Instead of protecting and strengthening a country it breaches its already existing harmony.

Examples of this securitization of migration can also be found in New Zealand, where they are sometimes presented as a burden to the national housing market and as contributing to the higher rates of crime. In this sense, it is interesting to see the collection of articles by Salahshour (2017), who studied the ways in which migration was treated in political discourses and the print media. She found that, in some cases, there was a dehumanization of migrants as they were presented with similes and comparisons with non-human entities; there was also an important "immigrants-as-a-threat-discourse"; and other associations of refugees as being needing of support, of integration, and of weak or no particular use to society. In sum, they are shown as a threat to the livelihood of locals.

A similar study, but focusing on Indonesia, is made by Lee (2017), who stands that while there used to be a positive representation of Indochinese refugees in the period of 1975-1996, new generations of forced migrants are now being portrayed negatively and framed as security threats. This, he argues, may be due to securitization moves made by specialized agencies in the country. And while there used to be a politization of migration before, there is now securitization within the treatment of new cohorts of migrants. Like these, there are many other examples on the ways politicians and the media have worsened the image of the migrant and on how migration has been securitized.

Fourthly, migrants can also be perceived as a threat to the host country in regard to the **bilateral relations** established with the country of origin. Weiner (1992) explains that there are different reasons why bilateral relations can be endangered when there are refugees in-between. He argues that when refugees are opposed to the

[48] For more on the theory of exception see Schmitt, C., 1996, *The Concept of the Political*, by Tracy B. Strong. Chicago: University of Chicago

regime of their country and it is recognised that there is a well-founded fear of persecution, the host country is somehow accusing the country of origin to engage in persecution, and so it is saying that there is a justification to be morally opposing to the regime. Thus just the granting asylum can create a more hostile relationship between the two. He exemplifies this case with the US Congress debate in January 1990 on whether Chinese students should be permitted to remain in the US because of the possible persecutions that could face in China. Hosting this debate was seen by the People's Republic of China as an "interference" in its internal affairs.

Worst is even the case of supporting these incoming refugees against the regime of their country of origin, as this bitters even more the relationship between States. Weiner gives the examples of the United States and its active support to Cuban refugees against the Castro regime at the Bay of Pigs; when India gave arms to the Bengali "freedom fighters" in the fight against the Pakistani military; when Pakistan, Saudi Arabia, China and the United States reinforced Afghan refugees with arms to force Soviet troops to leave Afghanistan, and so on. It is clear then, that when host countries actively support refugees in their fight with the country of origin, they become a tool of inter-state conflict. Hence the way in which governments assess and respond to one another's intentions in these cases can potentially represent the level of possible clashing between the two.

Fifthly, it is a way to reduce threats to **public order**. In this sense, the link that some political groups and media establish between crime and migration increase migration and challenge the integration of migrants within the host country[49]. The perception that migrants are more frequently involved in drug trafficking, thefts and robberies, armed aggressions, or terrorism has been strengthened not only since 9/11 but also since the terrorist attacks in 1995 by Algerian extremist on French soil (Lohrmann, 2000). The involvement of some immigrants in criminal activities has led to using prejudicial stereotyping in public debates connecting immigration with criminal threats. Adjudicating security connotations related to terrorism and international crime to

[49] Some scholars have called the attention to the fact that migration (including refugees and asylum seekers) is being connected to terrorism, drugs, crime, border control security, etc. For more on this, see Bigo, B., 1996*, Police en reseaux. L'expérience européenne*, Paris: Presses de Sciences Po; Rudge, P., 1989, Kumin, K., 1999, *An Uncertain Direction…,* Refugees Magazine, No. 113

the area of migration is now more common than ever. This, in turn, means that decision and policy making in the area of asylum is moving away from human rights to the security field. It is also important to highlight that when the elite and this mass media refer to migration, most times they do not distinguish, for instance, between refugees, illegal migrants or economic migrants, blurring them all into a single policing-repression scheme (Statham, 2003; Karyotis, 2011). Words like ‘migrant’, ‘foreigner’ and ‘refugee’ are now connected to security and are powerful signifiers in contemporary Europe (Huysmans, 2000; Greimas and Courtés, 1993), which can be referred to as the cause of many problems, even though they were not connected to migration before. Migration is simply presented as a danger “to public order, cultural identify, and domestic and labour stability” (Huysmans, 2000).

Last but not least, migration can also be perceived as a threat to **national security**, and here one must make special reference to the terrorism threat. Since 9/11, the Bali bombings or the Mombasa and Kenya attacks, there has been a linkage of national security to a borders-related issue. Especially relevant is the first, as it created a precedent which transformed the association of the foreigner with terrorism. And this has led to conducting immigration controls as a form of protection from terrorism. What is interesting in this sense is the fact that check controls are not so much based on nationality, but on ethnicity and religion (Guild, 2007).

After the 9/11 attacks, migration has been more often treated as a security threat by the West, being Muslim communities those which have more often been perceived as such. New political and media discourses have led to a new security agenda based on the securitization of Islam in many Western countries, and it has been challenging for these countries with an important number of Muslim immigrants to respond to 9/11 and other terrorist attacks without damaging the functioning of democracy and multiculturalism (Fox and Akbaba, 2013). According to Magen (2018), even though the West has faced a clear intensification of terrorist attacks since 9/11, liberal democracies are less prone to terrorist attacks than other regime types. Groups like the Islamic State in Iraq and Syria, Boko Haram, and al-Qaeda affiliates have perpetrated attacks in fragile states and have recruited adepts throughout.

Until recently, however, the idea was the opposite. Many scholars believed that democracies were more likely to be subject to terrorist attacks because of different reasons. One of them is related to the easiness of movements and the openness of liberal democracies. Another is also directly linked to the freedoms of press and communication which guarantee that discourses reach wide audiences. The third and last argument is that electoral competition and institutional design heighten the likeliness of suffering a terrorist attack. He continues explaining that this perception changed in the mid-1990s, when scholars believed that democratic openness allowed for grievances and injustices to be publicly addressed. This in turn meant that similar attitudes could be cut from the ground before they lead to bigger extremisms. Recent studies defend that the higher the quality of the democracy and the more civil liberties are guaranteed, the less likely it is for that country to suffer terrorist incidents (Magen, 2018). Contrarily, countries like Bahrain, Iran, Kuwait, Somalia, South Sudan, and Sudan, among others, had in 2013 multiplied by more than seven thousand percent the likelihood of suffering terrorist attacks than in 2002.

As said in the previously in this thesis, the G8 made of terrorism a transversal threat affecting the international agenda and NATO now deals with global terrorism and mass migration. Furthermore, in meetings of the G8 several nations have brought migration to the table to discuss it as a security threat. Interestingly, Bigo (2006) argues that most government of liberal democracies put "their own security beside the security and freedom of the individual".

All of these potential threats are presented as such by the elite, and perceived as such by the society, considering the previous existing values and circumstances of the country. Hence migration can be seen as a threat to the economy or the welfare state in a country, but as a threat to national identity in another. It is usually a combination of different threats, but there can be one that sticks out among the others given the historical, political and social context of the particular country. What has been outlined here are the potential views that an actor can give to migration to consider it a threat but depending on the context and circumstances of a state, one or a combination of some will predominate among the others. The following table summarizes all of these potential factors that have been analysed and which can place migration as a security threat:

Potential threat	**Justification/Rationalization**	**Example**
To national identity	Clash between multiculturalism and nationalism. Nationals may see their languages, values, norms and customs challenged with the arrival of immigration. The priority is the preservation of the national cultural identity.	The case of Switzerland where political discourses have raised the need to protect national identity towards immigration ("*Überfremdung*'s).
To the economy	Migration as an economic burden, associated with the scarcity of social and economic benefits for its nationals. Dependant on the political regime.	The repeated message that immigrants are stealing the jobs of nationals. This idea has been repeated throughout, including Trump's presidential campaign.
To the welfare state	Immigrants as illegitimate actors using social goods and accessing national social assistance. Intensified feeling/threat when the country is in economic recession.	Political ideas considering the migrant community as a burden to the national housing market as seen in New Zealand.
To bilateral relations	Especially when there are refugees involved. If supporting these refugees, the host country can be seen as accusing the country of origin to engage in persecution and, in some cases, to be opposing to its political regime.	The debate in the United States on whether to allow Chinese students to stay in the country. This was perceived as a hostile move by the People's Republic of China.
To the public order	Connecting crime and migration. Frequently seen in areas like	Public messages from politicians and the media

	drug trafficking, thefts and robberies, armed aggressions, and terrorism.	connecting migrant groups to crime and security issues. This is now commonly seen in many Western countries.
To national security	Association of the foreigner with terrorism. New political and media discourses have led to a new security agenda based on the securitization of Islam, specially seen in the West.	Many of today's security agendas are based on the securitization of Islam. This has been the case of the United States and European countries.

Overall, the ideas linking migration to security threats have aggravated the general public perception of the migrant community. Immigration attitudes vary across countries, but it seems fair to assert that the perception of immigration by the West has been generally negative for many years now (Freeman, 1997). And what is more, a report by the IOM (Esipova et al., 2015) found that the most negative region towards immigration is Europe, holding the highest numbers (52%) of people who would like the quantity of immigrants in their countries to decease. This does not mean that in all European countrhies the image for or against immigration is the same, as every case is different, but in the case of Great Britain and that of the Russian Federation -who are one of the largest populations in these countries in the larger Europe region- are particularly negative. The report also highlights that the strongest predictor of the view of the country on immigration is very much dependant on the country's economic situation. Thus when there is a favourable economic situation, the citizens seem to be more likely towards welcoming immigrants.

The rise of nationalist political parties and the voter support for right-wing parties it is very visible today; from Germany, where the Alternative for Germany (AfD) has become the largest opposition of the government; to Spain, where Vox became the third biggest force in the parliament (BBC, 2019). Matteo Salvini's leader of the League in Italy has gained popularity for its anti-immigration policies and has

also been known for actively refusing to help rescue ships, barring their entrance by closing Italian ports. The rise of right-wing and extremist movements is of course not only due to their views on migration, but it is also about concerns on globalization, the perceived need to reinforce national identities, and so on. However, they all refer to migration and are keen on taking stricter and harsher measures to control it.

Nonetheless, even though populist parties address a wide range of topics as any other, it is their attitude towards immigration what has given them more votes in the past years, or what it is the same, those who support these parties mostly do so because of their anti-immigration feelings. But it is also interesting to point out that it is not that people's attitudes towards migration have suddenly changed, but it is a combination of factors what has led to the rise of far-right parties specially in Europe. Rooduijn (2020) further develops this idea and describes three reasons to explain why these political parties have gained force. From the one hand, they have learnt to mobilise their voters. They learnt to present certain issues in a better way and a through what seems to be a more "moderate" way of saying things, while backing up a radical political programme with radical ideas. Second, there has been an emancipation of voters, who are not stick to voting the same political party over the years as they used to do before. Now the voter has become more floatable and is moving through a variety of options that were not there before. And third, migratory movements, the refugee crisis, terrorist attacks, and the Brexit have all become circumstances that have brought the topic of migration to the forefront of every European media outlet. We are all used by now of hearing about immigration news, opinions, and discussions. Thence it is not that the people's opinion on migration has changed, it is that migration has become a much more relevant topic, which has made it more important for the citizen to vote according to his or her migratory perception.

And this public opinion on migration is important for a variety of reasons. One of them, as it has been outlined previously, is that if the majority of the population agrees on the existence of a security threat, then the application of exceptional measures to counter terrorism is justified, which in turn can lead to infringing basic rights, weakening civil liberties safeguards. This can mean that authorities can get into the private sphere of the citizens, but it can also mean that the rights

of vulnerable groups, such as migrants, are even more endangered. On the other hand, this capacity to go beyond ordinary policing powers can also lead to using certain measures against political adversaries.

When analysing the conflict that migration can arise in international security and considering this as another "justification" to securitize migration, one has to bring in mind that migration today is a global phenomenon that cannot be only kept within national borders, but which is in fact touched upon and faced in every region of the world. Irregular migration flows and large refugee movements (more recently known as the "refugee crisis" in Europe) can lead to tensions between origin countries from the one side and destination and transit countries on the other. The latter are concerned about finding ways in which the first can control the departure of its nationals from its territory, and these countries of origin are in turn using irregular emigration as a negotiation card to force destination countries to make political, commercial and other economic concessions (Lohrmann, 2000). Tensions of this kind have arisen in different regions: between the Albanian Government and the European Union or between the US and Mexico. A clear exemplification of this securitization as an international phenomenon is namely that the G8 has made terrorism and transnational organised crime as one of the transversal threats at the top of the agenda and NATO also treats "global terrorism" and "mass migration" within their concerns (Bigo, 2006).

Taking back the three criteria as established by Floyd (2011) at the beginning of this section, the reasoning behind the securitization of migration becomes highly debatable. States have put a lot of effort into exposing a wide range of reasons why migration can pose a societal threat. Even though their reasoning might be controversial, if assuming that some migrants could be a potential security threat to the nation, is it morally legitimate to tackle them for their migratory condition? If they have been internationally recognised as a vulnerable group as a whole can they -and acknowledging that even some groups within migrants such as refugees seeking for a safe haven and who are at an even more endangered situation -really be considered a security threat to Western countries? And even if we answered affirmatively to this second set of questions which refer to the second criteria given by Floyd, would the third one on giving an appropriate answer be fulfilled? Are politicians using the laws in their hand and being 'sincere in their intentions'? Are migrants -the "aggressors"- in such a strong

position as to vulnerate their most fundamental rights? Is it justified to treat them as embryonic criminals, and even terrorists? Floyd (2011:429) further argues that the key to determine whether the securitizing actor is being sincere is to examine whether the rhetoric of the speech act is actually matched by the subsequent security practice. In the next chapter, we will expose a set of measures applied by different countries to tackle migration and analyse the securitization of migration in practice.

CHAPTER 6
THE SECURITIZATION OF MIGRATION IN PRACTICE

In this chapter, we will analyse the ways in which countries have securitized migration in practice. This process, as it has been stated previously, takes place from different angles and different areas, including legal systems, public policies and media discourses. This thesis focuses more deeply on the legal perspective, but it is still equally important to emphasize the impact that political parties -the elite- and mass media have had on the securitization process to observe the impact of their discourses, which have functioned as a key role in the development of measures on this matter.

Law and public policies are the ultimate result of the decision-making process, which later on becomes what the citizenship has to comply with in practice. However, it is important to see the entire process from scratch and all the actors that are involved in securitizing migration. It is not an easy task to point who are exactly the actors of securitization, since this takes place at different stages and from different places. The same event can be attributed to different actors: Bureaucracy, the state, the media, the individual... Hence even though it may be hard sometimes to point at a particular group or person, it is still possible to outline who the main actors in the process of securitization are.

When it comes to legal and political measures, naturally related to the state, the government is the central actor. It is the one taking part in the legislative process, along with the parliamentary institutions of the state, and it is also the one designing public policies in all matters concerning the organization of the state. Thus it is an important actor in the process of securitizing migration, since it is the one drawing the laws and policies which may link migration with security. As we know, the elite is the one sketching the security discourse and pointing at a particular security threat, but there is a combination of different actors working at different levels ultimately shaping the development of these outcomes.

But it is not the only actor, since there is not just one, but there are others involved. The securitizing actor is that which performs a security speech act (Buzan, Waever and Wilde, 1998), and it is in mass media where we can find a loudspeaker for the elites' messages. Considering this, and although media discourses will not be explored in as much detail as legislation and public policies, it is also important to emphasize its role in the process of securitizing migration.

To conduct this analysis, states have been divided considering their level of development of measures securitizing migration as well as the impact of securitizing actors. The process of securitization is usually a progressive one, commencing with the political and media discourses, which then leads to the application of laws and policies that start establishing a link between migration and national security in practice. However, it can be the case that a particular state faces a traumatic event that turns into the development of extreme measures in the field of security to protect the country from a potential external threat, which is what has sometimes happened after a terrorist attack.

However, it is usually common to see measures linking migration to security progressively and being applied incrementally, through different phases. First, by establishing the link, that is, connecting migrants with a potential terrorist threat, the entrenched fear. Then, by designing and flourishing new measures, building up on this connection between the two elements. And finally, by advancing this association into a well-established one, a well-consolidated linkage between migration and terrorism shown by the integration in the system of a wide range of measures, including legal and policy developments, targeting immigrants and migration in general as part of the national security agenda of the country in a more 'normalized' way. These three stages have thence been divided as the "preliminary", the "intermediate" and the "advanced" one.

At this point, it is necessary to indicate that reaching the advanced level does not mean that the situation of the state always stays this way. On the contrary, with elections and changing governments, different political parties with completely different views on migration may be in power, thus the public policies of the country may then lean towards a different side, a more liberal and rights-protective one. It can also be the case that after a liberal government, citizens later on support a political party that is more inclined to framing migration as a

security matter. The process of the securitization of migration is not always a lineal one and may go from a more advanced stage towards a softer one, and vice versa. This will always depend on a series of social and historical elements that must be contextualised within the country's situation at a given time.

The factors that will define the level of securitization of a country take in consideration different elements of the process of securitization. From the one hand, the quantity of measures (legal and political) is an important factor to take into account when deciding whether a state is in the preliminary, intermediate or advanced stage. As it will be seen in the following lines, the more a state develops norms and public policies relating migration with national security, the more advanced its stage is and so is the periodicity of the enactment of these measures. That is, the longer in time these measures persist and the more they are incremented, the more likely it is that the state is in a more advanced stage in securitizing migration. While some states only have punctual measures establishing this link, in others it is not unusual to find it.

The frequency and impact of political and media discourses is also relevant, since the more often we find speech acts blaming immigrants of crimes and making them the centre of attention of terrorist attacks, the more likely it is that this government develops anti-immigration measures. Media discourses are also important in this sense, as they help expand towards the general public these public speeches given by politicians giving this negative perception of migration.

Finally, the repercussion of these public speeches and the development of related measures on immigrants is also necessary to consider, since this will shape the way immigrants relate to nationals and will determine their level of integration, and the easiness in becoming part of the host society. The more advanced it is the stage of the state in securitizing migration, the more likely it will be to find xenophobic discourses and discriminatory acts by the population towards foreign residents.

All of these elements are a core part of what we need to determine whether a state is in a preliminary, intermediate or advanced stage. In the coming pages, these phases will be further developed through state case examples, studying the measures they have applied. As said,

a state may change from one stage to another thus the aforementioned factors have to be used only as a guiding tool since the precision of the distinction between stages may also blur at times and in particular cases, where it might be hard to distinguish whether a state is part of a stage or another. Nevertheless, these are made to serve as a sign to show the main elements to take into consideration when determining whether a state is securitizing migration or not, and how advanced this process already is.

6.1. States in a Preliminary Stage

States in this stage are those which have started developing measures in the area of national security connecting migration with security matters. There can already exist certain patterns found in political and media discourses establishing this link, but it is still not ordinarily found in general public discourses and measures are relatively low in both the grade in which they affect migration and on the quantity of existing measures. These discourses will usually come from a minority of political parties and media outlets, thus even though a line of thought on securitizing migration starts being perceived, it is not always clear to what extent it entails a wide representation within the general public or not.

Many times, measures linking migration to security matters have come gradually, probably because of rising incoming immigrants in the country, for an intensification of refugee flows, or because there has always been a sense of nationalism and patriotism which certain parts of the society combine with anti-immigration feelings. However, many other times and specially in recent years, these measures have appeared due to particular events in time which have required harder measures to protect from external threats. This is the case of terrorist attacks, which have led in many occasions to the enactment of laws and public policies preventing terrorism while at the same time hindering immigrants and fostering border control.

Generally, the phenomenon of securitization in the field of migration is connected to the political and social conflicts deduced by the arrival and permanent settlement of ethnically, culturally, and/or religiously distinctive minority populations within the host country and for the

challenges they pose for the national policymakers and native publics (Alexseev 2005; Messina, 2017).

Many scholars believe that the securitization of migration was a phenomenon that was incremented after the 9/11 attacks on the Twin Towers in New York City. Although securitization had previously occurred in different contexts throughout history, as explained in Chapter 5, this process reappeared after the terrorist attacks on the U.S and the subsequent ones in Madrid and London shortly after. These attacks were perceived by some as a chance to bring migration policies to the national security agenda of the country. Governments, politicians, lawmakers, and the media took the chance to correlate immigration with terrorism, and migrants started being perceived as a security threat, legitimizing extraordinary actions to fight against the war on terror. This process did not happen in a day, but it is one which has been established over time, and measures linking security to migration have been applied little by little, forming a whole legal framework securitizing migration.

6.1.1. Conditions and examples of a preliminary stage

While some states have established a wide range of measures securitizing migration and have expanded their legal systems with bills designed to counter-terrorism, but which have in fact targeted migration and treated migrants as a threat, other states have not done so to such a large extent -or are still at an early process of doing so. When the link between migration and national security is defended by some in the country, usually by certain political parties and some media agencies, discussions and debates around the topic increase, and so does citizens' preoccupations and fears. Thence the government starts applying measures to combat this potential threat and to resolve these fears. And even though there is not such a well-established linkage between the two aforementioned elements, a connection between them starts maturing and it can already be discerned among certain parts of the community.

This is the case of Belgium, prior to December 2003 the country had no specific terrorism-related legislation and most of it was developed between 2003 and 2015, in part because of the 9/11 events but also to implement EU legislation such as the 2002 and 2008 EU Framework

Decisions. However, most legislative changes were passed between 2015 and 2016. Some examples are the Law of 27 April 2006 (Law Terro II), which allows for arrests between 9pm and 5am when related to terrorist offences, and Laws of 3 August 2016 (Law Terro III) and 14 December 2016, which extends those crimes stipulated in the Criminal Code and extends the Belgian extraterritorial jurisdiction in relation to terrorism (European Parliament, 2017).

New introductions such as this have been criticised by NGOs such as Human Rights Watch (2016b), which pointed out that amendments to the penal code criminalizing the act of leaving Belgium "with terrorist intent" were written with vague language that could lead to conflicting arrests. They also criticised the law allowing stripping of Belgian citizenship to those with two nationalities could lead to discrimination towards "second- class" citizens based on ethnicity and religion.

Luedtke (2009) asserts that France and Belgium, due to their relatively large percentages of foreign-born residents and large Muslim communities, have long had generous immigration legislation. Nonetheless, he argues that after the review of immigration law at the EU level following the 9/11 events, these countries took advantage of the harsher measures applied by the EU to tighten their own standards "and crack down immigrant rights".

With his affirmation I am not implying that the Directives relating to immigration after 9/11 were all in detriment of migrants' rights, as some were much more generous that the laws of other Member States. However, the passing of legal instruments such as the Long-Term Residents Directive (LTRD) was in fact stricter than already existing national laws, this being the case of France, which decided to change its softer standards to those established by the EU Directive.

France's case has been at the spot for those studying the securitization of migration. Discourses such as that of the back then President Nicolas Sarkozy saying that there "we have too many foreigners" in France and that the system to integrate them was "working worse and worse" have contributed to this view (BBC, 2012). But even harsher comments have been made against migrants, with former French Interior Minister Calude Gueant saying that allowing foreigners to vote would lead to traditional Muslim halal meat being served in school cafeterias or that immigrants are "two to three times more

likely to commit crimes than average French nationals" (Borrud, 2012; Reuters, 2012). The National Front, with Marine Le Pen at its front, has also often played with the idea that immigrants pose a threat to France. In this way, this political party has talked about the threat to the French way of life (The Economist, 2015), and has presented them as an existential threat to the French society, thus contributing to the establishing perception of migrants as a threat, and so contributing to the securitization of migration.

In another discourse, the National Rally ("Rassemblement National" in French, also known as the National Front or "Front National" until 2018) kept on linking migration to terrorism and presenting it as a danger to the nation and to its citizens:

> *Uncontrolled immigration is a source of tension in a Republic which is no longer able to assimilate the new French. Ghettos, inter-ethnic conflicts, community demands, and politico-religious provocations are the direct consequences of mass immigration which is undermining our national identity and brings with it increasingly visible Islamization.*

In 2007, the French National Assembly promised to pass legislation to further control those immigrants who wanted to enter the country to join their family members. Under this bill, these relatives would have to demonstrate that they are financially solvent, that they speak French, and they could also be subject to a DNA test to prove they are relatives of those they want to rejoint in France (Spiegel, 2007; Friend, 2007).

Since the 2015 attacks, after which France declared the state of emergency, the government has extended the duration of these extraordinary powers multiple times. Among other things, these special faculties allow the interior minister and local government officials warrantless search homes and premises as well as the restriction of people's movements, the use of deadly force when encountering terror suspects, additional surveillance systems that since then had only been available to intelligence agencies, and the power to shut down religious places for half a year if hate, violence or discrimination was upheld within them. This demonstrates that for years, France has been under an exceptional security threat which has

involved the application of extraordinary measures to defend its national security (Sweet, 2017). While this is not proof that migration is a threat, it talks by itself after analysing the legislative developments of the past years, and especially those that emanated after the terrorist attacks. This is significant for different reasons, one of them being related to the vulnerability that many migrants' face and because these measures can be applied in detriment of their rights. The new counterterrorism bill of 2017 made some of the characteristic elements of the state of emergency as normal criminal and administrative practice (intrusive search powers, closure of places of worship, etc.) (HRW, 2017). As Human Rights Watch warned, "France has a responsibility to ensure public safety and try to prevent further attacks, but the police have used their new emergency powers in abusive, discriminatory, and unjustified ways" (HRW, 2016a).

Among these legal developments, there is also legislation on terrorism not dealing specifically with migration. And this is due to the fact that France has been subject to many terrorist attacks and has progressively developed specific anti-terror legislation. Key legislation was introduced in 1986, but further legal instruments were approved following the 9/11 attacks, those of Madrid in 2005 and the 2005 London bombings. The 1986 Law on the fight against terrorism (Law 86-1020 of 9 September 1986) has been amended several times and it is the cornerstone of anti-terrorism legislation in the country. Although there have been different introductions to French law in these regards, the major four pieces of legislation introduced after the 9/11 events were the Law 2001-1062 of 15 November 2001 on everyday security and combatting terrorism, the Law 2003-239 of 18 March 2003 on internal security, the Law 2004-204 of 9 March 2004 on adapting the judicial response to new forms of criminality and the Law 2006-64 of 23 January 2006 relating to the fight against terrorism and border control (European Parliament, 2017).

The law on "everyday security and combatting terrorism" of 2001 included the financing of terrorist activity as a terrorist offence and it increased surveillance measures in areas considered dangerous, among other measures (Chebel d'Appollonia, 2012). The Law Perben II of 2004 included new types of covert investigative methods to scrutinize suspects of organized crime and terrorism. These laws, although not being specifically designed to tackle migrants, are nonetheless affecting them as part of French society. Hence when there are new

laws and policies developed to increase surveillance and control in detriment to one's privacy rights, these do not only affect the general public, but are added to the already harshened circumstances of certain already vulnerable groups such as immigrant communities in the country. Migrants end up dealing not only with those laws linking migration to terrorism and national security, but they are also subject to those others directed to the global population, thus being even further scrutinized than the regular citizen.

Interestingly, France was the first EU Member State to plead to Article 42 of the TFUE and ask for assistance from other Member States. As the Article states, "if a Member State is victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by the means in their power (…)". Hence, when invoking this Article, France declared terrorist attacks as an armed aggression in their country (Dück and Lucke, 2019).

France has also been subject to criticism by UN specialists. Fionnuala Ni Aolain, the UN Special Rapporteur on the protection of human rights said she was concerned about French legislation for being disproportioned and for marginalizing the Muslim community in the country: "[Muslims in France] have been the community primarily subject to exceptional measures both during the state of emergency and the new law, in tandem with other counter-terrorism measures" (UN, 2018).

Now requirements for asylees are even higher than before. Their applications have to be submitted within the first 90 days after their arrival; appeal rights deemed, as they may be deported even before the appeal court has ruled on their appeal, which in turn can lead to them being sent back to the country where they came from and where they could be prosecuted (Marquis, 2018).

Castelli and Morales (2017) arrived to the conclusion that the more political parties that focus on the security aspects of immigration politics, the more public opinion perceives immigration as a security concern. Hence this public perception, according to them, does not depend on the intensification or negative politization of migration, but on emphasizing the security features of it.

In Greece, for instance, elites have long connected migration with poverty and higher rates of criminalization (Karyotis, 2012), a practice which has also similarly been spread through Europe (Buonfino, 2004). The repeated visualization of certain security incidents involving migration did not contribute to change this view (Williams, 2003). The security discourse on migration in Greece remained mostly untouched well throughout the 1990s, contributing to increasing public insecurity on migration and enhancing the differentiation between "us" and "them". This securitization of migration has meant that elites have been able to pursue a range of controversial goals related to national interests which would have been very difficultly approved by the public otherwise, but which have since then been approved because of the acceptance of the citizens of something as a security threat (Karyotis, 2012).

Canada has also faced a set of legislative and policy changes towards immigration. In 2012, the government amended the Immigration and Refugee Protection Act, the Protecting Canada's Immigration System Act and the Balanced Refugee Reform Act. Among the new measures, there were expedited refugee claim hearings, reduced procedural guarantees and reviews in refugee claims, growing use of socioeconomic deterrents an increased immigration detention. New securitization measures resulted in violations of asylum seekers' human rights, but also on the worsening of conditions of the refugee protection system. Interestingly, while practices like these can be traced already in the 1990s, specifically harsh measures were applied following the arrival of two boats containing 600 Tamil asylum-seekers (MV Ocean Lady in 2009 and MV Sun Sea in 2010). Coincidently, shortly after the arrival of these boats, the aforementioned measures reforming the refugee system of the country were applied in 2012.

Furthermore, a measure which particularly shows the securitization of migration in this country was the "Designated Foreign Nationals" (DFN) class, introduced in 2012 to respond to the arrival of asylum seekers by sea. This policy, justified by political discourse, allows the Minister of Public Safety to designate and mandate discretionary detention without a warrant of DFNs aged 16 or older who arrive by sea with the help of a smuggler[50].

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[50] As stated by Section 55 of Immigration and Refugee Protection Act 2001 (IRPA)

Similarly, Finland has also seen a steep increase in the securitization of migration since the 2000s, with even more emphasis after the approval of the 2004 Aliens Act, which meant a dramatic increase of the securitization of the sector. As seen in other cases, the terrorist threat has been the excuse for the government to protect the country against possible immigrants posing a threat to national security, and deportation and denial of entry on these grounds are more common than ever before. The Aliens Act of 2004 required more than one governmental period to be completed, showing the highly debated and complicated topic which it was. Under the new bill, provisions included as valid grounds for refusal of entry and deportation those related to national security and international relations; and it extracted the obligation to justify visa rejections if it were for reasons related to national security. The Act has been revised a few times ever since it was first approved, and some of the changes included amendments to security aspects. In parliamentary debates, amendments to the law such as that of extending the income requirement for family reunification to immigrants enjoying international protection were debated, and problems for the integration of immigrants were also brought to the table. All in all, since the increase in asylum applications in 2015, the government's strategy has been focused on reinforcing the borders and making Finland less appealing to those seeking refuge (Palander and Pellander, 2019).

The media also plays a key role in the securitization of migration. The repetitive pictures, slogan, and headlines in different media outlets are a key part of the process of framing migration as a security issue. Bringing the topic of immigration to the public arena is not only an action done by politicians, but also by the media. As Bigo (2006) says, "Fears in the population concerning internal security began to emerge when the media and the politicians regard the economic and social migration phenomena only from a security and cultural angle". The way in which this topic is brought to the public and the way it is presented (many times, as a "problem", be it economic, cultural, societal…) shapes the perception that citizens will have of migration-related issues.

Politicians and other elites can contribute, through their discourses, to framing issues such as migration as increasing the risk of terrorist attacks or relate it to higher crime rates. Many times, we find that the type of message they give, the way they give it, and depending on who

is saying it, gets more attention than what the actual arguments are. The public discourse of these elites, whatever it is, can be stronger than the logic and solidness of their arguments.

Additionally, the media has the power to amplify these effects (MEDAM, 2017). It has been shown that media reports can trigger emotions, tripping anxiety especially (Brader, Valentino and Suhay, 2008). At the same time, if these anxieties are extended, they will in turn reinforce the impact of different types of news on actual political action. That is the reason why many political parties use mass media as part of their strategies to direct the public opinion over an issue the way they want. This is what happens, for instance, with immigration and the way certain politicians present it publicly as a 'problem', threatening social and economic stability. Thus the role of the media is increasingly important in the sense that it can increase the salience of immigrant groups, but it can also help reinterpret or contextualize politicians' messages (MEDAM, 2017).

There are two important factors to consider at this stage and which will also determine to what extent the media can contribute to this securitization. The first is the degree to which the media is free and the other is the way in which it operates in the digital world (WMR, 2018). Freedom of the media is not only key to any democracy, but it is also necessary to inform the population about events in a reliable and objective manner, as well as to scrutinize institutions and hold strong accountability. There is a wide differentiation in the way in which the news are presented in autocratic regimes or democratic countries. Nonetheless, it is the case of many democracies to have published news reflecting the views of the government or of the elites in power. The role of the internet is also of much interest, since people start getting their information more and more often online, and not only through online newspapers, but also through social media. Studies show that almost half of the citizens of the United States rely more often on social media to get their news than on other sites (Newman et al, 2016).

The World Migration Report 2018 affirms that there is generally a more unfavourable treatment of migration on the media rather than favourable. As stated in the report, between 2013-2014, this was the case of Australia, Canada, the Netherlands, Norway, Switzerland and the United Kingdom -all of them, with more than twice of negative

than positive content- but also of Afghanistan, Bangladesh, Malaysia, Pakistan, Sri Lanka, Thailand and Viet Nam -with different levels. Different national studies show that migrant groups were also portrayed more negatively in the news of Germany during 1998 and 2005, and also of Denmark and the Netherlands during 2003-2010. This sense of "negativity" involves many different areas and arguments, from economic aspects such as the costs of migration in destination countries, to social approaches (the difficulties of successful integration, the threat they pose to national identity, etc) (IOM, 2018). As argued in an OECD report (2010), the growing commercialization of mass media has made this more sensationalist than before, which has in turn led to the worsening perception of migrants in different countries.

A study on the Czech Republic found that there was a striking disproportion between the number of asylum applications in the country and the critical relevance that the national media attributed to them. The intense broadcasting of the issue "could be perceived as an unreasonable amplification of the problematic social issue". This research argues that the three Czech online news portals analysed very commonly used the worlds "urgency", "extraordinariness", "overload" and "insecurity" when referring to migrants entering Europe, and they also relied only on institutional sources an government officials when talking about the European migration crisis, thus transmitting the news from a particular perspective, that of the government (Tkaczyk, 2017).

Estevens (2018) also highlights the key role that the media has to deconstruct associations between immigration and terrorism or criminality. The media is one of the actors -along with politicians and the political elite- to frame the way in which we treat and perceive migration related issues. Thence it is also these actors the ones who can help create an ambience of tolerance and acceptance towards them. To counter the rise of extreme right-wing populism and extreme right-wing parties, public messages should reinforce the importance of integration narratives than on those related to social threats.

6.1.2. South Africa

The case of South Africa is of particular interest, and this is why it deserves its own section within those states in a preliminary stage securitizing of migration. Its particularities come especially due to its history, both during and after the Apartheid period. Immigration was tackled as the Apartheid lasted, selecting newcomers that fulfilled certain preferred requirements, such as being white or from "European culture". However, after the Apartheid, and while the new government wanted to guide the population towards new non-discriminatory standards, immigrants were still chosen according to certain particularities, in this case, being skilled migrants.

South Africa's policy history on immigration must be put in context to understand the evolution of policies in these matters today. It has been suggested that during the Apartheid era, immigrants' acceptance depended on their origins. The "white" migrant was the "desirable" one, while those who did not have a European culture, often clandestine African migrants, were the "undesirable" ones, being subject to detention and deportation (Van Lennep, 2019). When the African National Congress came into power in 1994, the swift in immigration policies was part of the changes that were necessary to transform the governmentality of the country and come to a new era. At the same time, the ANC government wanted to ensure a migration of quality while enhancing the national economy of the country. Thus its political agenda gave prominence to transforming the domestic labor market to facilitate the integration of those nationals who had been excluded during the Apartheid, it wanted to lower unemployment rates (Tati, 2008), but the measures introduced were still designed to facilitate only the entrance of skilled migration, and deportation of undocumented migrants has not lowered since (Van Lennep, 2019).

With Mandela heading the government, the 1998 Refugees Act was passed. However, the system established for the recognition of asylum claims was under-resourced and many adjudicators were inexperienced. In late 2002, a new Immigration Act was signed after much negotiation, trying to design a more attractive framework for skilled immigrants. However, measures to refrain illegal immigrants from going to South Africa continued. Reforms to the Refugee Act have also taken place in the past years. The Refugee Amendment Act

of 2008 established, among other things, that asylum seekers would not be treated as refugees while their status was not determined and removed the refugee's right to the same basic healthcare and primary education as a national (Van Lennep, 2019).

All these changes have led some scholars to believe that there is an existing pattern in South Africa to securitize migration[51]. The consecutive amendments to the Immigration Act, which have also affected the Refugees Act, have led to a securitization of migration that has reduced the rights of refugees and asylum seekers in the country (Ngalo, 2018). "The first amendment which shows South Africa is moving towards a more securitized approach to migration took place in 2011 and made access to refugee asylum system difficult for refugees and asylum seekers", said Ncumisa Willie, research advisor of the South African Human Rights Commission.

A persistent problem within the country is xenophobia, a deep phenomenon that has not appeared recently, but which has continuously become a part of the South African society. In 2008 tens of immigrants were killed at the hand of South Africans. The reasons for the attack are due to the fact that even though South Africa has the continent's biggest economy, it still has high unemployment rates (25% by the time of the attack), and refugees are blamed for the jobs' shortage. Most of the victims were Mozambicans and Zimbabweans who had fled their countries due to violence (Evans, 2008). Murders and attacks have not been isolated and have taken place more than once ever since. Between 2008 and 2015, xenophobic attacks have resulted in the death of more than 350 foreigners (Baker, 2015).

Sadly, controversies with those with Zimbabwean and Mozambique origin are not new. A analysis between the relationship between immigration and foreign policy between the South African government and the treatment of Zimbabwean refugees was conducted by Hammerstad (2012). She found that immigration concerns in influencing South Africa's foreign policy towards Zimbabwe is the result of a securitization process that takes form in three steps: "(1) The evolution in the 1990s of a xenophobic public discourse on African immigration, fueled by the Department of Home Affairs, (2) a hostile grassroots level response to the mass influx of Zimbabweans from the early 2000s onwards, as segments of South

[51] In this sense, for instance see the work of Anne Hammerstad and Ncumisa Willie

Africa's poorer citizenry perceived Zimbabwean immigrants as threats to jobs, health and welfare, and (3) this grassroots level securitization, increasingly manifested in violence, riots and social and political tension in townships and informal settlements, led to an elite level securitization of a different kind". She explains that the problem is not that nationals see Zimbabwean immigrants as a security threat, but that the *reaction* given by the population to this immigration is indeed a potential threat to domestic stability -and this is shown by the 2008 xenophobic riots, but also in the consecutive attacks to these refugees. Thus she reaches the conclusions that it is not the only the speech acts given by the political elite that which securitized Zimbabwean immigrants, but it is the public that securitized "from below". They are the main securitizing actors.

Getting further into this idea, Hammerstad identifies three securitizing actors in this matter. From the one hand, there is the government, including both the President's Office, its Foreign, Security and Defense ministers, and its bureaucrats and advisers. The second actor is made of the members of the Department of Home Affairs and the police forces, as being part of the political elite, but not directly related to traditional policy making. And the third group is made of those South Africans living in the most disadvantaged areas and where the biggest Zimbabwean influxes of refugees have established (Hammerstad, 2012). Interestingly, then, the process of securitization, she argues, is not only held by the speech acts from the political elite - in this case being the government and other political elite actors such as those part of the police forces-, but it is also by the acts of intolerance of nationals that the process of securitization has consolidated. The Home Affairs xenophobic discourse obviously had a strong resonance among grassroots levels. Perhaps it is the case that these grassroots audiences accept the threat given by the political elite's messages, but because of their political culture and their acceptance or not to the security measures taken by the political elites, they want to become security actors themselves. They feel threatened but do not have the power to influence political elites, so securitization takes place through their own actions. That is why Hammerstad argues that non-verbal acts should also be included as part of the securitization process, since "the grassroots securitization of Zimbabwean immigration had to turn extremely violent, creating widespread public disorder, in order to achieve some form of recognition by those with the power to affect policy".

Most refugees in South Africa come from Somalia, the Democratic Republic of Congo, and Ethiopia[52] (UNHCR, 2015). Recently, a new law targeting them and restricting their rights was passed[53], prohibiting refugees, among other things, to participate in political activities related to their countries of origin. They are also forbidden to go to the "premises of any diplomatic mission representing his or her country of origin" and they cannot vote in their countries' elections. Many refugees arriving to South Africa are political dissidents of the governments of their countries (this is the case of those coming from Rwanda, Zimbabwe, and the Democratic Republic of Congo), and excluding these exiled politicians of participating in the political life of their countries can become an anti-refugee rhetoric. The South African government had been accused by these countries of being a political springboard for what these political dissidents, thus the new law wants to stop them from being involved in political activities which can have repercussions in their countries of origin (Deutsche Welle, 2020). Surprisingly, these amendments were announced by the Home Affairs Minister Aaron Motsoaledi, just two days before they came into effect.

The Department of Home Affairs has maintained that an individual is an illegal migrant even if she is an asylum seeker and has applied for asylum in the country. Some are even detained before they can make their applications while already being in South Africa and others are detained just after crossing the border. Detentions[54] are a common action related to immigration in the country, reinforcing the idea that securitization in these matters is now common in the country. "The framing of migration as a security threat has created a perception that the legal demands of detainees lack legitimacy, encouraging immigration officials to deny detained individuals' access to their legal rights to appeal and review" (Amit, 2013).

Africa is a continent that has also suffered from the disasters of terrorism. Kenya has endured numerous terrorist attacks, Nigeria has long been dealing with the violence held by Boko Haram, Mali has

[52] According to UNHCR data, most refugees come from these countries of origin (in order from more to less numbers of incoming refugees): Somalia, Democratic Republic of Congo, Ethiopia, Zimbabwe, Cote d'Ivoire, Burundi and Rwanda.

[53] The new laws are new amendments part of the 1998 Refugee Act

[54] Allowed by Article 34 of the Immigration Act of 2002

seen the brutality of terrorist groups against national and international security forces, spilling over to countries like Burkina Faso and Niger. Lamentably, terrorism and its violence have also been part of the history of Africa.

That is why it is not rare to see legislation on countering terrorism advancing in the countries of this region. Particularly, South Africa's involvement in fighting against terrorism throws back to the 2013 Westgate Mall attack in Kenya (Refworld, 2017). After the attack, the country started developing new legislation and organisms to protect from the terrorist threat. Among its existing measures, there is the Protection of Constitutional Democracy Against Terrorist and Related Activities Act (POCDATARA) and the Regulation of Foreign Military Assistance Act of 1998. The POCDATARA, the main legal instrument on terrorism, was the result of a slowly and lengthy process, since it began being discussed in 1995 and was not passed until 2004. South Africa also counts with the South African Police Service (SAPS) and inside it, the Crimes Against the State (CATS) Unit, among other agencies directed to identify challenges at the borders and defending the nation against crimes and terrorist offences.

However, South Africa's role in securitizing migration is not directly link to the fight against terrorism. As seen in most Western countries, governments have defended measures to control immigration as a measure to prevent the entrance of possible terrorist fighters and possible attacks against the nation and its citizens. Their discourses have been filled with connections between migration and terrorism, and in the last years they have justified the application of extraordinary measures with arguments about defending the nation against the terrorist threat. Nevertheless, South Africa's securitization of migration is more connected to its history of incoming asylum seekers from neighbouring countries and problems of integration, than considering the arrival of these persons as a potential terrorist peril.

This does not mean that terrorism is not part of the reasons to securitize migration for the South African government, since the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, affirmed on a 2007 report that "through discussions with numerous government and non-government interlocutors, it became

clear that in South Africa many see the risk of terrorism primarily as coming from foreigners and that among authorities there is a temptation to bypass procedural and substantive human rights standards when dealing with foreigners unlawfully in the country" (Scheinin, 2007).

A new armed service, the Border Management Authority (BMA) was created in 2017 to deal with the arrival of irregular migrants and asylum seekers at the border. The creation of these armed forces adds to the set of measures that the South African government has passed to add to this securitization approach to migration management (Landau and Kihato, 2017). These reinforcements lead to situations in which the asylum seeker is detained and deported or extradited. And this does not only work in detriment for their human rights, but also against the obligation of the state to make sure that the non-refoulement principle is being applied in all cases.

6.2. States in an Intermediate Stage

Those states which have been categorized for being found at this stage are those which have established a much clearer connection between migration and security matters and have started developing many more policies and laws applying this link into practice. This in part is also due to the existence of a wider political representation defending anti-migratory measures. Most of the times, the defenders of this view believe in the necessity to protect the nation from the war on terror, the necessity to increase border control, and to establish more requirements or harder measures for immigrants to enter and stay in the country. Thence migrants are presented as a "threat": to national security, to society, to cultural values, and to the stability of social cohesion. Of course, certain media outlets contribute to rising this view, since some of them present certain events, such as crimes, emphasizing the origin of the authors and putting an accent to its migratory background.

6.2.1. Conditions and examples of a preliminary stage

The higher level of securitization of these states means a more extensive development of measures connecting migration with

security issues. At the same time, this implies that the effects of these set of actions towards migrants is much harsher, particularly affecting the exercise of their rights. In these states, the consequences of these measures on the immigrant population, including refugees, is more evident than in those states in the preliminary stage.

Mexico, for instance, faces certain particularities. Scholars and activists argue that the securitization of migratory policies applied by the country are actually imposed by the United States since 9/11[55]. The policy of the United States fosters the perception that migrants are a threat to national security and that preventing the entrance of undocumented migrants also means preventing the entry of possible terrorists, an idea which has been extended to other countries, including neighbouring countries such as Mexico (Venet and Palma, 2011; Armijo, 2011). However, although it may be true that the US perspective has somehow strengthened the perception of immigration as a national security threat, measures in these regards had already been developed in Mexico well before the September 11 terrorist attacks (Treviño-Rangel, 2016).

The Spanish case is a particular one. Spain has fought for a long time against Euskadi Ta Askatasuna (ETA), a separatist terrorist organization from the Basque region. This explains the already existing anti-terrorist arsenal in Spanish legislation well before the 9/11 attacks. It was during the second half of the 1980s that the socialist government of Felipe Gonzalez started enlarging the antiterrorist capacities and implemented measures relating to the interrogation of those suspected of organizing terrorist attacks (Guittet, 2008). However, after the 9/11 events, another attack supported by al-Qaeda took place in Spain the 11th March 2004. In a serial of explosions in a train in Madrid 191 people were killed and another 1,400 injured. If the New York events had already reformulated the counter terrorist measures of Western countries, 11-M added an international dimension to Spain's struggle against terrorism and the government harshened terrorist legislation, making them even stricter than those shaped by the years of grappling with

[55] In this sense, see: Sin Fronteras I.A.P., 2009, *Situación de los derechos humanos de las personas migrantes y solicitantes de asilo detenidas en las Estaciones Migratorias de México, 2007-2009*, pp.11-12; Castillo, M. and Toussaint, M., *Seguridad y migración en la frontera sur*, in Alvarado, A. and Serrano, M., 2010, *Seguridad nacional y seguridad interior: Los grandes problemas de México*, El Colegio de México

ETA (HRW, 2005). Thus even though Spain had already made certain legal developments in the fight against terrorism, it is not until 9/11, and especially after 11/4 that the linkage between migration and terrorism is made.

After the 11-M attacks in Spain, and once those accused of perpetrating them were identified as Muslims, the migrant flows across the Strait of Gibraltar gained focus, as they were directly linked to the fight against terrorism. Bilateral cooperation on policing, law-enforcement and intelligence matters across the Mediterranean littoral was reinforced to detect and deter against the possible arrival of terrorists (Colás, 2010). This in turn led to the Euro-Mediterranean Code of Conduct on Countering Terrorism, signed in Barcelona in 2005, which represented an advancement on the development of a common political framework in these matters.

To strengthen coordination between national security forces in Spain, the National Antiterrorism Coordination Centre (CNCA in its Spanish acronym) and the Executive Committee for the Unified Command (CEMU in its Spanish acronym) were created. The first was actually set up only two months after the 11 March attacks. The latter approved a Terrorism Prevention and Protection Plan in 2005 to improve police and intelligence capacities. Controls on substances related to the setting of explosives were strengthened, further monitoring of the use of weapons and explosives, and an increase in inspections throughout the country were part of this Plan (Reinares, 2008).

A report published by Human Rights Watch (2005) stated that while Spain is party to all relevant major human rights instruments, there are still violations of human rights when it comes to bringing terrorist suspects to justice and using counter-terrorism measures into conformity with international standards. From its side, the human rights organisation condemns the Spanish government for antiterrorism provisions of the Spanish criminal law and the code of procedure, including:

- ***Reforming incommunicado detention:*** to ensure that all suspects of terrorism have access to legal assistance throughout the entire period of detention

- ***Improving judicial supervision of detainees in police custody:*** to bring the detainee in front of the judge when the latter orders a restricted regime
- ***Ensuring the availability and effectiveness of the right to habeas corpus:*** to make sure that detainees are well-informed about the right to habeas corpus
- ***Guaranteeing the right to an effective defence:*** by providing translation to non-Spanish speakers, by permitting contact between attorney-client, for the right to be tried within a reasonable time, and for using only in the most exceptional cases the secret legal proceedings ("secreto de sumario")
- ***Ensuring adequate safeguards for detainees in police custody:*** by investigating all reports of ill-treatment during police custody and to make sure all detainees are treated with dignity
- ***Improving conditions in pre-trial detention:*** by clarifying in the Penitentiary Regulations the minimum time outside of the cell that incommunicado detainees have and ensuring that this time is accomplished
- ***Ensuring that the expulsion of foreign terrorism suspects conforms with Spain's non-refoulement obligations***
- ***Exercising leadership within the UN Committee on Counter Terrorism***

Only three days after the bombings in Madrid, there were national elections planned, and against all previous expectations, the Partido Socialista Obrero Español (PSOE) won the majority in parliament. Since 11-M had been so recent, the new government announced new measures to fight against the war on terror. From the one hand, the government wanted to control all mosques in the country and the content of Islamic religious services to make sure they were not used for radicalization purposes. From the other, those who had links with international terrorism or were suspect of this kind of activities were expelled by using Article 54(1) and 57(1) of the Law on Foreigners, which state that those which participate in acts against the national security, public order or Spain's international relations can be deported. If being taken out of the country for these reasons, they

could be forbidden from returning to Spain for a period between three to ten years (Article 58(1)).

After September 11, the UN Security Council adopted Resolution 1373 and with it, it mandated all UN Member States to combat terrorism. It also created the Counter Terrorism Committee (CTC) to monitor states' compliance. Because of Spain's history in the fight against terrorism against ETA and its already developed legislative and policy efforts to combat terrorism internally, the country was quick in responding to the 9/11 attacks, and it has actively engaged with the work of the CTC (HRW, 2005).

One of the most controversial antiterrorist provisions is that in the LEC which imposes serious limitations on the right to counsel during incommunicado detention, as detainees cannot designate a lawyer by themselves but must instead have the services of legal aid attorney while they are in the incommunicado period. And even more controversial is the fact that they cannot confer in private with this lawyer at any time. While this was a measure to refrain ETA from transmitting information to the outside world through their lawyers, who were also connected with the terrorist organization, it is still a restrictive measure that violates basic rights according to Human Rights Watch. However, according to the Spanish government it is not restrictive nor disproportionate, since "the limitation it imposes on the fundamental right is reasonably balanced with the pursued result"[56]. This measure, along with that related to the secret legal proceedings, were the two most conflictive actions according to the human rights organization. The latter because attorneys have almost no information about the case against their client before they are called upon in the proceedings, they are restricted access to the details of an ongoing criminal investigation and are not entitled to see any of the evidence collected during the investigation. Different is the case of the prosecutor, who has access to all of this information at all times (HRW, 2005).

Those responsible to make sure that the Spanish Criminal Code is applied in terms relating to counterterrorism are not only the National

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[56] Constitutional Court Sentence 196/87, adopted on December 11, 1987, www.boe.es/g/es/iberlex/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1987-0196 (retrieved September 12, 2004), extract, para. 8

Police and the Civil Guard -plus regional police such as the Mossos d'Esquadra in Catalonia- but also the Center for Intelligence against Terrorism and Organized Crime (CITCO). The latter is the Spanish domestic intelligence agency for the prevention of terrorism and organized crime, formerly established in 2014 by the Royal Decree 873/2014. It actually resulted from two other domestic agencies: the National Anti-Terrorism Coordination Center (CNCA) and the Intelligence Center Against Organized Crime (CICO) which were put together with the aim to optimize efforts and put together economic resources to fight against these crimes. The intention of the government was to respond to the growing Islamic extremism and the escalation of the terror threat level.

Continuing in this line, in 2017 the government also published its National Security Strategy, which identified jihadist terrorism as "one of the principal problems confronting the international community", and Spain focused its energies in "Preventing, protecting, persecuting and preparing a response" to the terrorist threat by identifying jihadist extremists and disrupting terrorist plots while preventing radicalization in the country (Counter Extremism Project, 2019). While Spain had previous national security strategies (the one before 2019 was prepared in 2012 and expired in 2017), the 2019 one was the first which was publicly published (López-Fonseca, 2019; La Moncloa, 2019).

But as much as states can be adjudicated in one of these stages, so can international organizations, as actors of international relations, which also make laws which can be characterized for securitizing migration. Reference here can be made to the European Union, which has not only influenced in different ways the perception of migration within its Member States, but it has also strengthened the connection between migration and national security within its spheres of power.

In Europe, the establishment of linkage by the political elite between immigration and crime became more evident after the adoption of the 1990 Schengen Agreements, which became consolidated with the approval of the 1992 Maastricht Treaty and the 1997 Treaty of Amsterdam (Chebel d'Appollonia, 2017). With the approval of these instruments, the distinction between internal and external security became blurred and instead of focusing on border management to control immigration, Member States started focusing on "threat

management" (Huysmans, 1995; Bigo and Guild, 2005; Chebel d'Appollonia, 2017).

A trend to liberalize migration at the EU level, as many had hoped as the millennium began, shifted towards the opposite direction after the events of 9/11. For the first time in its history, the NATO invoked its Article 5 self-defence clause (Chebel d'Appollonia, 2012). Resources directed to EU immigration policy have since then been spent towards terrorism and police matters (Luedtke, 2009). Member States have all applied their own measures to stop and control migration flows, but there has also been cooperation between them at the EU level. The EU has applied a series of policy measures to control incoming immigrants; from lengthening the requirements to obtain visas, to increasing border control and detaining and deporting those who overstay or who enter irregularly.

Yet academics do not completely agree on whether there has in fact been a process of securitization of migration in the European Union or not. Much research has been produced to answer solely this question, and many academics strongly affirm that EU immigration policies and regulations have undoubtedly been securitized[57]. Others defend there has not been such thing[58].

We must keep in mind, as it has been stated in previous chapters, that the securitization of migration is not a new phenomenon. What I am suggesting here is that the 9/11 attacks and the subsequent attacks in Europe lead to a new wave of securitization measures against migration. Regrettably, these moves have had a negative impact on migrants who are not related to terrorism whatsoever. Among other things, a common EU asylum system was designed, which determined which was the State responsible for examining the asylum application, and common standards of procedure as well as conditions of reception were agreed upon.

Under the 1993 Treaty of Maastricht, Member States' cooperation in asylum matters became part of the EU's institutional framework. Later on, with the Amsterdam Treaty, signed in Amsterdam in 1997 and which entered into force on 1 May 1999, EU institutions were given

[57] In this sense see the work of Jef Huysmans, Didier Bigo, Georgios Karyotis and Thierry Balzacq.
[58] In this sense see the work of Christina Boswell.

new legislative powers to regulate in the area of asylum. Furthermore, it applied some major areas to the third pillar, such as asylum, immigration, crossing external borders and customs and judicial cooperation. The progress achieved with the adoption of this instrument was exceptional at the time, showing the strength of a sense of 'communitarisation'. In regards to immigration, some missing measures were those referring to the integration of refugees, and the opt-outs to the provisions relating to immigration and asylum by some governments such as the UK, Ireland and Denmark, which negotiated to decide in which particular measures they would participate or not, were also a disappointment. Furthermore, excluding EU citizens from the right of asylum within Member States was a clear geographical delimitation of the Geneva Convention. This proposal came from Spain and, among other things, it wanted to prevent members of ETA from being granted asylum in another EU country (Furuseth, 2003).

It was not until the Tampere Conclusions that the European Council decided that a Common European Asylum System should be implemented. Thus the EU started designing a common EU asylum and migration policy to address political and human rights issues, enhancing greater coherence of national and international policies of Member States. This process was further enhanced in 2004, when the Hague Programme implemented minimum standards for a common asylum procedure. It finally culminated with the Treaty of Lisbon, which transformed these measures from minimum standards to creating a single asylum procedure. Since the application of the latter agreement, Article 80 of the Treaty on the Functioning of the European Union (TFEU) also incorporated the principle of solidarity and fair sharing of responsibility between Member States in these matters (European Parliament, 2018).

In the past years many Directives and Regulations have been enacted regarding to migration in the EU. The Eurodac Regulation establishes a fingerprint database by which the EU can identify all asylum seekers applicants (European Dactyloscopy). This is system, established in 2003, is the first multinational biometric system in the world. Eurodac now also serves the implementation of Regulation No. 604/20133 (the commonly known "Dublin Regulation") and altogether these seek to assist in deciding which is the Member State responsible for an asylum application and for this to decide on an asylum application.

Thence with the approval of the Dublin Regulation, the criteria for establishing responsibility on a Member State to resolve on an asylum application was decided. Since Dublin III entered into force in July 2013, the procedures to protect asylum applicants and to improve the efficiency of the system were reinforced[59]. However, the large-scale and so-called 'refugee crisis' questioned the effectiveness of the Dublin System, and a revision of it was conducted in 2016, leading to the proposal of Dublin IV Regulation. This would enhance the capacity of the System to determine a particular Member State responsible for examining an application and ensure a fair sharing of this responsibility between Member States, based on a principle of solidarity EU.

An agreement which has been quite discussed is the Returns Directive (2008/115/EC). This sets out common standards for returning irregular migrants from third countries. This Directive has undergone some changes in the past years, but it is still controversial today. It seeks to speed up return procedures preventing secondary movements, but some have argued that its latest revision can be in detriment of the fundamental rights of these migrants (Kilpatrick, 2019).

In view of the migrant and refugee crisis since 2014, the Commission issued the European Agenda on Migration. The Agenda introduced the Hotspots to register and control incoming migrants, controlled between the European Border and Coast Guard Agency (EASO, formerly Frontex) and Europol. A set of systems have been implemented to control not only the arrival of migrants and asylum applications, but also to reinforce border control. In this sense, the Schengen Information System helps provide information on, for instance, wanted or missing persons and entry bans in a database which is accessible to all police offers and law enforcement officials of the EU. The Visa Information System, on the other hand, refers to a common visa policy and cooperation between Member States,

[59] In 2013, a group of legislative documents were passed to strengthen and further establish the proceedings, rights and obligations of Member States and asylum seekers and following the Common European Asylum System. The Reception Conditions Directive (Directive 2013/33/EU) also sets minimum standards for the reception of asylum seekers in the EU, and the Asylum Procedures Directives (Directive 2013/32/EU) sets minimum standards on procedures for granting and withdrawing the status of refugee.

controlling the issuing of visas and its control by officials at border points (European Parliament, 2018).

All in all, the following is the most relevant EU legislation for combating terrorism:

The three categories of counter-terrorism legislation impacting rights of suspects

Core legislation criminalising terrorism

- Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

Data processing regimes where data is collected or misappropriated to combat terrorism

- Schengen Information System II (SIS II)[24]
- Passenger Name Records (PNR) (including both the EU PNR Directive and international PNR regimes with the US and Australia)[25]
- Eurodac[26]
- Visa Information System (VIS)[27]
- Advanced Passenger Information Directive (API)[28]
- The annulled Directive 2006/24/EC (Data Retention Directive)[29]

Criminalising terrorist financing

- EU-US Terrorist Financing Tracking Programme (TFTP)[30]
- Anti-Money Laundering Directive.[31]
- Asset Freezing (Council Regulation No 881/2002)

European Parliament (2017) *EU legislation relevant for combating terrorism*

The European Union has had a very polemicized policy, based on the Emergency Relocation Scheme approved in 2015, whose goal was to share responsibility regarding asylum seekers among Member States. Later that same year, the program was amplified through the European Council Decision 2015/1061 of September 22nd. The objective of this measure was to relief the pressure of some Member States who could not cope with the massive flows of asylum seekers arriving to their lands, and it wanted to relocate 160,000 of these applicants to other Member States during a two-year period (Triandafyllidou, 2017a). Most of these relocations were of people who had arrived to Greece and Italy by boat. Relocation was based on four criteria: (1) national GDP, (2) size of the population, (3) unemployment level, and (4) the number of asylum seekers already hosted by the country. This was a meaningful response to the unprecedented migrant flows arriving to the EU, but most states were unwilling to take on their quotas and the failure of this measure has been highly disputed (Triandafyllidou, 2017b).

The EU has presented immigration as a security threat in many occasions. And although passing certain instruments claiming the rights of asylum seekers and immigrants, these are undermined by the approval of policy initiatives based on an idea to control these incoming migrants, linking them with the fight against organised crime, human trafficking and drugs control (Furuseth, 2003).

A clear symptom of securitization in the EU is the way in which this has coordinated and developed coastal border control. The European Coastguard is an entity created "to integrate national border security systems of Member States against all kinds of threats that could happen at or through the external border of Member States" (Abbott, 2013). Curiously, boat migration has been considered as a threat requiring of a border security response, and the EU has increased the militarization response of migrant watercrafts. And EU practice in these matters "presents compelling examples of securitizing search and rescue in the context of boat migration, which has distorted the primary humanitarian object of the regime. In both settings [EU and Australia], although there is rhetoric in relation to saving lives at sea, the commitment to human rights obligations is lacking in reality, once effective control is being exercised over boat migrants" (Ghezelbash et al, 2018).

Another example, at a crucial moment, was the response the EU gave immediately after the events of 9/11. An extraordinary meeting that took place on September 2001, the Justice and Home Affairs Council called for "the Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments" (EU, 2001; Neal, 2009), thus bringing migration and the right of asylum as a security matter, speaking of asylum seekers as potential terrorists and building tension between the two conceptual ideas (Neal, 2009).

At the international level, the EU has also looked for cooperation with third countries, as also shown by the application of the Global Approach to Migration and Mobility, a tool to design a framework of external migration and asylum policy. An example of an agreement with another country is that of Turkey, as previously stated in an earlier chapter, through which illegal migrants and asylum seekers who arrived to EU land from Turkey would be return to the latter country in exchange for visa liberalisation for Turkish citizens and a payment

of 6 billion Euros under the Facility for Refugees in Turkey (European Parliament, 2018). This shows the way in which migration has been securitized in the EU through the external relations of the latter, linking immigration with economic instability most times, and bringing to the foreign affairs' dimension many others:

> "The securitisation of asylum and immigration has often been the result of recognising a foreign affairs dimension to EU co-operation, by expanding the EU's external identity to encompass elements of asylum and immigration. Securitisation has also been revealed in the continuing emphasis on security and control in the asylum and immigration field, to the detriment of protection and minimum standards" (Furuseth, 2003)

The EU has externalized migration by pursuing readmission agreements with third countries to facilitate the return or rejected asylum seekers to either their countries of origin or to previous transit countries. The EU provided Ukraine with resources to sign readmission agreements to facilitate returns, and Italy negotiated with the Gaddafi government to prevent migrants from leaving its shores, despite the well-known human rights abuses of this country (Frelick, Kysel and Podkul, 2016). All in all, the refugee crisis led to the EU seeking for externalizing migration related issues, and it sought to shift responsibility towards third countries, especially those transit countries, to refrain potential migrant waves from entering the EU.

It is unclear to what extent these EU initiatives have been efficient or not, but it is clear that the politics of fear have never been a good companion of human rights (Mourenza, 2016). And terrorist attacks cannot be used by states, and nor by the European Union, to establish harsh measures that undermine the basic rights of both nationals and non-nationals (HRW, 2016).

Controversial measures have also been approved in countries like New Zealand, where the government started requiring refugees from the Middle East and Africa to have a pre-existing family connection to the country, otherwise their applications would not be reviewed (Sachdeva, 2019). This was not required to those coming from the

Asia-Pacific region nor for those coming from the Americas. The policy[60] was denounced by many, who considered it racist. Approved in 2009, it has stopped asylum seekers from some of the poorest and most vulnerable places in the world from having the right to seek for a safe country elsewhere (Stephens, 2018). In 2019, it was finally abolished.

The impact of the political discourse in the expansion of these measures is important to consider. In Switzerland, for instance, the impact of political discourse is remarkable, especially that of the Swiss People's Party (also known as the Democratic Union of the Centre (UDC) or *Schweizerische Volkspartei* (SVP) in German). This party radicalized its discourse seeking to tight Swiss policies on asylum and Swiss asylum law. In its political campaigns it has presented foreigners as "polluting Swiss society, straining the social welfare system and threatening the very identity of the country" (Sciolino, 2007) and even presented posters, flyers and newsletters in public spaces showing a white sheep (representing the swiss) kicking a black sheep (the migrant) over the border. Over time, SVP, the biggest political party in Switzerland, has made proposals to deny asylum to "criminal asylum-seekers" and to suspend the asylum procedure to those coming from countries which are at war, by making their status a temporary one of five years (Casagrande, 2012). They have also proposed to legalize expulsion of foreigners who have committed two offenses within a 10-year period without a trail or appeal (Quito, 2016).

The situation of Poland is different, because even though the country does not face a high wave of refugees and is more used to refugees passing by but not staying to apply for asylum, has still enhanced its political discourse against immigration and, particularly, against refugees. They are perceived as a threat because of their "cultural and religious foreignness" and, more specifically, because they are a potential terrorist threat. Problems related to the influx of refugees were part of the electoral campaign as never before and many political parties were strong opponents of admitting immigrants, refugees included, into Poland, on the grounds that they pose a security threat (Podgórzanska, 2019). Discourses against migration included that of Korwin-Mikke, leader of the KORWIN party, saying he would "not

[60] This policy is part of the refugee resettlement quota established under the fifth National government

admit a single immigrant" if coming to power, and in 2015, after national elections, the new government has been firmer contesting the EU in migration matters and reinforced the conviction that a terrorist threat is posed by immigrants, who at the same time lower the security level of the country (Podgórzanska, 2019).

New Zealand is also testimony of an increasing negative perception of migration, and this is exemplified through the media. Publications such as the New Zealand Herald often publish pieces portraying immigrants, including refugees, derogatorily. In an article published in 2007, and making reference to immigrants, it was written that "We have more than enough rapists, murderers, child-abusers and wife-beaters in this country, born here, and whom we have no choice but to keep". They also refer to refugees as people who need help in settling and integrating, and are used as part of election campaigns to win votes through the discourse that they take on services designed for nationals (Salahshour, 2017).

Slovenia, from its side, has also connected the notions of migration with security, and also with criminality. The *Slovenske novice*, the tabloid newspaper with most circulation of the country, has published several news of different incidents, putting an emphasis on the fact that the one perpetrating the acts was a migrant: "A fire was set in a camp and a group of migrants stoned a firemen", "An asylum seeker killed a woman", "Refugees attacked a woman and two senior citizens" (Malesic, 2017). This media has indirectly revealed the main attitudes towards migration, making the "migration element" the most relevant of these news.

But not all states face the same degree of marginalization of migration in their political and media discourses. Some have been able to detect hate speech arising in the public sphere and have passed policies against them. This is the case of Norway, a country whose government issues a political declaration in 2015 against hate speech and as a way to ensure that everyone can move in the public debate without being incriminated and combat these negative types of discourses to reinforce a healthy and safe environment for all. This declaration came after the Oslo Police Force had reported that hate crimes had multiplied that same year and acknowledging that other unreported hate crime cases could arise the numbers of victims much

higher, considering that only about 17 percent of victims report their cases (Norwegian Ministry, 2015).

Measures to combat not only hate speech, but to fight against discrimination and protect the immigrant population have not been set aside. What is troublesome and worrying is the fact that more counter-terrorist measures considering migrants as a potential threat are approved that those relating to the protection of immigrants, and specially refugees, as the vulnerable group they are. This divergence between the measures passed from one side or the other varies among states, but the tendency towards a securitization of migration, specially in Western countries, is noticeably alarming.

6.2.2. Malaysia and Indonesia

These countries are a different case scenario. Since they are not signatories of the 1951 Convention relating to the Status of refugees nor of its 1967 Protocol, refugees in these countries, for instance, already have less rights guaranteed than in those countries' parties of the 1951 Convention. The emphasis on being part of this international instrument is relevant because since refugees are one of the most vulnerable groups of migrants, if the state is not a signatory of a basic instrument to protect their rights, it is likely that their situation and the protection of their human rights is worsened. Nevertheless, it is still interesting to study these countries in comparison to others since they are also active agents securitizing migration. A party may be signatory of international instruments protecting human rights or not, and it can have one political regime type or another, but they are all interesting to scrutinize to compare their levels and methods in the securitization of migration process.

Undocumented migrants have often been treated as a "public enemy" by Malaysian authorities and as a threat to national security (Kudo, 2013). The control of immigration has long been held since the 1990s, both to refrain their entries at the border and to search for illegal migrants within the country. Most of these migrants come from Indonesia, and they are arrested and brought back to their country of origin.

The Immigration Act No. 1154 was passed in 2002 with the goal to search and fine or imprison illegal migrants residing in the country. Furthermore, a set of Special Immigration Courts were established just a few years later in different Immigration detention centers to speed up the process of resolving the cases of so many detainees. We need not forget that Malaysia is not signatory of the 1951 Convention relating to the Status of Refugees nor to its 1967 Protocol, thus refugees and asylum seekers face different circumstances in the country since they are less safeguarded. Consequences are, for instance, that a person with the profile of a refugee, is instead categorized as an illegal immigrant upon arrival to the country.

Policies such as the Ops Nyah I and II (meaning "Operation Get Rid"), first applied in 1991, targeted illegal migrants and let to thousands of arrests. Later on, Prime Minsiter Mahathir approved another measure to reduce dependency on Indonesian workers which consisted in replacing them with migrants from other countries. The idea was to "Hire Indonesians Last", arguing that because of the "crime they have committed, we've kept silent about. But when a riot is carried out by one group, followed by another and another, we cannot any longer stay silent" (Liow, 2006). Furthermore, in 2002, the Immigration Act of 1959 was amended to include a provision that would lead to imprisonment for up to five years for those migrants who violated immigration law (SUARAM, 2002). Migrants, including refugees, have long been seen as social threats. They have been referred to as those committing crimes, spreading diseases and supporting politically subversive activities, and this conduct has been enhanced since the events of 9/11.

Contributing to this perception, speech acts by government authorities have long treated immigrants as a threat and have openly shown their rejection to refugees. In 2015, after 2,000 Rohingya were rescued from people-smuggling boats, Malaysia's deputy home minister, Wan Junaidi Tuanku Jaafar, said publicly that "We don't want them to come here (…) I would like them to be turned back and ask them to go back to their own country. We cannot tell them we are welcoming them" (The Guardian, 2015).

Ethnicity also plays a key role for these peoples. Those coming from countries of a Muslim identity are given considerably better treatment than those who are not from Muslim ethnicity. The first have access

to education, employment and other services, while the latter do not (Isa, 2017). Politicians have also used ethnicity to place a threat to those who do not have Muslim identity, claiming that migrants wanted to inseminate Christianity amongst Malays. But not only politicians have added to this securitization, the media has also propagated the use of terms like "Indons", "illegals" and "troublemakers" to refer derogatorily to Indonesian migrants, they have been portrayed as a criminal threat, as increasing the crime rates, and have presumed criminals were from Indonesian origin (May, 2015).

Another example of how migrants are treated as threats is the creation of the People's Volunteer Corps (*Jabatan Sukarelawan Malaysia*), commonly known as RELA, a paramilitary civil volunteer corps created by the government to control undocumented migration in the country. Following the Essential Amendment Regulations 2005, they are fully allowed to conduct interrogations and demand all documents which they consider necessary. They are also allowed to enter and search both public and private premises without a search warrant to bear firearms. With the Approval of the Malaysia Volunteers Corps Act 2012 there were some restrictions applied to these Corps, such as the prohibition to carry firearms and make arrests. However, criticism against these bodies for the treatment given to migrants has persisted, and so are the accusations that RELA is a machinery to maintain the security of the present political regime (Kudo, 2013).

Similarly, Indonesia is also home of many refugees, including Rohingya refugees. They seek refuge in the country for different reasons. Firstly, because it is location and the sovereignty of its waters, as there are many loopholes that facilitate the arrival of immigrants through waters without examination from immigration authorities. Its coastline of about 34,000 miles in length makes it hard to patrol effectively, and simplifies undetected entries (Missback and Pallmer, 2018). Secondly, because there is a strong presence of UNHCR and the International Organization for Migration (IOM), that helps them deal with immigration issues, specially relating to refugees and asylum seekers. And thirdly, because there are corrupt personnel that make a business of facilitating the arrival of foreign immigrants (Isa, 2017).

Since Indonesia has not signed the 1951 Convention, and even though the principle of non-refoulement is stipulated in the Latter of the Director General of Immigration, for a long time those foreigners

seeking asylum upon arrival to Indonesia and expressed such were not deported, but were categorized as illegal immigrants and were processed through immigration regulations (Isa, 2017). With the Presidential Regulation 125/2016 a definition of refugee was established in Indonesian law, although the bill reflects the view of the government that refugees should be dealt as a security matter, and leaving out their rights (Sjamsoe'oed, 2019).

Adding up to this unfavorable legislation, the government has used the logic of securitization to construct the Rohingya community as an existential threat. And without taking in consideration international norms relating to the protection of refugees, it is hard for these to secure protection in countries like Indonesia and Malaysia. But since they have to escape from the threats of staying in their home countries, they are forced to find refuge elsewhere, even though the circumstances at the country of destination are not optimal.

Terrorism has also contributed to furthering this negative perception of immigrants in Indonesia. Since the 2002 Bali bombings, which killed 202 people and injured another 212, a special police unit was designed to handle issues related to terrorism. Radicalization and citizens leaving to Syria to fight for the Islamic State are also part of today's problems in the country, and as a result Indonesians are anxious about foreign fighters returning to the country and coming from other potential radicalization areas such as Southern Philippines (Missback and Pallmer, 2018).

6.3. States in an Advanced Stage

States in an advanced stage have an extensive and consolidated body of legislation securitizing migration. The existence of statutes and public policies in these regards is usually systematized. Since there exist a wide range of measures in relation to migration and security issues, these have usually been approved within a considerable period of time, systematizing the frequency of approval of measures in these regards and amplifying the general acceptance of their approval.

The public agrees with the need to establish measures protecting the country from an external threat, and immigrants are perceived as such by part of the population. In turn, this means that the integration of

migrants is much more complicated and that it is more likely that they are often isolated, thus becoming a fragmented society.

It can also be the case that the state has developed new infrastructures (i.e. border walls or border stations) or bodies (i.e. new police forces or immigration agencies) to further control immigration in the country. The coordination between these agencies is more evident, but so is coordination among neighbouring states, which is also strengthened to combat illegal migration, but also other types of migration, such as refugees and asylum seekers.

In some countries, and not only in the US, the consequences of 9/11 became evident. In Italy, for instance, the *Disposizioni urgenti per contrastare il terrorismo internazionale* (Law 438 of 15 December 2001) was actually first passed as an Executive Decree n.374 of 18 October 2001, only a month after the events in New York had taken place. Other governments enacted laws right after the events as an urgent measure to fight against international terrorism, such as the United Kingdom.

In fact, countries such as the United Kingdom, the United States, and Australia are good examples of states in an advanced stage in the construction of a link between security and migration. Not only for the legal and policy developments following 9/11, but also for the canons adopted ever since. They are in a clear advanced stage in the process of securitizing migration since they have enacted many laws and designed policies reinforcing this connection, and not only have they done so since the 9/11 events, but the tendency has remained to this day. Thus their body of legislation and public policies linking migration to security is much wider and the existence of this link becomes much more evident. That is why instead of offering different examples of states in an advanced stage, here I would like to focus more specifically on these three cases of states with a stronger legal body securitizing migration. To have a clearer idea on the lineal procedure each of the states has followed to make such affirmation, the three of them will be analysed independently.

6.3.1. The United States

The United States is a nation whose measures on the field of security have been more than often debated and questioned. The country has

invested in border control and security technologies in the past decades, and with even more courage after the events of 9/11. By establishing barriers at the border, allocating funds for electronic surveillance and augmenting the number of personnel at border stations, the US has tried to reinforce its security policies to refrain migrants from entering the country (Cinoglu and Atun, 2013; Migration Policy Institute, 2001).

There are three different ways in which immigration is a matter of U.S. national interest. Firstly, because of national sovereignty, since controlling who enters and leaves the territory through border control is a basic right of the state. Secondly, it is linked to the economic development of the country, contributing or not to growth and prosperity. Thirdly, there is also a diplomatic interest. This is so because those who enter the territory are in turn citizens of another state, and they might claim to be refugees. If that is the case, recognizing humanitarian immigration from a third country might involve acknowledging that the country of origin was unable or unwilling to protect the human rights of these people (Rosenblum, 2009).

After the 9/11 attacks, some called for severe restrictions on immigration and anti-immigrant forces took advantage of the security rhetoric. The U.S. government responded to the attacks in the same way it has in so many other times in history, that is, by using national security as a justification for incarcerating and deporting immigrants in a wave designed to defend the nation (Ewing and Martínez, 2015). Many scholars agree that the attacks became a major turning point in the way immigration was treated and, on the way, national security was seen by the United States, both for citizens and for the government. Since then, "immigration and terrorism became inextricably linked in the U.S. public debate on security" (Kerwin, 2005). The promptest reaction of the US government after the 9/11 attacks was the adoption of the USA Patriot Act. Passed less than six weeks after the attacks, it expanded the executive powers to fight terrorism. Only eleven days after the September attack, Tom Ridge was appointed as the first Director of the Office of Homeland Security in the White House. This Office later on became the Department of Homeland Security (DHS) about a year later, in December 2002. The creation of this Department was a clear consequence of the terrorist attacks, and it represented an important

sign of where the shift towards migration would be going from then on, as immigration was placed within the heart of the national security agenda, a link that has remained ever since (Waslin, 2009).

As it has been previously stated, it is not the first time in the history of states to securitize migration, nor to restrict immigrants' rights. An example of an old measure to control migration for the US can be the Enemy Alien Act and Sedition Acts of 1798, which restricted activities for foreign residents in the country were applied, as well as limitations on the freedom of speech, freedom of expression, and freedom of press. The situation was different back then, as back then the fears of French invasion which could develop into a war with France seemed imminent (History, 2009). However, legislation and policies passed through history to refrain immigrants and to harden their rights within one's country are not a new phenomenon.

Nor is the securitization of migration. In the United States, two laws were enacted in 1996 relating terrorism with immigration, the Antiterrorist and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Individual Responsibility Act (IIRIRA). The first introduced a new procedure for the removal of alien[61] terrorists, eliminating judicial review after final deportation orders premised upon an enumerated conviction (Solbakken, 1997). The latter strengthened US immigration laws and border control. It made it much easier for the government to deport immigrants, who could be expatriated for committing certain crimes, misdemeanours or felonies.

As a result of 9/11, new legislation relating to terrorism and migration was enacted. The Immigration and Nationality Act allowed to detain aliens for 48 hours without charge, and this period could be enlarged if there were any "extraordinary circumstances" (Chebel d'Appollonia, 2012). The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (more commonly referred to as the USA Patriot Act or PATRIOT Act) is the first and more well-known example of this. Signed by George W. Bush on October 26, 2001, it gave law enforcement agencies the competence to investigate and bring terrorists to justice. This Act has been highly disputed. Arguments against it are that it

[61] The term "alien" refers to any non-citizen, may she have permanent residency or not.

conferred federal agents the ability to obtain business records from hardware stores and chemical plants in order to find possible suspects of buying material to prepare bombs or related materials. Its definition of people carrying terrorist activities is so wide that it even includes the prohibition to enter the country for the spouses and children of inadmissible terrorists (Fitzpatrick, 2002). According to Dück and Lucke (2019) “this anti-terror legislative package included measures to restrict civil liberties, introduce additional surveillance, increase borer controls, as well as measures for a widely increased authority for intelligence agencies (…) It also enabled the US to detain suspects of terrorism without due process at the US military’s Guantanamo Bay camp”. Thus according to most critics, the bill cherished values and some very basic rights.

The broad definition of terrorist threat given in the bill extended the list of terrorist offences and led to the “increased infringements on civil liberties in the name of national security” (Chebel d’Appollonia, 2017). Section 218 of the act authorized the monitorization of phone conversations without a warrant. Section 411 widens the grounds for inadmissibility and exclusion, including spouses and children of those who are inadmissible under this Section, imposing sanctions by association on non-citizens. And Section 402 relates to the protection of the border, and it seeks to triple the number of Border Patrol personnel, Customs personnel and immigration inspectors at the Northern Border. The same thing was done with the Enhanced Border Security and Visa Entry Reform Act of 2002, which also expanded the budget, staffing, and powers of the immigration enforcement bureaucracy. What is more, the PATRIOT Act involved the amendment of immigration law to strengthen the powers of federal law enforcement to deport certain persons, and suspects could be detained for up to seven days without a hearing. If after seven days, in the hearing, the attorney general believed there were sufficient grounds to suspect that the person could be a threat to national security, she could be detained indefinitely.

Several measures were taken after 9/11 and other legislation and policies have been applied ever since. As put by Miller (2005), the USA Patriot Act 2001, the Homeland Security Act of 2002, and the Enhanced Border Security and Visa Entry Reform Act of 2002, collectively “illustrate the accelerating criminalization of the immigration system”. But what is also interesting in this sense is the

fact that the Bush administration categorized terrorist attacks as acts of war after the New York attacks in 2001. This is an important categorization since during times of war, the primary goal is to combat the enemy, and anti-terrorism measures shifted from the civilian to the military sphere (Dück and Lucke, 2019).

In the Homeland Security Presidential Directive 2 on "combatting terrorism through immigration policies" a set of measures were approved to prevent the entering of immigrants who could suppose a terrorist threat and to detain those being involved in related activities while in the country. Thus first, entry in the country was denied to those suspected of having engaged with terrorism; second, detention and deportation of aliens in the country who also engaged in terrorist activities; and a set of measures to coordinate immigration measures with its neighbouring countries, Canada and Mexico, was also approved (Chebel d'Appollonia, 2012).

In 2002, the National Security Entry-Exit Registration System (NSEERS) was expanded and it required male nationals from Arab and Muslim-majority countries such as Iran, Iraq, Libya, Sudan and Syria, admitted before 9/11 to report to an immigration office and register with the Immigration and Naturalization Service (INS). They were interviewed, photographed, and got their fingerprints taken. Those who did not obey could be considered out of status and sent back to their countries. About 84,000 registered through this process and more than 13,000 men who complied with the registrations were placed in removal proceedings (AAIUSA, 2016).

Later on, in 2003, the Clear Law Enforcement for Criminal Aliens Removal Act (CLEAR) was enacted, and it gave local police officers the power to enforce criminal and civil federal immigration laws. It also allowed for criminalization of all immigration violations and its registration into the National Crime Information Center (NCIC) database. Human Rights Watch (Parker and Patten, 2004) warned that this law would lead to arbitrary arrests, deprivations of property and deportations, which could even involve the deportation of refugees who enter the country without valid documentation to a place where they might face persecution (thus breaching the principle of non-refoulement). The provisions of the Act fully authorize not only state officials, but also those at the local level to remove aliens in the country, and they would not even have to follow the procedures and

checks usually done through the federal system, thus granting them with an extraordinary power that may lead to violations of basic rights.

The REAL ID Act of 2005 suggested increasing security levels by denying driver's licences to illegal immigrants. Operation Return to Sender, a program led by Immigration and Customs Enforcement consisted in conducting raids to look for dangerous immigrant fugitives and terrorists. The cost for filing naturalization applications increased by 80 percent in 2007, following an unprecedented number of applications seeking to vote in the elections of the following year. Adversities have been established in all sorts of ways for immigrants, including refugees, in the United States. They have had to cope with difficulties not only to seek for a safe haven, but also to remain safe within it.

In addition to this, selective country bans have also been approved very recently. In 2017, President Trump passed Executive Order 13780 of March 6 also known as the "Executive Order Protecting The Nation From Foreign Terrorist Entry Into the United States" addressed particularly at banning entrance from foreigners from six Muslim countries (Chad, Iran, Libya, Syria, Yemen, and Somalia) to protect national security. Furthermore, it is explained in Section 1 that the US Refugee Admissions Program (USRAP) plays "a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism". Again, the idea that terrorists may come hidden in refugee flows is manifested. But there have been more executive orders by President Trump to control immigration and relate it to national security. The Executive Order on Border Security to limit asylum and further control the US-Mexico border and the Executive Order on Interior Enforcement to "enhance public safety in the interior of the United States" have also been part of his "securitization strategy".

And while these measure bringing migration to the national security agenda have been developed pursuing the goal to protect the country from potential terrorist threats, it remains to be seen the extent to which they have really been effective, as attacks have persisted throughout Western countries, and asylum seekers have not stopped arriving to European shores and US borders. All of these counterterrorist measures foster the mistaken belief that actions such as limiting the number of immigrants will lessen the threat, but what they do is to crease the fears of citizens towards migration and

terrorism, which at the same time leads to them asking for more measures to ensure their protection (Chebel d'Appollonia, 2012).

Donald Kerwin, executive director of the Center for Migration Studies, has written extensively on the issues that asylum seekers face in the US and has questioned the national migration system and its coordination with national security matters[62]. He has debated on the standards of detained asylum seekers, he has collected cases of abuses in asylum adjudications, and has studied the implications of border and interior enforcement for immigrants. He has raised questions on the way "Immigration reform legislation, federal regulations, and administrative policy changes have been justified in terms of the nation's safety" (2005), laws and policies encouraged and reformed since the events of September 11 by the terrorist threat. Nevertheless, he calls for a complementary -not conflicting- interaction between refugee protection and national security, arguing that if refugees are better safeguarded, they can also help strengthen the security of the United States by contributing to the economic, military and diplomatic advancement of the country.

6.3.2. The United Kingdom

Hampshire (2009) maintains that in the UK there has been a securitization of migration since 9/11, which has legitimized extraordinary policies restricting immigrants and asylum seekers' rights. Legislators have brought migration within the national security agenda of the country, calling for measures to hinder migration due to 'security concerns'. However, he argues that these regulations have not only been developed because of security affairs, but also because of other economic and demographic factors. Thus harsher controlling measures for migrants are due, according to him, to a combination of interests (on security, economy, labour, demography, etc.).

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[62] In this sense see, *Migrants, Borders and National Security: U.S. Immigration Policy Since September 11, 2001*, Center for Migration Studies, Occasional Paper No. 12 (2002); *The Use and Misuse of 'National Security' Rationale in Crafting U.S. Refugee and Immigration Policies*, International Journal of Refugee Law, vol. 17 (2005), pp. 749-763; *How Robust Refugee Protection Policies Can Strengthen Human and National Security*, Journal on Migration and Human Security, Vol. 4 (3) (2016), pp.83-140; Kerwin, D. and Stock, M., *The Role of Immigration in a Coordinated National Security Policy*, Georgetown Immigration Law Journal, Vol. 21 (2007), pp.383-430

While I do not discuss that there are various interests to control migration, if migration is presented to the public as a 'threat' by the government (along with other actors such as the media), linking migration to security, then there is in fact an action to securitize migration. This link can be established, as it has been stated before, through the protection from terrorism. And while there may be other motives to apply stricter rules on migration, if the ways to achieve them are to hide them only through the discourse that it is necessary to apply extraordinary measures to 'protect' the country and its citizens, then a connection between migration and security is clearly established. Consequently, whatever are the reasons to control migration, when this link is presented, when there are "securitizing moves" (Waever, 1995), the securitization of migration is taking place.

To add further complications to those going to the UK, Prime Minister Boris Johnson decided, that on December 31st 2020, after the period of transition of Brexit took place, the country would only allow qualified immigrants speaking English, and with a minimum salary of 30,800 euros, to get established in the UK -whatever country they came from (Aranda, 2019). Making the UK less appealing to certain types of migration seems to be the goal of the government, and a multicultural England seems to be harder and harder to maintain.

Right after the New York terrorist attacks, the government of the UK passed the Anti-terrorism, crime and security Act (ATCSA) of 2001. The threat of a terrorist attack was heavily associated with non-nationals, and discourses referring to foreigners as suspects of terrorism was frequently seen in parliamentary debates (Hampshire, 2009). Part 4 of ATCSA specifically refers to immigration and asylum. One of the provisions allowed for indefinite detention without trial of non-citizens suspect of terrorist activity, until the House of Lords overruled the Article on grounds of discrimination[63]. This led to the detention of sixteen foreign nationals between 2001 and 2003 (Wilson, 2011).

The 1971 Immigration Act provided deportation powers on national security grounds. However, with the *Chahal* ruling[64] the European

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[63] See A v. the Secretary of State for the Home Department (2004) UKHL 56. In this case, the High Court ruled that this type of detentions based on nationality or immigration status were discriminatory given that terrorism is not confined to foreigners only

Court on Human Rights ruled that asylum seekers could not be deported to the country of origin where they could be prosecuted (in this case, where he might face torture) and thus deportation measures in the UK had to be complied with what the ECHR had stated. However, with the approval of ATCSA, the government sought to have powers to detain a foreign national indefinitely without charge or trial if he or she was suspected of international terrorism. If this person could not be deported, at least she could be imprisoned based on "reasonable suspicion" that she was a threat to the country. As the government acknowledged, this implied a derogation from Article 5 of the European Convention on Human Rights, which provides the right to liberty, and justified it stating that this was a measure "strictly required" due to "public emergency"[65]. This measure very well shows the quick relation of foreign nationals with terrorism, a clear move related to the securitization of migration.

Later on, some man who had been detained following the ATCSA provisions challenged the lawfulness of their detention. The Special Immigration Appeals commission (SIAC), a court established to resolve deportation appeals, decided that Part 4 of the ACTSA was unlawful. And even though this decision was overturn by the Court of Appeal, the House of Lords, the highest court in the English legal system, stated again that these stipulations allowing detention without trial were contrary to human rights law. In their decision, one of their reasonings was that there was a distinct treatment of foreign terrorist suspects to UK nationals who are in an analogous situation. As Article 15 of the European Convention on Human Rights prohibits discrimination based on nationality, the "decision to detain one group of suspected international terrorists, defined by nationality or immigration status, and not other", is discriminatory and "cannot be justified" as it is "inconsistent with the United Kingdom's obligations under international law"[66].

Another wave of securitization moves took place after the terrorist attacks of the 5th and 21st July of 2005. From the one hand, new requirements to concede asylum and to remain in the UK were to be

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[64] *Chahal v. U.K.,* 22414/93 (1996) ECHR 54, NOVEMBER 15, 1996
[65] The Human Rights Act 1998 (Designated Derogation) Order 2001, Statutory Instrument No. 3644
[66] Judgments – A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), House of Lords (2004) UKHL 56

applied. Furthermore, the creation of a list of "unacceptable behaviours" and a database of individuals who had demonstrated these behaviours was to be available to immigration officials. This served as a basis for immigration control and increased the discretionary powers of the State to refuse entry and right to remain (Hampshire, 2009).

Shortly after the attacks, a statement by the Prime Minister Tony Blair was published, calling for new measures to combat terrorism and in response to the London bombings (Prime Minister's Office, 2005). These are listed below:

1. New deportation powers, including new grounds for deportation. A list of websites, bookshops, centres and networks was made, and anyone affiliated to these could also be deported from then on. Furthermore, Prime Minister stated that "should legal obstacles arise, we will legislate further, including, if necessary, amending the Human Rights Act, in respect of the interpretation of the ECHR".
2. New anti-terrorist legislation, including an offence of condoning or glorifying terrorism.
3. Refusal of asylum to anyone who "has anything to do" with terrorism.
4. Extending powers to strip citizenship.
5. Setting a maximum time limit for all future extradition cases involving terrorism.
6. Establishing a new court procedure allowing a pre-trial process of terrorist suspects.
7. Extending the use of control orders for British nationals, and imprisonment if breaching them.
8. Increasing the number of special judges in these cases.
9. Widening grounds of proscription and new legislation.
10. Establishing a commission with the Muslim community to advise on how to better integrate those who are inadequately integrated, consistent with one's own religion and culture.
11. New power to order closure of a place of worship if used to foment extremism.
12. Measures to secure borders in cooperation with other countries.

At the end of this declaration, the Prime Minister made clear that "this is not in any way whatever aimed at the decent, law-abiding Muslim community of Britain". However, he adds:

> *But, coming to Britain is not a right. And even when people have come here, staying here carries with it a duty. That duty is to share and support the values that sustain the British way of life. Those that break that duty and try to incite hatred or engage in violence against our country and its people, have no place here. Over the coming months, in the courts, in parliament, in debate and engagement with all parts of our communities, we will work to turn those sentiments into reality. That is my duty as prime minister.*

Another legislation which was passed no longer after was the Immigration, Asylum and Nationality Act (IAN) of 2002 and later on the one of 2006. The first broadened the causes of immigration offences and hardened the situation of asylum seekers by restricting the period in which they could apply for asylum and because they could be detained and removed more easily. The latter included another set of measures to deprive the rights of migrants in British territory. Article 54(1), for instance, states that for the construction of Article 1(F)(c) of the Refugee Convention, now new acts are added as "contrary to the purposes and principles of the United Nations". The UK government now included two new situations; one being acts of "committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence)", and the other being "acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence)". Denial of refugee status on security grounds were possible after this bill, and so was the government to strip citizenship to anyone who had done anything seriously prejudicial for the interests of the country.

More laws have been passed to fight counterterrorism ever since. The Prevention of Terrorism Act 2005 introduced the imposition of control orders to protect the public from terrorism. Surprisingly, there need not be a connection between the person's alleged involvement in terrorism and the constraints imposed by the order. In a report to review the Prevention of Terrorism Act 2005, Anderson (2012)

affirmed that all those subject to these control orders were Muslims, most of them were of Asian or North African ethnicity. They disrupted the family life of those subject to them, and thus promoted a certain discontent in the wider Muslim community. However, the author of the report argues that control orders followed a fair administrative procedure and complied with the European Convention on Human Rights.

From the other hand, the Terrorism Act 2006 intended to "close the gaps" (Clarke, 2005) of the existing legislation, allowing the government to prosecute those training to commit terrorism and to tackle extremist bookshops disseminating radical material (The Guardian, 2009). This bill was criticised by some, arguing that it was too broad and vague and that it would put in danger the freedom of speech and freedom of expression, thus interfering with human rights (Tempest, 2006).

Just a few years later, the Terrorist Prevention and Investigation Measures (TIPMs) Act 2011 came into force, abolishing the control orders that had been in place since 2005, and substituting them with new control measures, which many criticised as they were just the same thing but under different name. Following the new provisions, the Home Secretary could impose restrictions on movement, financial activity or communication of an individual via means of a "TPIM notice".

Likewise, many laws have been adopted to counter terrorism not only after 9/11 but also after the subsequent terrorist attacks in London and elsewhere[67]. Some of this legislation has been criticised by human rights groups, as civil rights have been narrowed in many cases.

When Theresa May, in the position of Home Secretary, announced in 2012 that "The aim is to create, here in Britain, a really hostile environment for illegal immigrants" (Hill, 2017), it was clear what the official view of migration was. A set of administrative and legislative measures were approved to make it as difficult as possible to stay in the United Kingdom for people without "leave to remain"[68]. These

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[67] See also the Counter-Terrorism and Security Act 2015 or the Counter-terrorism and Border Security Act 2019

[68] Indefinite leave to remain (ILR) or permanent residency (PR) is an immigration status of the person who does not hold the right of abode in the UK, but who has

were known as the Home Office hostile environment policies. Giving police more power and applying stronger border measures, together with the introduction of new criminal offences, could lead to an intromission of the civil rights of those in the country and hence demand closer scrutiny. These measures, directed to fight against terrorism, and the problem of the "foreign terrorist fighters" exacerbates the interaction between criminal law and immigration law, fostering the impact of "crimmigation"[69] (Zedner, 2019). Interestingly, these "foreign terrorist fighters" are many times the citizens Western countries, being foreigners only in the conflict zones where they go to fight. Thence once they return after they have been radicalized and trained, they are actually returning to their home country where they are citizens, and this is why many measures that were directed to immigrants before, are now being extended to nationals too.

Immigration rules have also been subject of discussion. Article 322(5) of the Immigration Rules was controversial due to the restrictions imposed on migrants living in the UK. This Article can force those migrants who have made legal amendments to their tax returns to force them to leave the UK. The law is designed to counter terrorism, but it has had an opposed impact on many highly skilled migrants who had nothing to do with it, and the consequences are to leave the country in a maximum of 14 days or when their visa expires, not being able to apply for another visa and not allowed to return for a period of ten years. After much public criticism, the government published a review admitting that between January 2015 and May 2018, the Home Office admitted an application error rate of about 2% (Home Office, 2018), The Guardian accused them of having wrongly tried to force at least 300 highly skilled migrants to leave the UK (Hill, 2019).

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been admitted in the country indefinitely. This is acquired when accomplishing a serial of requirements, including having 5 years of continuous residence in the UK.

[69] Crimmigration is a term referring to the conjunction of criminal law and immigration law. While these had traditionally been operating as separated spheres, in the mid-1980s there was a dramatic shift and the gap between these areas in the law began to blur. This phenomenon started being analyzed in the United States, although the term is now more frequently used for other countries, which is what many academics now do within the UK. "For most of the nation's history, people were punished according to the laws enacted by legislatures, but they were punished identically regardless of citizenship status (…). Today it is often hard to explain where the criminal justice system ends and the immigration process begins" (García, 2017).

More recently, after the 2017 London Bridge terrorist attack, and another conducted by a knifeman in February 2020 where he stabbed and injured three people, the Home Office talked about a new anti-terror law in order to create a new offence relating to the possession of terrorist propaganda that glorifies or encourages extremism. The latter attack was directed by a man who had been recently released from prison after serving half of his three-year sentence for terror offences. After the episode, the Ministry of Justice called for a new legislation to end the automatic early release from prison of terror offenders and to only consider the release once they have served at least two-thirds of the sentence.

The Counter-Terrorism and Border Security Act 2019 is also a consequence of the 2017 attack, and it introduced broader border security measures. It also gave power to authorities (police, immigration, and customs officers) to search and detail suspects of "hostile activity" based on "reasonable suspicion". "Hostile activity" is said to be that which threatens national security, the economic well-being of the UK in a way relevant to national security or a serious crime. This is rather a vague term which can be subject to further controversies in its application. It also establishes as a criminal offence to refuse to give the examining officer the information requested, applying the penalties of a fine or up to a three months imprisonment (Zedner, 2019).

Fast-tracking legislation, although many times necessary, is most times not the best solution. The House of Lords Select Committee on the Constitution (House of Lords, 2009) made a report recognizing that not all legislation of this type was to implement emergency measures. However, between 1974 and the time of publishing this report, most of these laws were related to security issues, and particularly to combat terrorism. An example of this is the ATCSA which was processed entirely just in a month (Roe, 2012).

Even though the UK might not want to create a "hostile environment" anymore, as terrorist attacks have spread through Europe and have been perpetrated in the past years in British territory, the government has strengthened counter-terrorist legislation and tightened not only immigrants' rights but also those of its citizens. Nonetheless, a connection between migration and criminal law and national security remains, and certain immigrant communities have

been specially affected by them. It remains to be seen what the future holds for this nation, but there does not seem to be a pathway to redirect national security strategies towards and reprioritize the basic rights of all.

6.3.3. Australia

The case of Australia is marked by a breaking point. When in August 2001 the Norwegian cargo ship "MV Trampa" rescued an Indonesian boat with 430 refugees, it decided to bring them to Australian land although the nearest port embarkation was in Indonesia. The response of the back then Prime Minister of Australia was to deny access to Trampa to its national waters. He declared that "We do not have a legal obligation to take these people" alleging that "Every country has the right to refuse entry to the vessel of another country of course. It's fundamental to a nation's sovereignty, a nation's control of its borders". Evidently, the problem was not the vessel itself, but the 430 asylum seekers the ship wanted to disembark on Australian territory. The refugees were then considered a threat for the government, a threat to Australia's sovereignty, and thus a threat to its national security (Kasic, 2014).

The Australian government sent the Special Air Service (SAS) troops to control the ship and to send these peoples to third countries, including Papua New Guinea and Nauru, which were not signatories of the 1951 Refugee Convention, meaning that the situation of these asylum seekers could even worsen. As seen in the media, the decision of Prime Minister Howard was mostly respected and further reinforced by the media. The Daily Telegraph, for instance, wrote that "Australia should stand firm and not accept illegal immigrants" (Watson, 2009). As put by Kasic, this situation was perceived as a "moral panic" situation for Australian nationals, understood as the concern that these asylum seekers could be a threat to the values of the country or perceiving that "a cherished way of life is in jeopardy" (Kasic, 2014; Garland, 2008). It seems that the government's securitization of migration at that point was largely accepted by both the public and even the Labor Opposition (Kasic, 2014).

What is also interesting of this case is not only the way the government perceived the possible arrival of asylum seekers as a

national security threat, but also what followed the events. The Howard Government advanced Border Protection (Validation and Enforcement Powers) Act 2001[70] and the Migration Amendment (Excision from Migration Zone) Act 2001. The first announces right under its title that it is an "Act to validate the actions of the Commonwealth and the others in relation to the *MV Tampa* and other vessels, and to provide increased powers to protect Australia's borders, and for related purposes". Continuing to Subsection 185(3A), it states that officers can detain any person within a detained ship or aircraft, and "take the person, or cause the person to be taken, to a place outside Australia". What is more, any detention of ship, aircraft or persons inside them, are not unlawful "and proceedings (…) may not be instituted or continued in any court against the Commonewalth". This does not only allows the use of force towards asylum seekers, but it also removes the courts from reviewing their claims (Devetak, 2007).

The detention of asylum seekers is not prohibited under international law, but it should be a measure of last resort and only in case there is a threat to "public order, public health and national security", as stated by the Guidelines of UNHCR (2012). It is for this reason that Australia has received many criticisms not only by the UN Refugee Agency, but also from other human rights organizations and NGOs (Phillips and Spinks, 2013), to the extent that a UN Working Group stated that "criminals were being treated better than asylum-seekers" (Gelber and McDonald, 2006).

With time, Australia's government have kept on broadening legislation negatively affecting refugees and asylum seekers. Section 197C of Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 establishes non-refoulement obligations are "irrelevant to removal of unlawful non-citizens", further stating that it is "irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen". Thus officers have to remove even asylum seekers irrespective of whether this carries a breach of the principle of non-refoulement by the Australian government.

It is every time more difficult for asylum seekers to find refuge in Australia. Following Section 46A of the Migration Act 1958, those

coming in an unauthorised maritime boat will be denied their asylum or visa applications. To add more complications, Operation Sovereign Borders, a military-led border security operation established in 2013 committed to "protecting Australia's borders, combating people smuggling in our region, and preventing people from risking their lives at sea", operates under a veil of silence, lacking mechanisms of transparency or accountability (Ghezelbash et al, 2018). The government's approach in these regards has been to justify not to comment on these operations due to national security interests and because it would benefit "the people smugglers and their business model" (Chambers, 2015).

The 2002 terrorist attack in Bali, Indonesia, represented another key moment to understand the continuing securitization process of migration in the country. In this case, the event was a turning point for the role of terrorism in Australia, and even though the attack did not take place within its borders, 88 Australians were killed. In a similar way, the 2005 London bombings and its subsequent legislation developments also marked the pathway for Australian reforms. After the London attacks, the Anti-Terrorism Act 2005 was enacted. This bill has been highly disputed, and so it was the Anti-Terrorism Act (No.2) 2005. A Human Rights Committee of the United Nations (2009) submitted a report on the latter, criticising it for different reasons. Among other things, the Committee was particularly concerned about "(a) the vagueness of the definition of terrorist act; (b) the reversal of the burden of proof contrary to the right to be presumed innocent; (c) the fact that "exceptional circumstances", to rebut the presumption of bail relating to terrorism offences, are not defined in the Crimes Act, and; (d) the expanded powers of the Australian Security Intelligence Organization (ASIO), including so far unused powers to detain persons without access to a lawyer in conditions of secrecy for up to seven-day renewable periods".

With the Anti-Terrorism Act 2005, control orders were also approved, modifying the Criminal Code Act 1995[71]. These orders are used as a surveillance tool to monitor suspect terrorists without the requirement of having committed an offence and allowing the Australian Federal Police (AFP) to monitor and restrict activities of suspects, thus limiting freedom of movement, speech and association (Hurley, 2013). Preventive Detention Orders[72], from the other hand, are another

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[71] See Division 104 of the Criminal Code 1995

Australian measure to counterterrorism. They allow officers to detail a person if this is a suspect of committing a terrorist attack. These orders are approved by a judge without a trial and no particular offence has to be occurred. Thus it is only an order to prevent a possible future offence to happen, based on hearsay and speculation (Hurley, 2013).

With time, Australia ended up adopting anti-terrorist measures similar to those in the United States and the United Kingdom. Each year, new legislation intensified migration controls and police powers (Jupp, 2009). And since 9/11, Australia, which had no national laws dealing specifically with terrorism, has enacted more than 60 laws on the subject (Williams, 2013; bell-Welsh and Williams, 2014b). Furthermore, contrary to many other developed states, Australia does not have a Charter of Rights, which can more easily lead to violations of human rights, since the country does not have sufficient safeguards against abuse of fundamental rights.

In addition to this, in the fight against terrorism countries have also made technological developments on direct surveillance of the population, stored and monitored data in numerous transactions through access to private and public-sector databases, and then searched within this data to find a matching profile to that of the terrorist suspect. Many of these technologies pose a clear threat to the privacy rights and freedoms of citizens since they allow the state to monitor the lives of all at a much closer level (Council of Europe, 2008). But these surveillance and control measures not only concern privacy rights, but they even lead to violations of human rights, including the protection against torture, the right to personal liberty and security, the right to a fair trial including the presumption of innocence, the right to respect for private and family life, the freedoms of expression and of movement, the right to an effective remedy and victims' rights to reparation following states' unlawful acts (Council of Europe, 2015).

Many violations occurred in Europe in the context of anti-terrorist policies post-9/11 and the use of illegal methods to fight against terrorist has seriously harmed the human rights' protection system. This has not only affected nationals of the countries where new legislation in this regard has been enacted, but also the migrant

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[72] See Division 105 of the Criminal Code 1995

population. They face both the initiatives designed for the entire public, but also those designed specifically for them. And considering their already vulnerable condition, they are doubly controlled, and doubly harmed.

6.4. Crossing borders: internationalizing the securitization of migration

Buzan, Waever and de Wilde (1998) explain in their book that security issues produce a certain regionalization of dynamics, specially depending on the region that is being analysed. They study region per region to see the extent to which they are 'regionalizing' security complexes, and I will briefly go over their conclusions.

They argue that in Africa threats occur more often within states (i.e. to gain control of political power or a territory, ethnic political conflicts, secessionist movements), rather than between states. Similarly, in Latin America military security dynamics between states do not often occur. From the one hand, because the military sector is sometimes weak and so they do not seek to amplify insecurities. There is also not a regional issue with migration between states, as most migrants move to cities (besides those in Central America travelling through Mexico to reach the United States), so there is not an international migration security problem as such within the region. However, they have developed certain common projects to cooperative between them (i.e. OEA, MERCOSUR), although there is no prospect to have a regional developed structure such as that of the EU and there is no sense of a clear common identity of being "Latin American", for instance. A process of integration has not been developed yet and as a result, regionalism in this area is yet to be matured.

The case of North America is completely different. More than security issues, there are political or cultural issues such as the revindication of specific cultures such as African American, Hispanic Americans and Native America, but these cultural divisions can escalate beyond politicization into securitization. This is what has happened with migration, as we see that it is being securitized at the state-level specially for those areas in which the population balance has shifted notably because of the arrival of migrants trough the Mexican border. The authors of this book argue that there is a social security issue as

the collective identity of the country is being threatened. And although we are talking only about the United States and not about a group of nations, the fact that this particular country is compound by different states, some of which having developed a stronger sense of community (California, New York, Texas), the concept they use to refer to units in societal security is only that of the State. But it is instead to discern ethnic and other type of groups that operate outside the state system, focusing on identity groups regardless of whether they operate within or without state borders.

Europe, on the other hand, has much advanced regionalizing dynamics and has developed a stronger sense of belonging to the same community. The military, political and social sectors have been further integrated and there is a clear system of international law within the region. Furthermore, issues such as that of migration coming from the Middle East and Africa specially have been considered as common threats that have to solved not only by each state, but also through the regional institutions.

In the Middle East there is some sort of regionalization too, and there are also Islamic and Arabic common identities between states, but there are also stateless minorities threatening the specific construction of nations (i.e. Kurds, Palestinians). In the region there is a perception of common threat regarding the Western cultural and economic imperialism and discrimination. Migration, from its side, happens mainly at the regional level (although there are also many migrants coming from South and Southeast Asia), thus being a regional issue. The case of the Middle East is quite interesting in the sense that there is a strong identification through religion and the necessary defence against the West dominance and imposition of standards, but it still has deep divisions and conflicts within the region.

Asia is a bit more complicated to divide and to study as a region. From the one hand, we have South Asia, where the conflict between India and Pakistan make it complicated to think of regional dynamics, and Southeast Asia, where there are much clearer regionalization patterns as shown through institutional mechanisms such as the ASEAN. There is also the perception of a common social security threat this being the "Western-dominated international agenda" of which they have to protect from the Asian values. Last but not least, East Asia is complicated in the sense that there is increasing insecurity

derived from internal rivalries between states, and a possible decentralization and disintegration in the case of China if it continues growing as much as predicted.

This regionalization of dynamics exposed by Buzan, Waever and de Wilde is interesting when confronted to the concept of globalization. Thus it seems that while globalization is a phenomenon widely accepted in today's 21st century, there are still regional developments that confront this idea. However, most scholars seem to agree that when it comes to immigration policies and border control, most governments work in the same direction.

The globalist thesis suggests that there is a continuing erosion of borders, an undermining of state capacity, and convergence towards neoliberal policies (McGahan, 2009). As a result, in the area of migration, scholars have argued that there is an intense global pressure to generate similar policies in the area of immigration and border control between sending and receiving states. However, while globalization is a fact in many areas, immigration is a sensitive matter since it more closely concerns the sovereignty of the state, as it is related to the control of its borders and who is allowed to trespass them. Furthermore, governments also face certain difficulties in framing this subject as powerful business interests, lobbies and think thanks have strategically captured particular aspects of immigration policy (Freeman, 1995). Thus there is a tendency towards globalization and towards regulating in more similar manners in certain areas, and this pressure has also reached the subject of migration. But it is a sensitive matter for two reasons, because of the sovereign powers that immigration-related policies entail, and because of the interest of pressuring lobbies working in these areas, which in turn modifies the perception of internal and external threats.

The extrapolation of internal to external security issues is an attempt "by security professionals to make everyday life seem insecure and therefore justify a surge in police and military potential for action" (Bigo, 2006). And this means that internal solutions are brought to the external sphere, extending internal security problems beyond borders and treating them as transversal security threats. Migration then becomes related to a fear or insecurity and threat to the nation's security. It is clear that the process of securitizing migration is the result of transnational harmonization policies and laws directed to

immigration and to countering terrorism. It is an international product from the perceived "need" to "manage Muslims and Islam as a transnational risk category across Western states" (Humphrey, 2014).

Europe's approach to migration has been to securitize and externalize its management by negotiating with North African countries, at the other side of the Mediterranean, and control the reception of migrants in exchange for financial and technical support. The EU has even proposed to maintain the area as a point of disembarkation, so that migrants are less likely to decide to cross the sea, at the risk that they would be sent back to North African countries (Abderrahim, 2018). From the EU perspective, it seems that if these countries would have to deal with the reception of migrants, the EU would not have to face problems regarding the sharing of responsibility and quotas between Member States (Maiani, 2018). This proposal is just one of the examples of this externalization of the "problem" of migration that is faced by the EU, and the way the want to handle it.

6.5. The impact of the securitization of migration on refugees

One of the most defenceless groups within migrants are refugees. While there are many endangered and unprotected groups (we could also include, for instance, internally displaced peoples), given the special vulnerability of refugees as they have had to flee from their countries because of a threat to their lives, these are doubly impacted by the measures directed to securitizing migration.

And as we have seen in this chapter, there are many examples in different national legislation and public policies of the securitization of migration. International organizations, NGOs, civil society and even the Ombudsman of different countries have raised their voices in an attempt to raise awareness of the consequences of infringing the rights of nationals, newcomers, and those with special vulnerabilities in the fight against the war on terror. However, there does not seem to be any sign of a trend towards more rights protective paradigm.

When the Polish government introduced the 2016 legislation, the Polish Ombudsman made an appeal announcing a number of controversial measures that could have a negative impact on the

fundamental rights of the peoples in the country. His complaints are divided into four different areas of this new legislation and are described as follows (Polish Ombudsman, 2016; European Parliament, 2017)[73]:

Polish Ombudsman's appeal to the President of the Republic of Poland on the new counter-terror legislation 2016

1) Grant of new ABW (Polish domestic intelligence agency) powers, without any control over its activities

- The head of the ABW is to keep a list of people suspected of terrorist activity. The person to whom this list is to be described is not precise since there are no procedures for reviewing the quality of data.
- The head of the ABW may order a wiretap against a non-citizen if he or she is suspected of conducting terrorist activities. This is not subject to court review. If this issue is addressed in the context of other recently amended provisions, it can be concluded that the use of evidence obtained in the course of these activities will not be subject to any control.

2) Disproportionate restrictions on human and civil rights and freedoms, in particular the right to privacy and the right to public assembly

- Substantial doubts arise with the provision of blocking the internet
- Mass gatherings and events may be banned in the event of a third or fourth degree of alarm. The prohibition itself would not raise doubts, but it is unclear how and when the individual

[73] This is an extract of the Appeal made by the Polish Ombudsman, with the translation of the European Parliament

alert levels are introduced and what is a "terrorist event".

- The head of the ABW gets access to all data collected in public registers and records without reviews.

3) Special measures against aliens, including citizens of the European Union

Although the Constitutional Tribunal allowed for the possibility of differentiating standards for citizens and non-citizens alien rights (eavesdropping, the possibility of downloading biometric data) should not be waived completely. The premises for which the service is taking action against these persons are based, in accordance with the law, mainly on suspicion and doubt. There is no procedure to verify the correctness of the action.

4) Granting the right to use special weapons

In its Article 23, the Law regulates the use of firearms to save lives of terrorist victims. The meaning of this provision can only be known by analyzing the key concepts of the "terrorist event" or "anti-terrorist activity" which are not precise.

The Ombudsman manifested the outcomes and worries of giving too much power to police and security forces without control, thus leading to potential abuses of power. Consequently, the rights and freedoms of both individuals and foreign nationals may be restrained and limited, and lead to the infringement of the EU's Charter of Fundamental Rights and the European Convention on Human Rights. Nevertheless, his claims were displaced, and the legislation to which he made reference was approved (European Parliament, 2017).

This is just one of many examples of the ways in which a State can securitize migration and in turn put in danger the most basic rights of the people in the country. A State can have a much higher or lower level of securitization, but even the passing of a few instruments at a particular time can lead to a bunch of difficulties and constraints for the rights of the peoples. Thence it is not always just the amount of

measures approved what defines the level of securitization, but the hardness of these methods and its potential consequences on human rights.

Concern about terrorism has increased globally, being ISIS one of the leading threats to national security across the globe. A survey conducted by the Pew Research Center (2017) found that ISIS was the leading security threat -among the eight possible threats that were asked to people in 18 different countries- and climate change was in second place right after it[74]. From the countries surveyed, the response referring to ISIS as the most worrying concern was mostly concentrated in Europe, the Middle East, Asia and the United States.

The fear of terrorism has increased, especially in Western countries, where attacks have grown considerably. Nevertheless, the war against the terror threat is not a war against migration, or at least it should not be. As António Guterres put it, "It is not the refugee outflows that cause terrorism, it is terrorism, tyranny, and war that create refugees"[75] (UNHCR, 2015). This generalised concern on migration causing crime and terrorism is actually damaging the life of many immigrants looking for better lives, and it is even more damaging to those fleeing countries seeking to save their lives and that of their families. Refugees are already in a vulnerable position when leaving their home countries since the are escaping to protect themselves from a real threat, and they do so by fleeing from already dangerous conditions. Thence adding up to this vulnerability by creating measures to harshen their options to stay in a safe haven and integrate in the new host society means putting their lives even at more risk.

Their acceptance into the host society becomes much more complicated after hearing discourses blaming immigrants for increasing the economic and social insecurity of national citizens. Xenophobia and intolerance towards them, and particularly among refugees and asylum seekers has increased in recent years (Edwards,

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[74] The eight possible threats, in order of major to minor threats based on the responses, were: (1) Islamic militant group known as ISIS, (2) Global climate change, (3) Cyberattacks from other countries, (4) The condition of the global economy, (5) Large number of refugees leaving countries such as Iraq and Syria, (6) US power and influence, (7) Russia's power and influence, (8) China's power and influence.

[75] Said as part of a discourse during a visit at the Presevo refugee reception center on the border with the Former Yugoslavia Republic of Macedonia.

2005) and has added many more difficulties to their situation as securitization discourses have contributed to setting up a hostile local environment.

In Europe, refugees are many times intercepted beyond national borders and have no access to an effective asylum procedure or to any chance to challenge their return. This is what happens for instance with border controls at sea, which usually result in the interception of boats of migrants that are then sent back to their place of departure. This may put in danger those seeking for asylum and thus may be in breach of the principle of non-refoulement. Although the right to seek for asylum in entrenched in article 18 of the EU Charter of Fundamental Rights, if these asylum seekers are intercepted before they get to one's territory, the State has no duty to fulfil these obligations. However, the principle of non-refoulement is still an obligation, thus they cannot be sent back to their country of origin or to a third country where their security could be at risk.

The crisis of the refugees activated a latent xenophobia, which has subsequently led to anti-immigration rhetoric and protests. Furthermore, some politicians have taken advantage of nationalistic sentiments to accuse certain religious communities of unemployment and economic woes, growing religious intolerance. In turn, more fragmentation and non-integration of migrant communities into the host society mean that a generation of young migrants have identity issues, since they often do not identify with the host nor the origin country. Marginalization among some immigration communities has played a key role in the radicalization of young immigrants. This sort of isolation and disconnection from both communities makes them feel that they have more in common with some jihadi militants, thus being more prone to radicalization (Antunez, 2019).

Most of the times, those committing terrorist attacks are not refugees fleeing from their homes but are instead the same citizens of the country which have an immigrant background. When we talk about radicalization, we are dealing with a part of society of immigrant origin that has not been able to successfully integrate in the host country, these being poorer and more isolated, thus making us think of whether existing measures on integration are in fact effective and fruitful or not. Migrants and refugees are not the terrorist threat, but

they can be a target for religious radicalization, and specially in especially vulnerable and less integrated communities.

It seems then fair to affirm that greater social and economic inclusion of these immigrant communities within the host society can reduce potential radicalization cases. The focus should not be only on the punishment of terrorist crimes, but it should also be placed on preventing them from happening, including for instance anti-radicalization strategies. Preventing these crimes from happening does not mean to increase border control to refrain refugees and asylum seekers from entering one's territory, which is what many states have done in the past years. This is actually what ISIS wants, to create a backlash against Muslim refugees in Western countries as this would allow them to recruit more disaffected refugee peoples (Kerwin, 2016). Treating refugees with hostility will not solve the problem, it will instead increase fragmentation, social unacceptance, isolation, and thus radicalization. Consequently, they will be more likely to be persuaded to be part of radicalization recruitments since they will be left alone in vulnerable situations. Instead, one of the things that could be done is to establish greater integration measures to strengthen and unite the country's society. Nevertheless, many times fragile migrant groups such as refugees are not accepted in the host country. In the United State, for instance, refugees are the most vetted groups for admission (Strack and Emrich, 2015; Kerwin, 2016).

As Balaban and Mielniczek (2017) put it, the migrant's danger of being persecuted in her home country are to be considered, but so are the dangers in the host nation. The higher danger of her security because of a well-founded fear, the higher the need for the protection of her rights. Furthermore, if the refugee belongs to a vulnerable group, such as children or disabled peoples, the need for protection is even higher.

What happens then with their human security? The concept of "human security" places the individual, and not the state, at the centre of concern. Social, economic, environmental and human rights security frame this notion. This idea seeks a universalist approach, to go beyond state-centre world politics where each state is responsible of the security of its sovereignty, territory and population, to instead aim for the protection of all human beings by the international community, coordinating efforts among forces and all actors to protect the peoples of the world (Freitas, 2002). Leaving behind the

controversial definitions of the notion of human security, the idea of protecting all human beings, and putting an emphasis on those which are under a more delicate situation, such as what happens with refugees, should be beard in mind.

The security of refugees is hard to respect if considering them as a potential terrorist threat. After 9/11 many states were resilient to accept asylum seekers in their countries and increased border control to refrain potential refugees from entering their territories defending the need to protect themselves from the terrorist threat. In addition, this reinforcement of border control limits formal legal obligations such as the right to seek and enjoy asylum (Frelick, Kysel and Podkul, 2016). As Freitas (2002) explains, "the terrorist attacks emphasized the contradiction between internal security and human rights and clearly made refugee security more difficult". The protection of refugees is endangered and so is their security, and they are victims seeking for the protection of their lives, not perpetrators nor security threats.

CHAPTER 7
DEVELOPING INTERNATIONAL NORMS ON THE SECURITIZATION OF MIGRATION

In the previous chapters, we have been studying the concept of securitization in the case of migration and its applicability on today's legal and political systems of different countries from different regions around the globe. This has been useful to become aware of the increasing development of norms and public policies connecting security matters to migration-related issues. There has been a tendency in the past years to interlace both areas, and the establishment of this link has arisen because of various reasons. It is especially worth mentioning the massive refugee waves entering Europe and collapsing its immigration systems, and the more than ever evident terrorist threat due to the latest terrorist attacks in Western countries.

We have also covered the new trends in international law-making processes in Chapters 1 and 2, including the pluralization of international actors, the increasing support for informal forms of law-making, and a deeper study on the changes in the life cycle of norms. This has all been useful to give a closer view of what is happening in today's international order and within the international legal sphere. It is now time to put these two themes together -issues on the securitization of migration and those of the making of global norms- in the hope to determine whether it can be affirmed or not whether there are in fact new ways to create international norms in the particular areas of security and migration.

7.1. *Why* is migration securitized? Identification of the main interests used to justify these practices

The Copenhagen School has described securitization as an intersubjective and socially constructed process from a rhetorical perspective. This definition includes a securitizing actor and an audience, the first placing a threat to a particular object affecting the latter. To study securitization, then, it is necessary to analyse and interpret the goals and interests of the securitizing actor when trying

to protect us from the potential threat. The role of the security analyser is therefore to answer a set of questions, as expressed by Charrett (2009:14): "Has the securitizing actor managed to mobilize support? Who is the audience and what are the facilitating conditions? Have extraordinary actions been taking? And what might be the impact of such securitizing acts on other units?". We have already focused on the securitization of migration process in Chapter 5. It is now time to investigate the main interests and values of these securitizing actors not in securitizing migration according to the particular situation of every state, but in securitizing migration internationally and as a whole.

Finnemore argues that state interests are defined not by the result of external threats, but by "internationally shared norms and values that structure and give meaning to international political life" (1996:3). Thus interests are construed through social interaction. Her point is that not all state interests are defined by domestic politics -although they are indeed a determinant factor- but they are also articulated by the international society of which they are part. As this society evolves over time, normative developments adapt progressively, and state interests and their behavior also shift to coordinate the with changes of social interaction. State interests are thus in part subject to changes in international society.

What are the interests then of the international society? According to the first point of Article 1 of the UN Charter, one of the main United Nations' purposes is "to maintain international peace and security". Thence we understand that international security is a priority for the international society, and basic to maintain international order. There are many security concerns today within the international arena, from the environmental crisis to the development of chemical weapons. We have already mentioned some of the main global problems of today's world, and acknowledge terrorism as one of them. While we may also see the massive displacement of populations as a global threat, it is different linking it to terrorism, than looking at it from a humanitarian perspective. Can we think of migration as an international security problem affecting the international society? Can it be considered a shared global 'worry' or 'problem'? Is it a threat affecting common international goods or common interests? In sum, what are the reasons to securitize migration? Migration is indeed one of the 21st Century biggest concerns, but not because of its debatable connection

to terrorism, but because mass migration flows appear because of unstable, fragile and totalitarian governments. We should then se the issue from a human security perspective to ensure and protect these peoples fleeing in search for their personal security instead of perceiving them as a source threatening the stability and security of national governments in destination countries and of the international society.

Still, governments have continuously applied measures to place migration within the security realms. And since this is a practice which has already taken place in several states and at different degrees, as we have seen in Chapter 6. Thence we can start thinking of the securitization of migration as an international practice. It is important to emphasize that even where there is widespread agreement to put an issue within the legal international framework, this can be "hotly contested and compromise will be essential" (Boyle and Chinkin, 2007:9). It is clear that an issue such as terrorism must be condemned and there is a general willingness to compromise to adopting measures to prevent it. The United Nations has taken several steps by adopting resolutions and setting up special committees addressing different aspects of terrorism-related concerns. Similar efforts have been taken both at the regional and national levels. From international specialists in the field, to lawmakers, bureaucrats and states' political representatives have participated in adopting such measures. There has been an exchange of information from a wide range of states, organizations, police services and intelligence agencies to discuss potential mechanisms of response to the terrorist threat. Thence it seems evident that there is a wide consensus to condemn terrorism and find a common international framework to resolving this issue.

But why is it so hard to find a coordinate answer to fight the terrorist threat? Why does it seem so hard to find common ground to protect international security? Vurnek, Bengez and Perkov (2018:163) argue that it is harder to find measures to protect international security than it is to achieve national security because the international system is underprotected: "The reasons for this are non-centralized operating systems, insufficiently coordinated and non-centralized data collection systems, data processing and undisclosed use of information on security threats, such as migrants, migrations, and side effects that they cause". With a series of security challenges, international organizations -especially those dedicated to maintaining world security

as the UN, NATO, and the SOCE- have made efforts to find solutions, some even transforming and reorganizing themselves with new agencies and departments, but they have still been unable to respond to them.

At this point, I think it is also interesting to consider Weiner's perspective on the subjective perception of migration as a security issue depending on the country situation and the people's in this country. Security, he argues, is a social construct with different meanings for different people:

> *"An ethnically homogeneous society, for example, may place a higher value on preserving its ethnic character than does a heterogeneous society and may, therefore, regard a population influx as a threat to its security. Providing a haven for those who share one's values (political freedom, for example) is important in some countries, but not in others; in some countries, therefore, an influx of "freedom fighters" may not be regarded as a threat to security. Moreover, even in a given country, what is highly valued may not be shared by elites and counter-elites. The influx of migrants regarded as radicals may be feared by a monarch, but welcomed by the opposition. One ethnic group may welcome migrants, while another is vehemently opposed to them. The business community may be more willing than the general public to import migrant workers."*
> (Weiner, 1992:103)

The discussion on what is a *real* or a *perceived* threat is an infinite one. And if we acknowledge that the interpretation of what security is differs from one another it is much harder at times to divide the line of what is real than what is not. Then what do the countries analyzed have in common? If they have all securitized migration to some greater or lesser degree, then they must have all perceived migration as a real security threat, although the reasons between them may differ. As explained in Chapter 5, the reasons to securitize migration are due to various perceptions of threats: a threat to the national identity of the country, to the economy and/or the welfare state, to bilateral/international relations, to the public order and to national security.

The reason some states focus on one of these potential threats or another is shaped by a set of influencing factors; from the country's past history to its current situation. Historical events, such as South Africa's Apartheid period, the continuous entrance of Indonesian migrants in Malaysia for decades, or the large quantity of foreign workers in Saudi Arabia since the 1930s are part of the reasons why for some countries can be perceived as better or worse. In the last case, for instance, Saudi Arabia has become increasingly dependent on foreign labour, which has made of migrants a necessary workforce for the country. On the other hand, South Africa holds a xenophobic racial history along with the increasing entrance of Zimbabwean migrants since the 1990s. Malaysia, from its part, has also seen a massive entrance of Indonesians in the country -including refugees-. All of these elements of their recent history have contributed to shaping a particular view of migration within these territories.

Besides this historical approach, another element influencing the perception of migration as a security threat is the quantity of the migrant population, not only in the past, but in the current moment. The so-called "European refugee crisis" was marked by the massive entrance of refugees into European borders starting in 2015. The EU migration system was unable to cope with such large numbers of asylum applications and migrants spreading throughout the Union, collapsing both the EU and national migration services.

The United States has also had a long close history with migration, being the same country built in itself from peoples from other lands. However, the acceptance and integration of migrants in the country has changed a lot in the past decades. Even though it has been considered a nation of immigrants, attitudes and laws on immigration have switched from passing the first law on US citizenship to white people through the Naturalization Act of 1790, to banning the entrance of Chinese immigrants through the Chinese Exclusion Act of 1882. But it is with World War I that xenophobic attitudes arise; first, by tackling Asian countries in particular through the Immigration Act of 1917, and then limiting the number of allowed migrants in the country with the Immigration Act of 1924. More recently, the Trump Administration issued the "Protecting the Nation from Foreign Terrorist Entry into the United States" two executive borders, which banned immigration from six majority Muslim countries (Chad, Iran,

Libya, Syria, Yemen, and Somalia), as well as North Korean and Venezuela (History, 2018).

The previous history of the country with immigration, the quantity of migrants entering the country, the economic situation in which it is going through… All of these are elements which somehow explain the perceptions of some countries towards migration, as well as their interests. Going back to the US case, the Chinese Exclusion Act was passed after 30 years of continuous and steady flow of Chinese workers emigrating to the United States. The Immigration Act of 1917 is designed to tackle Asian immigrants after xenophobic feelings arise due to World War I. The Immigration Act of 1924 favors Northern and Western European immigration while limiting that coming from Southern, Central and Eastern Europe (History, 2018). Mexican labor force is encouraged in the US during the 1940s and 1950s due to labor shortages during World War II, but it is not today when the message that "they are stealing US jobs" is being echoed. All these legal developments have responded to the interests of the country in a particular given time, thence immigration feelings are shaped by the combination of a multiplicity of elements, past and present.

Are there interests to protect then or are there strategic tactics to follow? Or, considering that the perception of security threats can be subjective to some extent, can it be a combination of both? It seems appropriate to say that, in some cases, certain practices to securitize migration in fact follow a particular strategy from a government to regain control over migration. In other cases, it can also be the case that the perception by some of migration as being linked to terrorism can cause some governments to find it necessary to establish certain security measures to frame immigration. It will then depend on the particular case to determine whether the securitization of migration is a tactic or a protection movement. Whatever the case, though, the debate on whether it is justified doing so is a different on.

7.2. *Who* is driving this transformation? The actors involved

Migration movements have proved to be a matter of concern for many countries around the world and even for the international society, since we can find mass migration movements in almost all

regions in the world, and thus affecting many countries -be it as origin, transit or host countries. Furthermore, the international terrorist threat also illustrates how necessary it is to find a global solution to fight against terrorist groups and to prevent their attacks. The movements of peoples and goods is a key component of our interconnected and interdependent world, thence it is also basic to address these issues within the international legal field to find a common legal ground which binds all states equally.

When dealing with the process of creating norms there are different elements that need to be studied. Following up on the previous section, and once we have perceived some of the reasons in their appropriate context of why new norms emerge, we need to identify the actors creating these norms. Once we know that, we will then be able to analyse what specific steps have been taken to set the ground to release new norms. And we will finally be capable of determining which specific outcomes arise from them. Thus to understand the process of creation of global norms we need to resolve three main questions: Who is making these norms? How are they doing it? And what is the result? We will now take a closer look and try to resolve all of them.

One of the main characteristics of international law-making today is that there is a pluralization of actors taking part in the process. Norms in relation to the securitization of migration can be used to exemplify this particular feature. As discussed in Chapter 1, the globalization, privatization and fragmentation of states has led to the addition of new players in the process of making global norms. Thence creating norms, whether national or international, is not just a matter of states only, but it is a much more complex process today than it was before precisely because it involves the interaction of subjects from a wide variety of origins. If we look back at what has been explained in the previous chapters, we can deduct that actors participating in norm development on the securitization of migration go from the state to the media. Let's take a closer look at all of them.

First and foremost, we obviously have the state. This can actually be understood to be compound by a diversification of actors and departments. At an organizational level, we could consider as being part of the process of norm creation in this area not only the President's Office[76], but also the Foreign Affairs Department, the

Department of Home Affairs (or Internal Affairs), and the Defence Department. In some countries these may be mixed or be independent from one another[77]. In some cases, the Department of Home Affairs will also be responsible for all migratory-related issues, in other cases, there will be an independent Ministry for doing so[78]. Let's recall the case of South Africa, where the discourses given by the Department of Home Affairs had an important impact among grassroots levels[79]. They may all collaborate at some point in making sure that their interests and goals are safeguarded. Finding a common ground at this point is not the most difficult of issues, since the government usually shares a common view and thus works towards achieving the same goals. What is different though is to satisfy the demands of other political parties not being part of the government. Thus there is an interplay within governmental institutions where debates of different opinions on, for instance, immigration laws, can be much heated.

In more sensitive scenarios, we can also find extremist right-wing parties throwing into these different views on migration and its relation to security, and rising controversies. We have also seen some of the discourses of parties like the National Rally in France, presenting migration as the source of terrorist attacks; the entrance in Parliament of VOX in Spain; references of immigrants in Germany as an "invasion of foreigners" by the Alternative for Germany; or the continuous politicization of immigration and Islam by the Party for Freedom in the Netherlands. In fact, in the latter case, the party has repeatedly accused immigration from Islamic countries of profiting from the Dutch welfare state and causing a negative impact on the national economy and disrupting the cultural life. And more importantly for our case, through social media and other means it has connected Islamic migration as a source of violence and danger everywhere. Outside of Europe, other parties like the Canadian Nationalist Party have also irrupted in the political scenario, claiming

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[76] This can also be known as the Prime Minister's Office, Department of the Prime Minister, and other similar titles

[77] In the United States, the government counts with the U.S. Department of State (with the head figure of the Secretary of State), taking care of carrying out the President's foreign policies

[78] This is the case, for instance, of Australia, where the government has a Ministry for Immigration, Citizenship, Migrant Services and Multicultural Affairs.

[79] See page 191 in Chapter 6

for maintaining the demographic majority of white people in the country, deporting all illegal migrants, and so on.

However, today there are also many other participants in these debates besides those part of the political elite. There are also international organizations, from international to regional ones, involved in the securitization of migration. As a regional example a clear case is that of the European Union. We have analysed different instruments like the European Agenda on Migration of 2014, which introduced hotspots to register and control incoming migrants as well as to reinforce border control. It has also created new entities like the European Coastguard which was set up to provide border security against "all kinds of threats". Migrant boats have been considered as one of these threats to European security. The involvement of the NATO, though, is another example of the well-established linked between security and migration. This organization has included terrorism and mass migration as part of their main concerns in their defence agenda. EU Operations like EUNAVFOR Sophia, whose mission is to identify and capture vessels used by migrant smugglers and traffickers have been highly controversial, and they have counted with the cooperation of EU Member State authorities, EUROPOL, FRONTEX, the European Asylum Support Office (EASO) and EUROJUST. But naval missions have also been directed by the NATO. NATO, after Germany, Greece and Turkey asked for its intervention, also sent warships to the Aegean Sea to conduct "reconnaissance, monitoring and surveillance of illegal crossings in the stretch of sea between Turkey and Greece" (Drent, 2018).

These are just a couple of examples of measures which show how migration has been brought to the security field and is treated as a national and even international security threat. Not only have states taken the necessary steps to pass laws and public policies controlling migration and increasing border surveillance, but they have also worked together to coordinate their forces in fighting against illegal migration and making sure that their borders are kept secure and away from those trying to enter them, even though doing it as asylees. The terrorist threat has not only contributed to increasing fear against the immigrant population, but it has also been used to justify the approval of measures furthering in the control and prevention of immigration. With the excuse that terrorist fighters are sometimes hiding between migration flows, new technologies on surveillance measures have been

used to identify and check refugees during their trips to reach the land of Western countries.

But let's not forget that within today's international order there are not only states and international organizations, but transnational corporations and other powerful enterprises are also participating in shaping the interests of governments and of the international society as a whole. The role of these enterprises in the field of security is utterly important. And that is precisely the reason why it is key to focus more specifically on them to explain what is exactly the role that they play in shaping international norms related to security and migration.

The protection of European borders has been put at the forefront of the European agenda, with important increases in the funding of this sector. As noted by Akkerman (2018a) it is striking that in a time where the EU has had to deal with the Brexit and an unfinished economic crisis, the European Commission still proposes to triple the funding for borders, migration and asylum with wide consensus. What is more, I would add to his comment that again, borders, migration and asylum go hand by hand, since it seems that dealing with migrants and asylees is intrinsically linked to border control, and not to their safeguard.

In fact, between December 2014 and June 2018 EU and member states' officials have had dozens of interviews, conferences, roundtables and fairs with the European Organisation for Security (15 times), the AeroSpace and Defence Industries Association of Europe (29 times), Airbus[80] (131 times), Leonardo[81] (25 times) and Thales[82] (18 times) (Akkerman, 2018a). Members of these arms companies also participate as experts on border security in the drawing up of EU reports and make concrete proposals which later on have been framed as EU immigration policies. This has led to the approval and setting

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[80] Airbus is a global leader in the defense sector and the largest defense supplier in Europe. Besides manufacturing commercial aircrafts and helicopters, it also develops combat aircrafts and military communications, intelligence and surveillance.

[81] The Leonardo S.p.A. is an Italian company designed to advance in the development of defense technology for air, land, sea and cyber security

[82] The Thales Group is a French multinational company serving in various security sectors, including aerospace, ground transportation, digital identity security and defense security

up of the wide border monitoring system EUROSUR and the establishment of a European border guard (Akkerman, 2018a) which, in turn, have generated a market of more than 17 billion euros between 2014 to 2016 (ODI, 2016). If this were not enough, another sign of how this industry has expanded the market is the budget allocated to the EU border agency Frontex, which has gone from just 6 million euros in 2005 to 254 million in 2017 (Delle Femmine, 2017). On top of that, Leonardo (formerly known until 2017 as Finmecannica) Thales and Airbus are three of the top four European arms traders, selling in the Middle East and North Africa, where many refugees come from.

The walls to separate Spain from North Africa placed between Ceuta and Melilla and Morocco were backed up by Spanish companies Indra and Dragados. The costs of these walls have been said to be of 72 million euros between 2005 and 2013, and the Spanish coastal surveillance system SIVE of about 230 million between 2000 and 2008 (Delle Femmine, 2017). In a freer Europe after the fall of the Berlin Wall where a new era seemed to begin, we are now closing our doors to refugees and migrants. Akkerman (2019) is the one to ask "Who killed the dream of a more open Europe?", and the answer he gives is clear "One group has by far the most to gain from the rise of new walls- the business that build them". All in all, it seems clear that the industry is one of the few beneficiaries from the refugee crisis.

Thence the interplay between governments and private entities is key in understanding today's processes of global norm-making. As Bloom described (2014:151), the "privatization across all stages of migration occurs in some form in all global regions and leads to a relocation of migration control and delegation of key functions". Thence there seems to be an international pattern adjudicating -at least partially- the control of migration to the hands of private actors.

In December 2017, the Italian government redeployed part of its troops in Iraq and Afghanistan to North Africa to stop migration; and the French government also wanted to increase its military presence in Niger to fight against the so-called war on terror. In addition to this, governments from origin countries are praised by Western states when they apply harsher measures to restrict migrant flows (i.e. the same way that Niger did through its northern city of Agadez). In fact, collaboration between origin and destination countries have reached

bilateral agreements, but so has the European Commission. Collaboration between the EU and its member states individually with third countries has taken place in terms of accepting deported persons, training of police and border officials, developing biometric systems, and donations of helicopters, ships, and other vehicles, as well as surveillance and monitoring equipment (Akkerman, 2018b).

It is clear then that the role of governments is indeed key in developing international laws and policies in any matter, but their interaction with private enterprises has also become a huge part of today's negotiations in security affairs. As stated by Davitti (2019:53) "Private Military and Security Companies do not merely provide border security and migration control services. They frame, shape and entrench militarized responses within the European Agenda. They contribute to the framing of irregular migration as a security threat which can only be addressed through emergency-driven military responses –and, conveniently, the same services that they provide. Thus, they irreversibly shape European migration policies an accelerate the securitization of the EU border"[83]. In setting up EU priorities in defence and security they are contributing to framing irregular migration as a security threat, in other words, to reinforcing practices that lead to a securitization of migration. With terrorist attacks leading to increasing reliance on security technologies and thus on security companies, we are seeing a translation of the War on Terror into a "War on Immigrants" (Kumar, 2020).

Another very relevant and active actor participating in the process of securitizing migration and thus contributing to the creation of global norms is mass media. As we have seen in previous chapters, media outlets in occasions have used language diminishing the immigrant community and accusing migrants of the terrorist threat. We have seen examples of these media discourses in Chapter 6 in relation to news media in Australia, the Czech Republic, Malaysia and New

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[83] To see similar conclusions on this subject, see Chris J. (2017) 'Market Forces: The Development of the EU Security-Industrial Complex', *Transnational Institute*. Available at: https://www.tni.org/files/publication-downloads/marketforces-report-tni-statewatch.pdf; Akkerman, M (2016) 'Border Wars. The arms dealers profiting from Europe's refugee tragedy', *Transnational Institute*. Available at: https://www.tni.org/files/publication-downloads/border-wars-report-web1207.pdf; and Akkerman, M (2016) 'Border Wars II. An update on the arms industry profiting from Europe's refugee tragedy, *Transnational Institute*. Available at: https://www.tni.org/files/publication-downloads/borderwars-issuebrief-web.pdf

Zealand. Acknowledging the important impact that the media has on public opinion, it is crucial to be aware of the messages they send because many times they will contribute to giving a bad image of the immigrant population of the country which worsens the public perception of migration, hinders a positive integration of immigrants and thence is part of increasing measures securitizing of migration.

And on top of that, and of course also linked to the impact that the media and politics have on the public opinion, there is also civil society actively participating in the international political life, and here we can specifically refer to civil associations but also to the citizen as an individual. NGOs such as the Red Cross, Human Rights Watch and Amnesty International participate monitoring and reporting abuses and making sure that international laws are complied with, or even lobby for their change. Whether organized in groups or acting on their own, citizens are the ones voting on elections for their governments and campaigning for and against political parties since they are the ultimate subject for which laws and policies are addressed to. According to Hammerstad (2012), and as seen in Chapter 5, citizens are also a securitizing actor. He argues, for instance, that South African living in the most disadvantaged areas and where there are more Zimbabwean refugees living are also where acts of intolerance take place, creating widespread public disorder to achieve some policy recognition. They are subject to them, and thus they are also the ones in favour or against them. And this also applies to the international arena, and especially if we consider today's globalized world as an interconnected one, in which we all are somehow part of the international community.

To sum up what has been explained in this section, I have divided all of the actors mentioned above in a table following different categories based on their intensity or degree of involvement in the process of norm-making in the field of security and migration. The levels of implication have been synthetized as high, medium and low, having either direct or indirect impact. Thence in the first category, we can find those actors with a high and direct degree of involvement, also known as the "promoter". Most of the times, the state will most likely be engaged in this position since it is the government the one approving laws and policies of their interest. But depending on the state or the moment in which we are making this analysis, the position of different actors will vary. Thus it is also possible that the promoter

is found on civil society but that at a later stage it has a less relevant involvement causing its position to pass onto a lower category and having a low-direct participation. Thence it must be noted that this is a generic table, but more accurate definitions are very much dependant on the specific country being studied and depending on the phase of construction of the particular norm at stake. Thus while in general, it is clear that the implication of the state understood as the government is usually high since it is a driving actor and in many occasions, the main actor securitizing migration as it is the one approving laws and policies in this and other fields, the situation of other players such as international organizations is very much likely to change according to the particular geographic space. For instance, as it has already been exposed, the role of the European Union in moving forward certain legislative developments that favour specific sectors makes it an actor that has a much higher level of involvement that other regional international organizations like for instance, the Association of Southeast Asian Nations (ASEAN), or bigger ones like the United Nations. Thence the role of international organizations will be very much dependant on each organization.

The second category is formed by what I have found in "supporters". The difference between this and the third category -that of "followers"- is their level of implication. While both have a direct involvement in the development of a particular norm securitizing migration, the first is more actively participating than the second, which is a mere interested part but without taking any major steps to influence the process. Falling between the two categories there can be actors like, for instance, the opposition of the government. I have specifically referred to extreme right-wing parties since these are the ones having a much clearer intention to securitize migration than those being on a leftist side. However, it will be very much country-dependant the role and implication of these parties according to the parliamentary representation they might possess. Other actors that could suit these two categories would be international organizations, private entities or even civil society. Again, the clash between groups can be more or less evident depending on the particular situation of the specific country. Private entities can be the very early promoters of a norm and can even participate in its design, which will be later on enforced by the state. The passing of responsibility from one actor to another and their level of involvement can then vary along the phases of construction of the norm.

In general, the role of civil society in the field of the securitization of migration is more likely to fall within the third category. Not because of the lack of presence of civil society organizations advocating for the rights of migrants, for instance, but because of their low level of implication in actively securitizing migration. Since most of these bodies try to defend the rights of the most vulnerable groups in society, they are not participating in the securitization of migration, but on the contrary, calling for the de-securitization of the sector. As in every case, there are civil society organizations in favour of securitization measures, and even though they are not political associations, they sometimes lean towards certain right-wing political parties. Whatever the case or their preference, the implication of civil society does not have such a relevant impact on the making of these laws and policies in the area of migration and security, which other players do in fact have.

From a different perspective, there are also the fourth and fifth categories, that of the persistent objector and general contenders, are characterized for having a more indirect involvement. I have found unnecessary to divide this indirect implication within high, medium and low since the nuance between them is not so strong. That is also the reason why I have also highlighted whether the implication of these actors is direct or indirect. With "direct" implication I am referring to the willingness take action in the securitization of migration. This can be due to a variety of reasons: to re-gain control over a specific area, to obtain economic benefits, to xenophobic or racist reasonings, etc. From the other hand, "indirect" implication refers to the impact of certain discourses or measures in the securitization of migration, even though it does not willingly want to achieve this end. Here, the different between the persistent objector and the general contender is that the first is, as the same word connotes, continuously disputing the measure, while the latter is only arguing against it during particular moments of the process and without as much intensity as the persistent objector.

Mass media is the clearest example of this case, since it does not actively participate in the approval of such measures, but some of its discourses indirectly contribute -and in many cases, very strongly- to the development of a negative perception of migration and creates a collective imaginary where migration is perceived as a threat. Mass

media can at times have a high level of implication while at others a much lower one, depending on the specific media outlet, its interests, its influence and its relationship with the government (depending, of course, on the form of government of the country).

Typology of actors	Intensity of involvement
First category (promoter)	Direct-High
Second category (supporter)	Direct-Medium
Third category (follower)	Direct-Low
Fourth category (persistent objector)	Indirect-High
Fifth category (general contenders)	Indirect-Low

These are the main actors taking part in drawing one direction or another to certain parts of the international political agenda. They are all responsible to some extent in the way we treat common global issues like climate change and sustainability, the protection of human rights and the fight against poverty, the development biotechnologies, dealing with international migration and providing international security. In tackling these and other issues, we need to be aware of the importance of international law as the source to find common ground and to establish basic rules while finding potential solutions. International law is essential in a globalized world, and that is why it is so crucial that the evolution of international norms and the processes to make them adapts to the changing conditions of today's international order. The debate around the international normative approximation of terrorism has demonstrated that it is key to be able to adapt to current international concerns, and the international community has at times shown its incapability to cope with the pressure to reach global and effective agreements on both migration and terrorism.

7.3. *How* are they doing it? Characteristics of the processes and outcomes

In the aftermath of the 9/11 attacks, the War on Terror started, and it was endorsed with the subsequent Madrid and London Bombings of 2004 and 2005 respectively. The involvement of defence companies to provide security to the citizens led to the development of technological innovations on the one side, and new legal instrument from the other. The narrow relationship between public and private interests - the first being represented by the state and regional bodies such as the EU, and the others by security and defence companies, lobbying consultancies, and other similar private actors- has tightened even more in the past years. But the question is how has this happened altogether?

As it has already been explained, there are several reasons why a government would like to re-gain control over a subject when it feels it has lost it, such as what happened during the refugee waves at the beginning of the refugee crisis. There are also several reasons why they want to refrain them from entering their territories, from economic, social to national security motives. The terrorist threat has been an important addendum seeking to further control migration, and terrorism has become the main priority in most national security agendas. Thence protecting from the terrorist threat has been put at the forefront of most national and international strategies. To reinforce this idea, security states have resorted to defence and security companies, and these have been astute in asserting their dominance in the field through their technical expert opinions in every negotiation process and by perpetuating the insecurity narrative about the figure of the migrant (Kumar, 2020). They have developed a wide and complex range of border technologies and perimeter security systems, communication and identification systems (aircrafts, drones, biometrics systems, command and control schemes, screening and scanning mechanisms, etc.), information technology systems, and other types of surveillance, tracking and tracing technologies to control goods, vessels, trucks, aircrafts, and peoples. These measures have in turn represented a change in national and international security policies. These companies have thence framed, shaped and entrenched militarized responses further contributing to securitizing migration (Davitti, 2019).

All these methods frame the migrant as a de-politicised and technologically manageable threat (Kumar, 2020), and instead of considering them as vulnerable groups seeking for a safe refuge and thus leaning towards the Refugee Convention, the migrant is seen as a security threat from which we have to protect ourselves. At the same time, if there is technological failure or inefficiency which leads to the death of migrants or to their entrance into Western territory, this is seen as a reason to reinforce security technologies and promote their further advancement. This also means that refugees will be more likely to take even more dangerous routes (Lutterbeck, 2006). As explained by Kumar (2020):

> *"We witness the emergence of a selective-mobility regime which, on the one hand, smoothly facilitates trade and tourism but simultaneously sorts and filters the illegal and illegitimate and severely shrinks the protection space on the other. This selective-mobility regime stands in contradiction to the protection space afforded by the Refugee Convention read along with other relevant treaties and conventions as it frames a refugee along the migration-security nexus who must be controlled, managed, categorised and sorted as "desirable" or "undesirable" (Bigo and Guild, 2005:234) making migration control a viable and profitable enterprise".*

The actors responsible of the reinforcement of security technologies and of constructing this particular view of the migrant have been by non-state, private actors. As we have already seen, they do not only provide resources, but also services of expertise which help shape new migratory and security frameworks. The proliferation of actors (public and private, national and international) involved in restrictive policy implementation has led to an externalization and privatization of migratory and border control management.

Liberal states have overcome certain constraints by including private, local, international and supranational agents which enlarge the migration playing field and make use of state functions. It is important to highlight that states can transfer such powers and responsibilities precisely because of how important it has become to the citizen to secure themselves from the terrorist threat and to secure the country

from external -immigrant- irruption in their society. Security is powerful enough to motivate voters to transfer the control of some of their basic rights and freedoms in exchange for a greater sense of security in front of the immigrant and terrorist threats. As argued by Lahav (2003) the control of this security can then be assigned to non-State actors in the name of law and order, and contractors from the private sphere like transport companies, health care services and shipping carriers among many others endure a privatization of the regulation in the sector. Private carriers and agencies become, in part, agents of the State while they are ensured business, trade and labour.

We already have an international legal framework tackling different aspects of migration, and not only is it interesting to analyse whether this structure has been ampliated, but to see what kind of sources have been incorporated. We need to keep in mind that although international migration law is fixed in customary and treaty law, soft law has also been used to develop material in this field. In the past years, many nonbinding instruments have been used to treat migration issues and foster international cooperation, showing how migration governance involves a variety of actors besides the state, at the international, regional, and bilateral levels (Chetail, 2017). Thence in the field of migration, different types of sources are used to construct the entire body of international migration law. The fact that legal instruments in this field is captured in treaty law, customary international law and soft law shows its heterogeneity and cross-cutting character. While positivism, expressing international norms in a written manner, seems fundamental to attain international actors to comply with certain basic norms, we must think of migration as a global phenomenon in an era when new ways to construct international norms are at play, thus in a time when migration law might also be subject to certain changes, even in the way it is constructed.

In regard to terrorism, there have also been international legal developments in the field, which have been especially emphasized more recently after 9/11. However, international law has long addressed terrorism. Boyle and Chinkin (2007:168-169) make a brief summary of the evolution of international instruments on terrorism. Holding that first references to the subject date back to the International Conference for the Unification of Penal Law after World War I. The League of Nations subsequently sought to suppress this

activity by setting up a committee of experts to draw up a convention (the 1937 Convention for the Prevention and Punishment of Terrorism), although this failed to come into force (Boyle and Chinkin, 2009: 3-4). Most of the earliest conventions on international terrorism were adopted by the International Civil Aviation Organization (ICAO) and International Maritime Organization (IMO), they were mostly focused on attacks on aircraft and ships in response to events occurred in the 1970s and 1980s. It was not until 1994 that the United Nations through its General Assembly started developing instruments on terrorism more broadly. The first instrument to be approved by the UN was the Declaration on Measures to Eliminate International Terrorism. Later on, an ad hoc committee to prepare the 1997 Convention for the Suppression of terrorist Bombings was adopted, as well as the 1999 Convention for the Suppression of the Financing of Terrorism and the 2005 Convention for the Suppression of Acts of Nuclear Terrorism. These are examples of the progressive legal development of international measures taken in regard to the terrorist threat.

Even so, these authors (2009:7-8) also stand that following the September 11 attacks in New York and Washington, the Security Council started taking more resolutions in relation to terrorism. First, by adopting Resolution 1373 of 28 September 2001 (S/RES/1373) which established a comprehensive approach to terrorism applicable to all states (although not defining terrorism as such). Many of the provisions of the Terrorist Financing Convention became obligatory upon all states and to this binding nature the Security Council set up the counter-Terrorism Committee, to ensure that states would comply with these provisions. What is more, Resolution 1373 required member states to change domestic law in order to fulfil the requirements established by this Resolution. Thence for the first time it attributed the capacity to the Security Council to require all UN member states to adapt domestic laws (Scheppele, 2010:440). Later on, with the Security Council Resolution 1540 of 28 April 2004 (S/RES/1540) on non-proliferation of weapons of mass destruction, new obligations were imposed. These are two examples of institutional responses which have imposed obligations on all states. From the one hand, they have reached their goals of being binding more quickly than through treaty-making processes, and from the other, they made everyone accountable regardless of whether they decide to join the document or not. Describing the evolution of terrorism-related instruments in the words of these authors (2007:8):

> *International legal responses to terrorism illustrates many facets of contemporary international law-making that are discussed throughout the book. It shows how international law evolves both rapidly in response to specific events and more slowly through policy deliberation. It also illustrates the diversity of law-making approaches that international law now offers and that the choice of*

process depends upon context, political preference and purpose. In addition assessment has to be made as to whether a particular process is law-making, or whether the outcomes of specific deliberations are moral or political recommendations rather than legally binding norms.

Interestingly, many countries adopted similar laws in a very short time reacting to the 9/11 attacks. For the first time in history, countries around the globe reacted to a particular event to protect from the same threat and fight global terrorism. Following a constructivist interpretation of international relations, it is only when states are involved in non-previously constituted situations (in other words, in new situations) that new practices can arise (Wendt, 1995). That is, there can be collective interactions that contribute to constituting new patterns. Global terrorism, or the terrorist threat, is an example of a new situation that states have had to confront by creating new practices internationally (Bello, 2017a).

In addition to this, we also count with faster ways to make legal reforms and respond to particular international threats (Scheppele, 2010). Comparative law has also had its part, and countries have been able to see the measures applied in other states, and "borrow" legal ideas from others (Epstein and Knight, 2003). These ideas and legal developments migrate in international space and despite having different legal and political systems, they can still be used and placed into another legal systems. As put by Scheppele (2010: 438) "Laws of different countries converge through the movement of legal ideas horizontally from one domestic legal system to another".

If we put together this willingness to learn from certain laws of other nations with the fact that after Resolution 1373 new international legal obligations arose, making binding global security law, we have now a more international approach to security law as ever before. This does not necessarily mean that a clear international response to terrorism exists, since all nations can still have different perspectives on the terrorist threat and may respond differently from one another. We have seen how some prioritize human rights while others play with the interaction between gaining control in detriment of basic rights. There is, then, a global response to terrorism, and there are, now, more common security legal practices across the globe. It remains to

be seen how these will evolve and whether they will end up designing an entire international security framework or not.

To summarize the complexities of the outcomes and processes associated with the securitization of migration I have developed a table in which there are four main strategic areas through which security and migration are brought together and a few examples for each of them. They all superpose one another to some extent, but here the strategies have been divided according to the area in which they are most focused in or centred. The first two have been widely explained, and we have already seen some of the measures related to both law and politics in Chapter 6. Thence it is crystal clear that the law and politics are critical in the securitization of migration, with their most common developments including norms and public policies, these being two of the most often outcomes. These are applied at the local, state, regional and international levels and involving a wide range of actors. On the other hand, we also have mentioned the importance of discourses in spreading this general view of the migrant as being necessarily connected with security. These discourses are usually given by actors who are part of the government, political parties, media outlets, etc. A fourth strategy is that related to security technologies. While migration is presented as a threat, reinforcing certain security technologies has become a justified strategy directed to protecting the citizen. And the citizen agrees to give up part of her privacy or free movement rights, for instance, in exchange of being ensured greater security. Overall, as we have seen, there has been a growing number of surveillance mechanisms and other security related technology developments to further control foreign nationals and the citizens within the territorial borders of a country, and a region. In the following table these categories have been divided including some examples which have been picked and classified as being part of a particular strategic area to securitize migration[84].

Strategies	**Examples**

[84] For more detailed information of each of the measures specified, please take a look at Chapter 6.

Centred in the law	USA Patriot Act of 2001 (United States); Anti-terrorism, crime and security Act (ATCSA) of 2001 (United Kingdom); Immigration Act No. 1154 of 2002 (Indonesia)
Centred in public policy	Operation Sovereign Borders (Australia); EUNAVFOR Sophia (European Union)
Centred in discourse	Discourses given by political parties such as the National Rally (France); Discourse by Korwin-Mikke, leader of the KORWIN party in 2015 (Poland); publications by the New Zealand Herald (New Zealand)
Centred in security technologies	Project Seabilla (an EU-funded research project related to border surveillance conducted by Leonardo S.p.A in 2016);[85] CLOSEYE (EU project to advance in the technological control of external maritime border surveillance); Scenario Based Targeting System (a Canadian system which uses algorithms to assess individuals' levels of risk); Trusted and traveler programs including biometric entry/exit systems such as Hong Kong's e-channel, Germany's Easypass and USA's Global Entry.

These are just a hand pick of examples of different strategies that can be found worldwide securitizing migration. As we have seen, the result of the process of securitizing migration, in practice, is the

[85] European Commission, 'EU Research for a Secure Society' (2016), pp.304–305. Accessed at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/industry-for-security/docs/security_research_fp7_catalogue_part1_en.pdf

creation of new laws and policies, and their reform. In Chapter 6 we have seen very clearly how nations have passed legislation and public policies tackling migration from a national security perspective. We have seen how Canada created a new class of "Designated Foreign Nationals" to mandate discretionary detention without a warrant to those migrants arriving by sea[86]. We have heard discourses in the US targeting refugees as potential terrorists posing a threat to national security in order to present the entrance of undocumented migrants. In the UK, the 1971 Immigration Act provided deportation powers on national security grounds, but with the approval of the Anti-terrorism, crime and security Act (ATCSA) of 2001, the government increased its powers to detain foreign nationals indefinitely and without charge or trial if this person was suspected of being a terrorist. A connection between national security -terrorism, in this case- and migration was more tightly established. In Europe, after the adoption of the 1990 Schengen Agreements, the 1992 Maastrich Treaty and the 1997 Treaty of Amsterdam the distinction between internal and external security disappeared, and it became harder to tell when there was one or another. Furthermore, the ways followed by the EU to develop border control have put immigration at as a threat requiring security response. Both in theory and practice, the EU has connected security to migration more often than not. And these are just a few of the many examples out there linking migration to national security. These national and regional frameworks can give rise to an international global response towards terrorism and migration altogether, they can be the base to set up an international framework on security which departs from the securitization of a particular group, with the negative impact that this can cause to migrants and, more particularly, to even more vulnerable groups like refugees.

7.4. *Which* are the effects of these norms? The global consequences of framing security and migration

In Chapter 6 we explored the consequences that securitizing migration could have on migration, and specially on particularly vulnerable groups such as that of refugees. While some social consequences will also be explored here, the main idea is to highlight the legal and political effects that norms and policies framing migration from a

[86] See page 186 of Chapter 6

security perspective can cause on these groups. The perception of migration as a threat has brought the figure of the migrant -and specially those categorized as irregular or undocumented migrants- at the forefront of many national security agendas as they are seen as a contemporary security "problem". And even though many destination countries have tried to establish measures to prevent them from entering their territory, these policies have not resulted in a lesser number of arrivals. On the contrary, the effect they have caused has been in the detriment of the situation of these peoples, who have seen their human security unprotected in detriment of the national security where they are trying to seek for a safe haven. These and other related themes will be the main topic of this chapter.

Starting with this rejectionist perception of migration, which considers the migrant as a threat associates it with security is not directed to all migrant groups uniformly. Most of the times, when we talk about migration as a security threat we are referring to particular groups of migrants, those known as irregular or illegal migrants. However, some have also thrown in refugees due to the large numbers of international refugees crossing borders and collapsing national asylum systems of Western states. As it has been repeatedly stated in previous pages, the link between migration and national security has been intensified in periods of economic recession or when terrorist attacks have taken place and one or more of the attackers were of migrant origin. This has led to strengthening border which are no longer a method of defence and protection from enemies but has also become a symbolic frontier separating "us" from "the others" (Da Sousa Santos, 2000; Ferrero, 2017:56). It has internationalized border issues leading to international cooperation measures of exchange of information, identification and surveillance. What used to be addressed through national policies has now become feasible outside of the regular state jurisdiction through international cooperation between states in order to increase their own national security but also international security as a whole.

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. Under a human security approach, it puts even more obstacles to these peoples in search for protection. It will thence become impossible to sustain

mechanisms securitizing migration without harming the security of the migrant. These authors further argue that if providing a framework which responds to the causes of migration instead of their control at the destination country would be helpful to find more rational and humane solutions. In consequence, we should be thinking of strategies that seek to buttress local economies so that people have economic opportunities in their countries of origin and pressuring governments to protect human rights to maximize freedom of opportunity. Instead of being forced to flee, we should make sure that people can exercise their most basic rights and find opportunities in their countries.

Contrary to what some appear to believe, establishing prohibitions and restrictions to migration does not increase national security. A rejectionist approach to refugees causes more damage than the good to national security it seeks to achieve. As explained by Massimino (2017), "ISIS is already exploiting hostility to refugees and other Muslins, using it to validate its clash-of-civilizations narrative". Refugees are pictured to be threats to safety and to be going against European and Western values. 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 presentation of refugees as a threat 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. In reality, the increasing numbers of ultra-right nationalist parties and groups and of their supporters in Europe poses an existential threat to European democracies and to the European Union (Massimino, 2017).

Furthermore, governments and regional bodies -and this is especially clear in the case of the European Union- have shifted the burden to deal with forced migration towards non-state actors in order 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). What is more, the administrative routines followed by destination countries, and this is especially clear in the EU case, have added up to this negative perception of the migrant. The EU establishes that asylum seekers need to prove their status of refugee, otherwise they will be expulsed from European territory (European Parliament, 2015). As exposed by

Bello (2017b:61), the fact that many citizens witness the arrival, detention and expulsion of these peoples increases prejudice since it is only with the presence of long-term migrants that positive attitudes increase towards newcomers. Short-term migrants and return migration, on the contrary, do not contribute to improving this image. The EU administrative approach to deal with the arrival of asylum seekers is thence not helping towards the integration of migrants in general and, in fact, becomes another setback that derives into increasing this negative perception of migration overall.

We seem to have forgotten that it is not only important to protect the security of the nation as a whole (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, 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. Sadly, a big number of states have gone for this approximation. This has aggravated the situation of immigrants and particularly that of refugees, which have had to search for new and more dangerous routes to reach Western shores, but it has also reinforced a negative perception of migration by nationals of destination countries. It is important to be aware of this antipathetic perception of immigration since many have associated social, economic and cultural worries with them, and as a result, we have seen rising discrimination and xenophobic rates, a growth of extremist

right-wing parties, more restrictive and/or anti-immigration policies, greater difficulties for the integration of migrants, and a more segmented society. As a consequence, what these securitization measures are seeking altogether is not achieved since migrants have not ceased to arrive to Western land. But what is more, they are now facing more risks during their journeys to escape stricter border controls through the market of irregular crossings, such as those in charge of smugglers and human traffickers.

At the beginning of this chapter, we were wondering why are we dealing with migration -and refugees- the way we are doing it today in relation to the values seeking to be protected. Is it because international security threats have changed? Is it because the way we perceive these threats? Is it because of this sovereignty perspective related to national security versus the human security one? Is it because of the hidden interests that lie behind the securitization of certain issues such as the implication of interests of private actors in the field of security and defence? Or is it because of a change of direction of the international order?

As discussed in Chapter 1, in recent scholarly debates many have talked about the current international order being in crisis and about the possibility of a new one emerging. With Western liberal values and through the growing impact of globalization we leaned towards a world of international relations based on cosmopolitanism. However, globalization has also increased inequalities across the globe, and new rising actors such as China have been pushing to place their interests at the forefront of the international agenda. And even though the Trump administration came to an end in November 2020, his entrance into the White House and his four years of presidency also meant a crack of this international liberal order while establishing policies based on unilateralism. Altogether, it seems as if we are facing a change of the current international order towards one based on the previous modern Westphalian model. Is there really a comeback of Westphalia or will those calling on Cosmopolitanism manage to keep the design of the international order as it is?

While this question is still unanswered, it is important to keep in mind these changes in the international sphere as they have had a great impact on the way we understand international law and the way global norms are created today. As it has been more extensively developed in

Chapter 2, and as we have seen in this chapter, in the process of international law-making there are new actors implicated. It is not a matter of states alone or of international organizations anymore, but civil society and private actors have a huge impact in the design of new norms. 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, in part due to the continuous changes that the international order is facing, and in part due to the impact of globalization and of the rapid technological advances which have led to a continuous renovation of the way international norms are made and are understood. A change in the way we recognize and accept law to be has very much had to change from the previous statical classical theorization of international law.

These changes, and this comeback of Westphalia have also resulted in changes in the ways we understand subjects like security and migration. A centralization of measures and laws securitizing migration have shown that there is an international -even though not necessarily established everywhere or at the same degree- move towards treating migration through security measures, including laws and policies. Migration is at many national security agendas, and it has also become an international focus, with regional bodies such as the European Union increasing reinforcing borders to control the entrance of migrants.

This change of direction along with the setback in global governance that we have been witnessing in the past years in relation to other issues such as those related to climate change, the Brexit and the period in power of ex-President Trump in the United States have become a turning point in the way states address global issues. As argued by Bello (2017), these events are proof that the solution of migration-related issues cannot be found in the rejection of global dynamics, but instead we should see migration as one of the many issues resulting from the poor governance of economic globalization. As a consequence, she supports that global governance should be oriented towards politics of social protection so that societies can feel safe again.

7.5. *Where* can we find these norms? The diffusion of norms securitizing migration

Departing from the previous sections where we have seen how there are different actors, processes and reasons securitizing migration, we have seen that this is no longer a unique or rare practice, but it has instead become quite usual in certain contexts, countries and regions. If it has spread to different places throughout the globe, it is interesting to see why and to what extent these norms on security and migration have been diffused. Has there been a diffusion of norms securitizing migration and if so, to what extent and why have them spread to different countries with different characteristics and probably, different interests? Have these norms been applied very similarly, or have they taken different forms depending on the context they are being applied?

States are influenced by their external environment (Jörgens, 2004:257). That is, states and their legal developments are in part a result of transnational influences. In today's globalized world, sometimes the line separating states and their legal frameworks blurs, and while they all have their legal systems existing independently from one another, they influence each other continuously as the fluctuation of information spreads very rapidly and can be accessed almost instantly across the globe. It is even easier to share certain views of a particular conflict when the problem is shared, and even more when the countries are part of the same region.

Thus if we think of migration or terrorism as a common concern, it is likely that we turn to other nations to see how they have handled similar issues, we may want to cooperate to find a common and more effective solution. And we even might develop norms to regulate threats and acts on these matters. Norms which can affect other nations, be duplicated or imitated by them, or that can even emerge and become part of the international legal system spiralling from these precursory national outcomes. Norm diffusion is, as it has been explained in the previous chapter, a process of imitation or learning (Simmons and Elkins, 2003), and it occurs in the absence of a formal obligation (Jörgens, 2004:252). It is a process which facilitates adopting new norms and which favours new policies since they are already in place in other countries, meaning that one is able to see the

success and consequences of their application elsewhere. Norm diffusion becomes evident through the accumulation of individual cases of imitation of the same policy or norm.

Dembinski and Schott (2014) offer a particular view of norm diffusion in which they emphasize the importance of "regional security arrangements", using as examples the cases of the European Security and Defence Policy and the Africa Peace and Security Architecture in relation to the Responsibility to Protect. These authors argue that regional security arrangements are based on each regions' security culture, these being "patterns of agreed statements and established practices carried out by a given regional security organization which define the role, legitimacy and efficacy of particular approaches to protecting values" (Dembinski and Schott, 2014:364). Their idea is that regional security arrangements play a major role in modifying global norms into the local level. There are three main ways to exert the influence of these regional arrangements. Firstly, they shape the reception of emerging global norms at the regional and national level in an *outside-in* transmission process. Secondly, the can opt to reject the global norm through an *inside-out* process of dismissal. And thirdly, and adding the contribution of Amitav Acharya (2009), there can also be a localization of norms, that is, modifying them to make them more adaptable to the local context, instead of just accepting or rejecting them. This is what he calls *pruning*. Evidently, the success of these processes will very much depend on norm entrepreneurs (international institutions, states, civil society organizations…) who will, according to the way they involve themselves into norm-shaping and according to their transnational networks and international support, will be more or less likely to accept a norm and, if necessary, adapt it to the particular area where it wants to be integrated.

This perspective might be useful to further contribute to that of the established life cycle of norms. Instead of seeing the diffusion and internalization of norms as a patterned process, we should consider them as a still evolving process through which norms are adapted to the particular local and regional situation of the country. The norm might be contested, or not, within the region, or within the nation. Thence we should no longer see the life cycle of norms and the process of diffusion as being static, but it is a dynamic and context-depending one instead. This actually recalls the work of Prantl and Nakano (2011) previously exposed in Chapter 2, where they argue that

the process of diffusion looks like a "feedback loop", with global norms being reconstructed and deconstructed to be adapted to the national sphere through feedback and self-correction mechanisms.

And what is exactly this national or regional context that will ultimately accept, reject or adapt the global norm? There are a series of elements defining the conditions under which a norm will be integrated within a national's legal framework. Among them, we can think of the values and interests of the particular country -or even government of the country-; its long-standing social values and beliefs; its geographical situation; its historic past and, of course; its present, including recent events that might have taken place and disrupted the normal functioning of the country, may there be related to national security (i.e. terrorist attack), economic stability (i.e. economic crisis), or any other. I have divided all of these factors in three major categories: those related to the values and beliefs of the country; those related to its historic past; and those concerning more recent events and/or the current situation of the country.

When dealing with the first category, I make reference to those countries in which, for instance, religious beliefs might become a barrier to accept a particular global norm. This is also the case of those states who do not want to diminish the rights of their citizens embedded in their legal systems to favour a norm focusing on particular aspects of security. Or even the case of those who have more directly attacked particular religious or ethnic groups because of the widening of immigration, because of the origin of major criminal offenses, or other similarly applicable situations. An example would be that of Western countries who have seen growing number of arrivals of immigrants from Muslim origin and in order to prevent them from entering their countries, they have publicly and continuously tackled immigrant groups of Muslim origin and dealt with them as a security issue. Wolffe and Moorhead (2016:23) summarize this in a clear and thoughtful way:

> *"Like 'religion', 'security' also proved to be in many ways an ambiguous and contested concept. It should first be noted that the issues raised in the previous two sections have substantial implicit relevance, given that perceptions that 'religion' is a threat to 'security' are often rooted in partial, polemical and Western-centric understandings of its character and significance. An obvious example is the drawing of a simplistic connection between Islamic belief and the radical and violent actions of a small minority of Muslims, a perception that fuels Western Islamophobia, which in turn stimulates Islamism in the*

> *Muslim world. In these polarised constructions of the religious 'other' lie perceptions of substantial threats to global security."*

In relation to the second category, here we can find countries that because of their historical past are resentful to integrate certain security norms within their national legal systems. Historical experiences can foster a security culture within a country or region hindering the integration of foreign normative initiatives. African states, for instance, have a security culture of non-interference regarding external actors. This is due to their past colonization experience, which has left Africans overtired of outside interventions (Dembinski and Schott, 2014:371-372).

And third but not least, recent events also define the willingness of a country to enact certain security norms that would have otherwise not been applied before. The clearest example is that of terrorist attacks which, as we have seen, have unchained a series of legal developments nationally and internationally to protect from the terrorist threat. Some of these norms would not have been applied should not these events had taken place, since at times some basic rights and freedoms have as a consequence been diminished (i.e. freedom of movement, privacy rights, etc.). Interestingly, if these events had not occurred, these laws would not have been passed since they would have conflicted with the first category, that related to the values and beliefs of the country, which would include the importance of the protection of certain values and rights.

In the next chapters, we will analyse two legal instruments trying to plasm the answers of each of this chapter's section to see what, who, how, when, where and why these norms have been developed. This will also help us solve the question of whether norms securitizing migration have been extensively developed at the global level and to what extent they have influenced or been influenced by other national, regional or international regulations. All in all, this will be useful to study where these norms stand in their life cycle, what journey they have followed and, what is more, what their main consequences have or can be.

Once we have established the theory and practice of the securitization of migration and built a solid foundation on the theory and current debates on international norm-making, in the next chapters I will

focus on specific norms bringing together one subject matter to the other. Thence in the following chapters I will analyse different type of legal sources to deepen in the making of norms securitizing migration and to determine whether the securitization of migration is a well-established practice that has firmly landed into different legal frameworks around the world and, if so, at what stage these developments are found at the moment.

To offer an international perspective, I have selected the sources from South Africa, the European Union and the United States. This selection will be useful to analyse the cases of countries/organizations in a different stage. As indicated in Chapter 4, a division between states in a preliminary, intermediate, and advanced stage was framed, and some of the examples of states at these stages were the cases of these three international actors. Thence to study the situation of the development of norms on the securitization of migration, it will be interesting to see the scenario of South Africa as a state in a preliminary stage, that of the EU as an intermediate stage, and the one of the US as an advanced one. Moreover, the European Union will offer an insight of an international organization, which can in turn influence the creation of new norms or the modification of existing ones of Member States.

The cases of the EU and the United States, being powerful actors in today's international order, will contribute to providing a more definite approach since the recompilation of information on the debates preceding the creation of these norms and their subsequent evolution will be more accurate due to the higher amount of sources that can be found from them. South Africa, from its side, will be a good example of a developing country of a major economic and political power within Africa, and thus amplifying the geographic scope of analysis of this research by studying cases from three different regions and continents in the world.

For each of these actors, there has been a selection of different legal and policy sources which will hopefully positively add to the analysis of the situation of the international securitization of migration and therefore determine whether there are any existing patterns nationally which can contribute to affirming that new norms or frameworks are emerging and being shaped internationally.

PART III:

CASE STUDIES OF THE SECURITIZATION OF MIGRATION

CHAPTER 8
SECURITIZING MIGRATION IN THE EUROPEAN UNION

In the case of the European Union, one of the main instruments dealing with migration, and which will also serve as a good example of a measure securitizing migration, is the Return Directive 2008/115/EC. This chapter starts with an exhaustive exploration of this Directive -both the first text and the recast approved in 2018- and its most contentious parts. In the second part, an analysis of the overall initiatives which have been approved at the EU level will follow. This will be useful to provide a global overview of some of the measures approved, their impact in the external dimension of EU policy. This will, in turn, be useful to show the direction taken by the EU when dealing with migration and provide a more accurate picture of securitization of migration in the region and see the extent to which these measures have affected the migrant population.

8.1. The Return Directive 2008/115/EC

The Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter Return Directive) was approved in June 2008 by the European Parliament under the co-decision procedure by 369 votes to 197 and 106 abstentions. The main purpose of the Directive is to lay down a set of rules and procedures for all Member States on the return of illegal immigrants within the Union. Although every state can still decide whether it wishes to regularise or deport an immigrant found within its territory, the goal of this EU legislation is to be applied once this decision has been taken to establish periods of custody, re-entry bans, and other similar regularisations. For the first time at EU level, the Directive established mandatory return decisions, the preference for voluntary return, the mandatory issuance of entry bans along with return decisions, procedural safeguards in these processes, and grounds for pre-removal detention (European Parliament, 2019). Let's see in more detail each of these requirements.

The Directive states that once the decision to deport an individual has been adopted, there is first a voluntary departure period from seven to thirty days in which, if the deportee does not leave the country, a removal order will be issued. If this order is issued by a judicial authority which believes that the individual might abscond, the person can be placed in custody for a maximum period of six months, extendable by a further of twelve months. In addition to this, if the person does not leave the country during the voluntary period, she can then be forbidden to entry for up to five years, or longer if she presents a threat to public safety.

It took three years to agree on the text, a fact showing how complex the negotiations were. Some of the contentious parts of the Directive concerned the personal scope of the directive, the period of voluntary departure, re-entry bans, detention, procedural rights and the situation of children (European Parliament, 2020). It is interesting to highlight in this sense that the United Kingdom and Ireland have not opted-in into this area of EU law and have preferred to do the same when it comes to the enforcement of this Directive. In the case of the United Kingdom, for instance, arguing that the Directive does not establish a sufficiently strong returns regime (European Parliament, 2008a).

According to the Slovenian Interior Minister Dragutin Mate speaking on behalf of the Council Presidency-in-Office, the part which was more difficult to agree on was that on legal aid, as there was a multiplicity of views depending on whether states were near to or far from migratory flows. The diversity of political positions and the debate surrounding the text becomes clearer when seeing the opinion of the representatives of different political groups. While the European People's Party (EPP-ED) supported the Directive and considered it a "firm and decisive step", others like the Party of European Socialists (PES) argued against it because it did not offer adequate human rights protection, or according to Greens/EFA group[87], the established periods of detention were too long and could harm the mental health of detainees (European Parliament, 2008b).

Other groups have also manifested against it. Hélène Goudin, of Independence/Democracy (IND/DEM) said that "the EU is becoming a Fortress Europe (…) The result of this ban or return will

[87] This group is made up of Green, European Free Alliance, Pirate, independent, ecological and animal welfare members of the European Parliament.

lead to an increase in illegal immigration, more human trafficking and a hatred for the system we are setting up in our western world". Giusto Catania, speaking on behalf of the European United Left/Nordic Green Left (GUE, NGL) made much tougher declarations (European Parliament, 2008b):

> *"The directive is a disgrace, an insult which aims at ruling out thousands of years of welcoming people, of openness in Europe. It seeks to limit free circulation. We are talking about 18 months not 6 months detention without having committed any crime. Detained in degrading and humiliating conditions as the Committee has seen in various detention centers. This directive is being forced upon us by Governments (…) There is a need to consult wider. People are dying to get into the EU, 12,000 have died over recent years. The Mediterranean is becoming a cemetery. We should not approve this directive".*

As Kilpatrick (2019) points out, the same introduction of the legislative text was highly controversial since it introduced very low standards governing the removal of migrants. Debates over the text emerged from the very beginning, with a compilation of signatures from more than 600 NGOs advocating for a stronger protection to the human rights of migrants during the same year the norm came into force. The Platform for International Cooperation on Undocumented Migrants (PICUM) even argued in its 2015 report that "the directive fail to establish a principled policy on return which fully respects migrants' dignity and human rights" adding that "references to human rights in the text are vague and mostly limited to the introduction" (Manieri and LeVoy, 2015:4).

Looking in more detail the reasons why the Return Directive has been so widely criticised we see that, as mentioned above, the detention period of third-country nationals is of 6 months but can be extended for up to a maximum of 18 months. This has meant that some countries have decided to change their national law to increase their previous period of detention. This is the case of France which, after the approval of the Return Directive, extended its maximum length of detention of 32 days to a maximum of 45 days after passing Law No. 2003-1119 of 26 November 2003[88]. A similar case is that of Italy,

which also extended this custody interval to twelve months in application of the Return Directive, but later on in 2014 moved back to a 90 day period[89] (Manieri and LeVoy, 2015:5). We must keep in mind the text of the Directive states that going beyond the six-month period is only an option foreseen for exceptional cases. And in addition to that, the EU Court of Justice has clarified that these detentions are limited only to instances where immigrants are awaiting repatriation[90]. Thence while the length of the period of detention has been questioned by many human rights organizations, this period has then been used by Member States to justify amplifying the time of custody of their national laws.

With regard to detention, there are additional grounds for detention relating to public order by Article 18(1)(c) and considering also the risk of absconding (Article 6). Member State have used the latter to implement an open-ended list of "objective criteria" through which it was rather easy to find a justification for detention. Judicial dialogue has contributed to narrowing down these lists and ensuring that each case is studied individually and based on substantial grounds, being insufficient the mere fact of illegal stay. For instance, criminal records cannot automatically lead to a risk of absconding but there has to be proof that it can lead to such risk (Cornelisse, 2020).

In 2016, a new Partnership Framework was approved by the Commission in accordance with the European Agenda on Migration, seeking to cooperate with third countries to ensure effective returns based on readmission agreements. These agreements were signed with countries like Gambia, Bangladesh, Turkey, Ethiopia, Afghanistan, Guinea and Ivory Coast. However, these deals were concluded "in the complete absence of a duly parliamentary scrutiny and democratic oversight (…) [that would] ensure appropriate monitoring through the establishment of legally binding frameworks for cooperation, which can be challenged before courts" (Sargentini 2019:86) and "in the

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[88] Law 2011-672 of June 16, 2011, on Immigration, Integration and Nationality, published in the country's official gazette on June 17, 2011 (Loi n. 2011-672 du 16 juin 2011 relative à l'immigration, à l'intégration et à la nationalié)

[89] This happened after the approval of Law 30 ottobre 2014, n. 161, "Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea - Legge europea 2013-bis", (14G00174) (GU Serie Generale n.261 del 10-11-2014- Suppl. Ordinario n.83)

[90] Case C-357/09 PPU Said Shamilovich Kadzoev (Huchbarov) v. Bulgaria

complete absence of duly parliamentary scrutiny and democratic and judicial oversight" (Strik, 2020:7).

In 2017, a Commission Recommendation called for a stricter interpretation of the Return Directive and urged states to harmonise their approaches on the return of third-country nationals[91]. While different human rights organizations again tried to make the Commission take a step back, the following year the Commission proposed a new Return Directive to turn these recommendations into law (Kilpatrick, 2019). Later on, in September 2018 the European Commission proposed a few amendments to the Return Directive. This Proposal has been criticized for "betraying a shift in the EU's immigration agenda by prioritizing speedy returns, increasing possibilities for the use of pre-removal detention, and limiting judicial scrutiny, thus overlooking important human rights and procedural guarantees developed by European and domestic courts (Moraru, Cornelisse and De Bruycker, 2020). In reaction to the Commission's Proposal, and not having this one conduced an impact assessment, the European Parliament issued a draft Report in early 2019. However, since parliamentary elections were taking place that same year the report was never submitted for voting in plenary. Thence a later report was issued a year later, but it was not then submitted in plenary because of the COVID-19 pandemic crisis (Cornelisse, 2020).

8.1.1. The *new* Return Directive 2018/0329/(COD)

On 12 September 2018, the commission published a recast proposal of the Return Directive[92] arguing that it needed to "notably reduce the length of return procedures, secure a better link between asylum and return procedures and ensure a more effective use of measures to prevent absconding"[93]. However, and as it has been widely criticised,

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[91] *See* Commission Recommendation C(2017) 6505 of 27.9.2017 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks

[92] Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018 COM/2018/634 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0634:FIN

the proposed recast did not come accompanied by a Commission's impact assessment that would justify any of the changes and additions of the new proposed version of the text. Considering this as the latest version of the Return Directive, I find interesting to study in more detail the controversies it has arisen and the reasons behind them. Doing an analysis on the most contentious Articles of the new Return Directive seems appropriate at this point, thus an exploration of the most debatable topics of the Directive will be analysed as follows.

8.1.1.a. Risk of absconding

In Article 6 there are sixteen grounds for Member States used to justify detention, and the identification of one of them automatically leads to the surmise of risk of absconding.

Frontex also participated in the negotiations by submitting a non-paper in January 2019, arguing in favour of the proposal and noting that this would further facilitate the agency's tasks. However, as Kilpatrick (2019:6) highlights, "it approaches the Directive from a clear position that coercion, rather than cooperation, is the preferable route to ensure more effective returns". For example, on the risk of absconding (Article 6) Frontex argued that "the increased number of conditions to identify the risk of absconding is assumed to lead to a higher number of detention cases" which would in turn "increase both the number of returnees identified and those taking part in return operations". Arguing that around 44 to 57% did not show up on the day of the identification if they were not detainees, having them in detention while the documentation process is concluded would certainly benefit the return operations (Frontex, 2019).

However, in the draft report of the Rapporteur Judith Sargentini in behalf of the Committee on Civil Liberties, Justice and Home Affairs, she argued that this long list of criteria proposed by the Commission includes almost all irregularly staying third-country nationals, meaning that the assessment of the risk of absconding can very likely result in the automatic use of detention measures and compromise the principles of proportionality and necessity (Sargentini, 2019:44).

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[93] European Commission, COM(2018) 634, explanatory memorandum, 12 September 2018, p. 2.

8.1.1.b. Obligation to cooperate

This obligation embodied in Article 7 is a new addition to the proposal given by the Commission, consisting in individuals having to cooperate with the return procedures being held against them. The consequences of not fulfilling such obligation are not specified. However, according to the list of Article 6, failing to cooperate would be one of the criteria to be considered when assessing the risk of absconding.

Sargentini proposes an amendment in her report on not *obliging* them, but to instead "facilitate cooperation between persons facing return procedures". Moreover, she further argues that Member States should at all stages make sure to inform third-country nationals in a language they understand and in a "concise, transparent, intelligible and easily accessible form" (Sargetini, 2019:45).

8.1.1.c. Return decision

A troubled part of Article 8 is that relating to the moment after a decision not to grant a third-country national refugee status is made. According to the proposal of Article 8(c), after this decision has been made, a return decision must be made also immediately after. Sargentini (2019:51), argues that this obligation to issue a return decision so rapidly is "disproportionate and counterproductive" and that an amendment to ensure that the rights enshrined in Article 47of the EU Charter of Fundamental Rights should be made. Let's remember that the right to asylum, the principle of non-refoulement, the right to an effective remedy but also the right for private and family life are to be protected and would be endangered if the proposal was left as suggested. Imposing an obligation to issue a return decision immediately after the adoption of a negative decision on an asylum application would "create unnecessary legal ambiguity as regard the asylum seeker's legal status pending an appeal or during the time period for lodging an appeal". She further argues that issuing a return decision would determine that the immigrant is on an irregular status and while she would still have the right according to international protection standards to remain in the country during the time of the appeal procedure -which, very often, are lengthy

processes-, this Article would create confusion on whether she is in fact an irregular migrant or not, what her status then is, and about her right to remain on the territory.

The Greek Ombudsman stated that there is no adequate information offered to third-country nationals about return procedures while they are detained in Greek island hotspots. The fact that no one informs them of their rights means that many do not even consider challenging negative asylum decisions, which in turn leads them to a return order (Kilpatrick, 2019).

8.1.1.d. Voluntary departure and entry bans

One of the changes in Article 9 on voluntary departure refers to the minimum length of time an individual can stay in the country before he is forced to return. While there used to be a 7-day minimum, the Commission's proposal reframes this obligation to establish instead a 30-day maximum period for voluntary departure. While Member States are free to establish a minimum period in their national laws which some may use to extend to longer time frames beyond the seven days, it can also be the case of some states to decide to establish this period to one or two days if they prefer, making it difficult for individuals to arrange their own voluntary departure. That is why Sargentini clarifies that the text should instead persuade states to establish a minimum of at least to fifteen days for voluntary departure, thus not granting a voluntary departure period might make it difficult for them to comply with this voluntary return before coercive measures are applied and thence "undermine the primacy of voluntary return over forced return" (Sargentini, 2019:53).

Civil society organizations have reported that Member States do not comply with the provisions established in this Article. In Spain, for instance, it has been denounced that voluntary return is not complied with, most immigrants being subject to executive return orders having had no prior time nor option of voluntary return (Manzanedo et al, 2013).

Furthermore, the Council's version of Article 13 on entry bans increases the length of entry bans from five to ten years. And what is more, "if the their-country national represents a serious threat to

public order, public security or national security", this period could even surpass the ten years. Imposing lengthy re-entry bans on migrants contributes to the logic of criminalising migration. Thus instead of establishing long periods forbidding them to re-enter the country, reviews of each case individually should be made in order to establish an appropriate period of time according to the particular case and reasons lying behind her expulsion.

8.1.1.e. Detention

The proposal also introduces new grounds for detention. While the Return Directive stated that Member States could only keep in detention immigrants in cases of risk of absconding or when "the third-country national concerned avoids or hampers the preparation of return or the removal process", the new text would include in Article 18 cases when this person "poses a risk to public policy, public security or national security". This is a rather ambiguous legitimation of detention since depending on the interpretation authorities give to a particular situation, this can more easily fall within one of these situations and thence the probability of finding sufficient grounds for detaining a person will likely increase.

The proposal has been reinforced by a July 2019 CJEU judgment where the court ruled that the interpretation of this addition relating to third-country nationals posing a threat to public public order counts with a big margin of appreciation since authorities "are not obliged to justify that the personal conduct of such national constitutes a real, actual and sufficiently grave threat affecting a fundamental interest in society". Thence the mere existence of a suspicion that a third-country national has committed a crime threatening public order can be sufficient grounds justifying that this person can be considered a risk[94].

In addition to this, the Commission's proposal would also change the minimum period of detention, preventing states from setting a maximum period of detention of less than three months. This would

[94] Conclusiones del Abogado General Sr. Giovanni Pitruzella, Case C-380/18. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=216086&pageIndex=0&doclang=ES&mode=req&dir=&occ=first&part=1&cid=2599777

mean that countries like Spain and Portugal would have to extend their time limits of detention since they were established at 60 days (Kilpatrick, 2019).

Furthermore, countries like Spain are using detention as a primary measure instead of applying it "unless other sufficient but less coercive measures can be applied effectively in a specific case". As reported by Pueblos Unidos (Manzanedo et al, 2013), none of the alternative measures to detention are applied nor by the police nor by judicial authorities. While Spanish Immigration Law establishes measures like periodically reporting to authorities, residing obligatorily in a particular place, passport withdrawal, or any other measure that the judge of the case might find appropriate, authorities nevertheless continue resorting to detention as a priority measure.

As Manieri and LeVoy (2015:28) have pointed out, "the use of detention for migration purposes involves the deprivation of liberty for the administrative convenience of States and has a very detrimental impact on migrants' human rights, particularly on children and their families" thence they strongly suggest that alternatives to detention should be promoted and adopted in accordance with the Return Directive. The United Nations High Commissioner for Refugees (UNHCR) and the Office of the High Commissioner for Human Rights (OHCHR) organized the first Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons in 2011. Non-suprisingly, the main conclusions made reference to finding alternatives to detention. Arguing that "there is no empirical evidence that detention deters irregular migration, or discourages persons from seeking asylum" and that "seeking asylum is not a criminal act and asylum-seekers should not, as a consequence, be penalized for the act of seeking asylum through detention", these experts argued that imposing penal sanctions to persons who have not committed a crime bestows to criminalizing immigration (OHCHR-UNHCR, 2011).

In addition to this, Article 20 -which used to be Article 17 in the first text- also refers to detention and, in this case, deals with the detention of minors and families. This Article states in its first paragraph that "Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time". Nevertheless, even though as a last resort measure,

allowing the detention of children breaches the UN Convention on the Rights of the Child since regardless of their situation, detaining them because of their migratory status or that of their parents breaches the principle of the best interest of the child and it is never justifiable or in their best interest[95]. Furthermore, as established in Abdullahi Elmi and Aweys Abubakar v. Malta, parents or legal or customary primary caregivers should also not be detained to protect the best interest of the child[96]. Despite the limitations established in the Directive, 17 Member States have detained unaccompanied children and 19 have detained families with children (Manieri and LeVoy, 2015).

8.1.1.f. Border procedure

Chapter V is dedicated to border procedure. In Article 22, the Commission proposes that once a decision rejecting an application for international protection taken by virtue of Article 41 of the Asylum Procedures Regulation, there will be no voluntary departure period. In paragraph 4, it is established that only those "holding a valid travel document and fulfilling the obligation to cooperate with the competent authorities of the Member States at all stages of the return procedure" may be granted "an appropriate period for voluntary departure". Furthermore, the following paragraph also states that a period of maximum 48 hours can be granted to appeal against the aforementioned return decision. Paragraph (c) adds that this period will only be suspended if there is a risk of breaking the principle of non-refoulement.

This part of the proposal was highly controversial among Member States. In October 2018, the Austrian Presidency of the Council said that the lines on whether the application for border procedure should be mandatory or not was one of the most challenging parts of the text, although a note by the Romanian Presidency a few months later stated

[95] In this sense see: UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion on The Rights of All Children in the Context of International Migratio*n. Available at: http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf.

[96] *See* ECtHR Abdullahi Elmi and Aweys Abubakar v. Malta, Application No. 25794/13 and 28151/13, 22 February 2017.

that a large majority preferred it for it to be mandatory, although the matter was still highly controversial (Statewatch, 2018).

In Sargentini's draft report, she dismisses the entire article, arguing that establishing a maximum of 48 hours to lodge an appeal is "unacceptable in light of the precarious situation of third country nationals subject to a return decision in border procedures and in detention" since many times they do not have access to legal assistance and interpretation, which would lead to damaging their judicial protection. Furthermore, she also argues that an extension of the maximum duration of detention of 22 months for those whose asylum application has been rejected at the border and are subject to a return's procedure would not ensure an effective return but would instead, and according to research, decrease its chances after 30 or 60 days of detention (Sargentini, 2019:85).

8.2. The EU's approach on irregular migration

In the past years several steps have been taken to deal with migration. Through different strategies and agreements with third countries, the EU has tried to address the growing numbers of migration flows, and especially those which appeared after the migration crisis of 2015. In this section, I will focus on some of the main initiatives that have been approved to address this issue in the hope of drawing an accurate picture of the EU's approach in dealing with immigration. Thus while a focus on the Return Directive in the previous section was useful to determine what was exactly that was established in the law, and in a particular law which has shaped the legal framework on migration in the EU, when analysing the political field I will take a different approach. Firstly, because political initiatives are approved more easily and often than legislation, thence counting with a multiplicity of documents defining the EU strategy in the field. Secondly, because analysing these political initiatives altogether will provide a more accurate picture of the steps taken in the past years and the direction and goals followed by the EU.

Thus if we go back a few years, an important document dealing with migration in this millennium was the Global Approach to Migration (GAM). It was established in 2005 and it aimed to address the causes of migration and prioritise the rights of migrants. Thence it was

supposed not to be an answer to the security interests of EU states, but instead to focus on the figure of the migrant as a person whose rights needed further protection. It became a tool to cooperate with third states on signing readmission agreements in exchange of visa facilitation agreements, mobility partnerships, etc. Thence the two main ideas under which the program worked were the cooperation with non-EU countries based on the principle of equality, and the idea that the main intention was to protect the migrant (Strik, 2017).

Another Global Approach to Migration and Mobility (GAMM) was presented in 2011, being formally adopted in May 2012 by the Council's Committee of Permanent Representatives. The main aim was to address irregular migration and human trafficking, and to cooperate with third countries to better deal with migration, although the text has been denounced as "a means for the EU to restrict access to its territory and for allowing Member States to use migrants as disposable workers" (Martin, 2012). The M for "mobility" was added to cover all forms of mobility and it has worked as a way of facilitating visas as an incentive for third countries to cooperate in combating illegal migration. Since Member States can decide on short-term visas, this part of the GAMM requires Member States to voluntarily give up their discretion. In practice many have not done so, which in turn means that third countries cannot fully cooperate. That is why European Commission officials have complained that Mobility Partnerships cannot be dealt with because of the unwillingness to cooperate by Member States (Strik, 2017).

It is interesting the comparison that Martin (2012) makes on the evolution of the Global Approach on Migration of 2005 and that of 2011. While in the first integration of immigrants is emphasized for "all areas of importance including labour and socio-economic, public health, cultural and political dimensions", the later text is directed towards temporary works rather than full residents. In this sense, the 2011 approach talks about the need to improve the effectiveness of policies related to the integration of migrants into the labour market of the destination country.

There is broad consensus that GAMM policies seek to fight against irregular migration and ensure the return of these migrants through readmission agreements (Strik, 2017). And while at times these frameworks theoretically want to safeguard migrants' rights, in

practice and through its implementation this is rather unreal. The prioritization of internal security and border control over the right to seek for asylum or the protection of non-refoulement do not help in improving the protection of third-country nationals but instead their human rights are set aside. The UN Special Rapporteur on the human rights of migrants in 2015, François Crépeau, also expressed his opinion in this sense, pointing out that "the overall focus on security and the lack of policy coherence within the Approach as a whole creates a risk that any benefits arising from human rights and development projects will be overshadowed by the secondary effects of more security-focused policies".

The Committee of the Regions also issued an opinion document[97] in which one of their considerations was to call "for a policy to combat irregular immigration which is not based solely on border controls and the interception of migrants on departure, but also on effective legal entry opportunities which are also open to less-skilled workers, taking into account the specificities of the individual Member States".

The New Strategic Agenda for the period 2019-2024 has put once again migration policy as one of the priorities to address during these years. The four main goals of the Agenda are to (1) protect citizens and freedoms, (2) develop a strong and vibrant economic base, (3) build a climate-neutral, green, fair and social Europe, and (4) promote European interests and values on the global stage. Included in the first of these objectives is to develop a fully functioning comprehensive migration policy, calling for deepening cooperation with third countries and reforming the Dublin Regulation to balance shared responsibility (European Council, 2019).

Here again we see some differences between the way in which migration was addressed in the latest agenda presented in 2014 and the one published in 2019. While both strategies seek to fight against illegal migration, in the first one the idea was to reinforce skilled labour from third countries, while in 2019, the EU considers the protection of external borders as a absolute prerequisite for the security of Europeans. The asylum and returns policy along with border enforcement are much more reinforced in the latest agenda, although the issue of how to establish a harmonised and

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[97] Committee of the Regions, *Opinion of the Committee of the Regions: The Global Approach to Migration and Mobility* CIVEX-V-027, 96th plenary session, 18 and 19 July 2012

comprehensive European policy to address immigration is rather vague (Joannin, 2019).

One of the latest published documents is the New Pact on Migration and Asylum. According to the European Commission itself, this new Pact offers a "comprehensive European approach to migration" and puts in place "a predictable and reliable migration management system". The Commission argues that the Pact will promote faster border procedures, a fair sharing of responsibility and solidarity with flexible contributions, further partnerships with third countries, and boosting a common EU system for returns with a stronger role of the European Border and Coast Guard with a newly appointed EU Return Coordinator (European Commission, 2020).

Many voices have risen against it. The pact has been described as a "push-back" and criticized "for catering to the priorities of the more conservative and anti-immigrant member states such as Hungary, Poland, and Slovakia" (Kirişci, Erdoğan, Eminoğlu, 2020). It is a pact which will not, according to Home Affairs Commissioner Ylva Johansson, satisfy anyone, adding that "voluntary solidarity is not enough (…) there should be no way for Member State to have an easy way out" (Zalan, 2020).

The pact consists of three pillars: an external dimension, the management of external borders, and internal rules directed to finding a more balanced distribution of responsibilities among EU Member States. Looking at the three dimensions in more detail, we see that one of the additions in the pact relating to the first pilar is in regard to the external dimension is the possibility of opting out. Member States can opt out from the relocation of asylum seekers and refugees "in exchange" of providing administrative and financial support to other Member States instead. In connection with the second pilar, reinforcing border security is once again a priority for the EU, being over the protection of asylum seekers and refugee's rights and the protection of the principle of non-refoulement.

What do civil society organizations say about the New Pact on Migration and Asylum? In a public statement[98], dozens of

[98] *The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded.* Available at:

organizations (including Amnesty International, Human Rights Watch and the International Rescue Committee, among many others) signed a document commenting on some of their main concerns regarding the proposals in the communication on the New Pact. These organizations were hesitant from the very beginning, wondering whether the text would guarantee the rights of migrants and contribute to a fairer sharing of responsibility in Europe. They raised concerns on the sharing of responsibility, wondering if the Pact would become a more complex Dublin system. While they acknowledge that the expansion of the definition of the members of a family to include siblings, they are concerned with the proposed mandatory asylum and return border procedures in certain cases, the creation of the figure of a Return Coordinator within the Commission and of a Frontex Deputy Executive Director on Returns, the pressure on Member States to increase border control, and the removal of the principle that detention should only be applied as a measures of last resort in the context of border procedures.

8.2.1. The external dimension

As one can see, there have been several documents published over the years trying to address immigration at the European level, from strategies, to agendas, approaches and pacts. Still, the EU has been unable to find a harmonised and coherent approach to immigration that suits all the interests of Member States, and it has also failed to protect the figure of the immigrant, be it legal, irregular, an asylum seeker or a refugee. A third country national whose rights should be at the forefront of one's interests since international treaties and conventions establish their human rights and guarantees. Nevertheless, all of these documents have been used to pass new legislation, adopt new public policies and reframe national frameworks. Not all publications need to have a legal character for them to develop new policies or to incentivise states to adopt certain measures, thence the relevance of non-legal initiatives is also crucial to understand the development of specific manoeuvres, operations, and actions taken by states.

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https://www.hrw.org/sites/default/files/media_2020/10/NGO-Statement-Pact-Oct-2020-FINAL.pdf

Thence what is the image that the EU gives to the world in the treatment of migration and how are its international relations according to this view? The both the EU's internal and external dimensions on immigration are based on returning irregular third-country nationals. As we have seen, the internal policy is governed by the Return Directive, shaped and reinforced by other documents, those which have pathed the way for it, and those which have strengthened its grounds. The external dimension is operationalised by EU readmission agreements with non-Member States.

The purpose of these agreements is to cooperate with third countries so that these readmit their nationals in exchange of certain incentives (such as visa facilitation or liberalisation, development aid or trade preferences), so that readmission procedures are efficient and enforced. The Treaty of Amsterdam allowed the EU to sign readmission agreements with non-Member States, but this practice has raised concerns on the avoidance of judicial and democratic accountability (European Parliament, 2020; Molinari, 2019). Although there have also been informal means of cooperation which have increased the focus on operationalising returns of irregular migrants, further uplifting doubts.

Therefore, a key feature of the EU's approach to dealing with immigration is this cooperation with third countries. The Migration Partnership Framework adopted in June 2016 tries to address the migration crisis of 2015 by making agreements with non-Member States. While this was not the first initiative to find agreements on migration, but the tone is very different from previous documents (Clare, 2017). As Lehne (2016) states, "the EU's interests are laid out in brutally clear terms [and] the approach focuses almost exclusively on keeping people out and sending them back". What happens in turn is that the EU's interests are put at the forefront while mentioning the ones of African countries in more general terms.

As Clare explains, these agreements are problematic on a number of levels. From the one hand, they tie important policy areas to cooperation on migration "in ways that may undermine the EU's other policy goals and commitments". From the other hand, the incentives they involve are just not enough to mobilize African countries, since the remittances they get from their nationals living abroad are more significant than some of the offerings given by the

EU (Clare, 2017:14). It can also be viewed as a way to tie migration to cooperation with development countries, thence their economic growth partly becomes conditioned to the way in which they deal with immigration. But it also fails to address the root causes of migration, linked to the political and economic situation of fragile states, and the lack of services related to education and labor, not to mention that the EU's goal to return third-country national overlooks the poor human rights records of certain countries they are cooperating with. As Oxfam International (2016) denounced, "by choosing to outsource third countries Europe's border control and the responsibility for managing migration, Europe attempts to outsource its obligations to respect human rights". And what is more, demands have been made to these third countries to prevent irregular departures going to Europe, what Amnesty international has reported as being a way to put refugees, asylum seekers and migrants in general in their countries at risk for a prolonged and arbitrary detention, refoulement and ill-treatment (Amnesty International, 2014).

In sum, criticisms about the norms being applied by the EU on migration issues are already common. Its protection of the human rights of immigrants is not what would be expected seeing its internal common standards and framework on fundamental rights, and the fact that they negotiate with countries whose respect of human rights is also questionable is not exemplary of an advanced and protective organization.

8.3. Overall assessment

In the exploratory memorandum of the renewed version of the Return Directive, it is explained that effective return is a primary objective of the European Union and that "in order to address the key challenges to ensure effective returns, a targeted revision of the Return Directive is necessary to notably reduce the length of return procedures, secure a better link between asylum and return procedures an ensure a more effective use of measures to prevent absconding"[99].

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[99] *See* the "Explanatory Memorandum" of the *Proposal of the European Parliament and of the Council on Common standards and procedure sin member states for returning illegally staying third-country nationals (recast)* 2018/0329 (COD). Available at: https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2018/0634/COM_COM(2018)0634_EN.pdf

Overall, not only was the Return Directive disputed at the time of approval, but it has also arisen many voices against it after the Commission's proposal and the Council's recast version. As Kilpatrick (2019:21) says in her analysis of the matter:

> *"The entire aim of the Commission's proposal is to lower fundamental rights standards in order to increase the number of deportations from the EU, yet there is no evidence that this would make the EU's expulsion system any more effective. Even if this were the case, it would be difficult to argue that such harmful and destructive means – such as the massively-expanded use of detention – could justify the ends. It appears that the Commission and Council favour a recast version of the Returns Directive that would both degrade fundamental rights standards and be ineffective, ignoring potential alternatives and discarding the progress made by member states in implementing such alternatives in the framework of the existing rules."*

She argues that there was no public consultation nor impact assessment studying its potential effects before approving the new Returns Directive, and the result was a text which placed "emphasis on coercion at the cost of cooperation, despite a lack of evidence for the effectiveness of forced removals in increasing the overall number of returns and clear evidence of the harms to health and wellbeing caused by forced removals".

As explained in PICUM's report, "the current emphasis on border control in Europe significantly overshadows the need to address other causes of irregularity, such as inadequate visa and residence policies, administrative failures and difficulties in understanding the complex procedures of residence and work permits" (Manieri, M. G. and LeVoy, M., 2015:27). Furthermore, the lack of existence of any impact assessment makes it impossible to determine whether the Directive has affected return rates or if there is a need for additional EU action. Still, the need to ensure the protection of human rights of third-country nationals in the EU while ensuring a fair and effective return procedure in light of the Return Directive persists.

The Substitute Impact Assessment published by the European Parliament in February 2019 reached a series of conclusions, which will be exposed below along with a short summary explaining the grounds for each of them (European Parliament, 2019):

1) **There is no clear evidence supporting the Commission's claim that its proposal would lead to more effective returns of irregular migrants:**
   This first point is based on the fact that the time elapsed between the recommendations (such as the Commission's 2017 Recommendations and the Return Handbook) has been very short to objectively affirm that a revision of the legislative framework was necessary. What is more, the Commission's approach in the new proposed text moves away from acceding voluntary departure to focus instead on enabling more detention measures to Member States. The same recast impact assessment argues that the proposal for the new Return Directive, although mentioning a preference for voluntary departure, hardly proposes any provisions on supporting and facilitating them to instead include several additions increasing opportunities for forced return.

2) **The Commission proposal complies with the principle of subsidiarity, but some provisions raise proportionality concerns**

   This finding is that related to the proportionality of certain provisions of the revised text. The parts arising concerns are those related to adding a list of criteria indicating risk of absconding, the limitation of possibilities for voluntary return, those related to entry bans, the inclusion of a new ground for detention based on "public policy, public security or national security", the length of detention of three months, and the overall border procedure. As it has already been discussed, the implementation of such measures would rather limit the possibilities for

voluntary return while putting at risk the coordination of asylum and return procedures since it seems that the primary focus is on speeding enforcement return decisions.

3) The Commission proposal would have an impact on several social and human rights of irregular migrants, including likely breaches of fundamental rights

This third point on the likeliness to breaching fundamental rights is also an important one to consider. From the one hand, the right to asylum and the principle of non-refoulement could be breached by the adoption of Article 7(1)(d). As the European Parliament states in its assessment, the obligation to lodge a request for obtaining a valid travel document to third countries "encompasses a right to confidentiality and the obligation for the State not to request the asylum seeker to contact his or her home country". Other rights like that to liberty and the likeliness to increase the risk of arbitrary detention are also highly controversial because of the criteria set out indicating risk of absconding (Article 6), and the increase in the grounds for detention (Article 18).

4) The Commission proposal would generate substantial costs for Member States and the EU

Articles 9, 14, 18 and 22 would require substantial investments to contract new staff and improve infrastructure to ensure, for instance, the existence of enough detention facilities in all Member States. This would not only mean more national investment but also additional EU costs stemming from monitoring and coordinating agencies across the territories.

5) **The Commission proposal raises questions of coherence with other EU legislation, especially legislation that is pending**

The last point, as explained in more detail in the analysis of Article 22, might not be coherent with Article 41 of the proposed Asylum Procedure Regulation affecting coherence between both return and asylum legislation.

These conclusions were also supported by Tineke Strik, the rapporteur in charge of writing a report on the implementation of the Return Directive on behalf of the Committee on Civil Liberties, Justice and Home Affairs. She argues that many of the measures of the Directive have not been contrasted and might not have a direct impact on increasing the number of returnees but on the contrary, they might even have a counterproductive effect. Firstly, because entry bans may make it less likely that returnees want to leave the Member State and secondly, because the short periods of time available for voluntary leaving the country are actually an added difficulty for them to actually be able to make this return successful. She is also concerned that some rights might be put at stake because of the broad interpretation of certain provisions (i.e. risk of absconding), because of the long periods of detention, and the lack of access to legal aid and interpreters, among others issues that have already been highlighted (Strik, 2020).

Less than a year later, in June 2020, another report was published concerning the Return Directive. In this case it was an Implementation Assessment in which there was a complete evaluation of the implementation of the Return Directive. The first part of this report, written by Katharina Eisele, a summary of the main findings is listed (European Parliament, 2020:17-20). Again, it is accentuated that the risk of refoulement is not fully assessed when contemplating return decisions and that the text's emphasis on prioritising the effective return of irregular migrants "at all costs" might undermine the human costs involved. Other provisions relating to entry bans and detention are also marked as controversial, adding other conclusions related to the lack of transparency due to the lack of disaggregated and comparable data; the increasement of costs related to making detention possible; and the lack of judicial and democratic

accountability because of, for instance, informal agreements. All of these are again contentious measures that need to be reviewed.

And what is more, the Return Directive has been complemented in the following years with strategies and policies harshening the approach to deal with migration, in addition to signing agreements with third countries to refrain these groups from entering EU territory or to be able to take them back to their transit countries. The Global Approach to Migration and Mobility shows this intention from the EU to refrain irregular migrants from accessing the region, also through the work with third countries in exchange of facilitating visas to their citizens. And as years passed by, migration policy has been kept as a top EU-priority, as shown in the New Strategic Agenda for the period of 2019-2024 but this time, reinforcing the preference of skilled labour in respect to increasing border enforcement to contend illegal immigrants and asylum seekers.

As Strik argues (2017), if the EU continues focusing on the expulsion and fight against irregular migration when dealing with migration issues, other EU external policy objectives such as regional stability, cooperation, rule of law, peace, security, and economic growth might never come into the picture. A serious reflection should be made as to how to reach a coherent strategy that comprises equality and compliance with the human rights of all.

CHAPTER 9
SECURITIZING MIGRATION IN THE UNITED STATES

The United States has a long history of immigration, being built itself by migrants from overseas. Nevertheless, it has also been a nation of strong anti-immigrant sentiments, which were reinforced after the September 11 events. Right after 9/11, new laws strengthening national security and in defence from the terrorist threat were passed, and in the following years legislators continued to focus on the same matters. However, the defence of national security has also involved a drawback on the rights of immigrant origin and non-citizens in the country.

With the passing of the USA PATRIOT Act of 2001, a cluster of anti-immigrant laws arose, which has thence made the United States a nation at an advanced stage of the process of securitizing migration. In the following lines I will analyse the USA PATRIOT Act to see which were its main additions and changes with respect to immigration, and later on I will complement them with some of the laws that were approved in the following years on the same line. Since many of them were passed in the aftermath of 9/11 but are still enforced today, they are still relevant to make this study. However, I will also make special emphasis to legislation passed during Trump's administration, since those years were also a period where the same direction of uprising national security in connection with immigration law was enhanced, which had a real impact on non-citizens' rights.

9.1. USA PATRIOT ACT 2001

One of the most important additions after the September 11 attacks of 2001 was the passing of the United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) and new national security policies. In the aftermath of 9/11, the protection of the rights of migrants trying to enter the US or those already in the territory was sacrificed in exchange for greater security measures to protect the country. Only seven weeks after the attacks the Act was enacted. In this sense, the

focus has been on bringing together two figures: that of the immigrant, and that of the terrorist.

The USA PATRIOT Act was enacted the 26th October of 2001 under the Bush administration, which defended the need for expanding the definition of terrorism because the Alien Terrorist Removal Court Act of 1996 did not suffice under current immigration threats to security (Friman, 2006). Furthermore, the range of aliens who could be deported from US territory on terrorism-related grounds was enlarged, while also reducing their procedural rights. Overall, the migrant is very much at the centre of this statute, being directly tackled and connected with terrorist offences.

9.1.1. The concept of terrorism

While one of the main goals of the Act was to identify and detain terrorist aliens, the Department of Homeland Security (DHS) prioritized the "apprehension and deportation" of criminal aliens as part of the war on terror (Friman, 2006).

One of the most controversial points of the USA PATRIOT Act is Section 411, establishing that any individual who "knows or reasonably should know" is giving material support to a terrorist organization will be committing an offence. As the definition of terrorist organization was expanded, so was the scope of Section 411, which would lead to include a wide range of organizations which were not until then thought to be related to terrorism. According to this Section, engaging in terrorist activity means:

> *"In an individual capacity or as a member of an organization, to: (1) commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; (2) prepare or plan a terrorist activity; (3) gather information on potential targets for terrorist activity; (4) solicit funds or other things of value for a terrorist activity or a terrorist organization (with an exception for lack of knowledge); (5) solicit any individual to engage in prohibited conduct or for terrorist organization membership (with an exception for lack of knowledge); or (6) commit an act*

that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training for the commission of a terrorist activity; to any individual who the actor knows or reasonably should know has committed or plans to commit a terrorist activity; or to a terrorist organization (with an exception for lack of knowledge)."

Section 219 of the INA also designates a list of groups as foreign terrorist organizations. The USA PATRIOT Act retains this provision but in addition to this, it attaches immigration consequences to involvement with a terrorist organization. From the one hand, it establishes a second type of "designated organization", which can be determined by the Secretary of State when she finds out that an organization commits, incites, prepares, plans, gathers information for, solicits funds for or engagement in a prohibited conduct, or affords material support toward a terrorist activity. Describing terrorism as any crime involving the use of a "weapon or dangerous device (other than for mere personal monetary gain)" is such a broad definition can lead to the detention of many individuals committing a crime completely out of the realms of terrorism.

From the other hand, it also penalizes involvement is "undesignated organizations", broadening the concept of what a terrorist organization following Section 411. It is thence no longer limited to organizations that have been officially designated as terrorists and published in the Federal Register but according to Section 411, a terrorist organization is that designated as such under the INA or by the Secretary of State, and also "a group of two or more individuals, whether related or not, which engages in terrorist-related activities". While before the USA PATRIOT Act only non-citizens engaging in or supporting terrorist activities were deportable, with the approval of this Act the new definition of terrorism makes deportable all those having "any connection to a terrorist organization" (Patel, 2003). With the passing of Section 411, the mere association makes an immigrant guilty and deportable without even the need of proof between the immigrant's conduct and the terrorist activity, something that did not

happen before (Vandenberg, 2004). If we connect this in light with the enlargement of the definition of a terrorist activity or terrorist organization, it becomes far too easy to detain and deport immigrants.

As explained by Sinnar (2003:1422), Section 412 raises constitutional problems because the previous section expands the range of aliens who can be associated with terrorist offences which, in turn, means that the new criteria refer not only to individuals who plot to undertake a terrorist attack, "but also individuals who are more remotely affiliated with proscribed organizations". Thence this allows the Attorney General to certify immigrants as "suspected terrorists" without proof nor even probable cause (ISPU, 2004).

Dority (2004) compares parts of the Act to legislation passed hundreds of years ago:

> *"Perhaps the most frightening thing about the Patriot Act -even putting aside these other impending instructions on civil liberties- is how similar the act is to legislation enacted in the eighteenth century. The Alien and Sedition Acts are notorious in history for their abuse of basic civil liberties. For example, in 1798, the Alien Friends Act made it lawful for the president of the United States "to order all such aliens, as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States". For years Americans have pointed to legislation like this as a travesty never to be repeated. Yet now it is back!"*

It must be noted that not all prohibitions are dangerous only for immigrants, but for the general population. Section 802 states that "acts dangerous to human life that are a violation of criminal laws" which "appear to be intended to influence the policy of a government by intimidation of coercion" can actually lead to acts of civil disobedience being considered as attacks that violate the law and fall within the application of this Section. The definition is vague and broad, inviting the distant possibility of danger of becoming a pretext

of an attempted terrorist attack. This is thus also threatening the right of free speech and assembly found in the First Amendment and international law.

9.1.2. The nexus between immigration and terrorism

In October 25, 2001, the Attorney General John Ashcroft made an speech at the US Conference of Mayors and referred to the efforts being made to respond to the 9/11 terrorist attacks. Interestingly, he made special reference to immigrants in the country:

> *"If you overstay your visas even by one day, we will arrest you; if you violate a local law, we will hope that you will, and work to make sure that you are put in jail and be kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America."*[100]

Although different parts are threatening for the rights of the general US population, many are directed exclusively to tackling migrants. Examples of this are Sections 201 and 203, which determinate that "unlawful presence" in US territory is a criminal rather than a civil offence, being subject to detention. As Friman (2006:17) says, "the length of sentence was not by accident; such a sentence would automatically result in an estimated 12 to 14 million migrants already illegally in the United States being designated as aggravated felons".

While detention would not be permitted in many cases under criminal law -like the requirement of a probable cause for arrest or the right to be brought before a judge within forty-eight hours of arrest- it is nevertheless now authorised if an individual violates immigration law. Thence arresting aliens under immigration charges enables the Department of Justice not only to deport them as it used to be the case, but also to keep them imprisoned while it continues to

[100] The full speech is available at: https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/ashcrofttext_102501.html

investigate and interrogate them about potential criminal activities they might have committed.

What is more, the Department of Justice has also created new immigration policies and procedures to limit the safeguards with which non-citizens used to count with. Thus while most individuals were usually released after being accused of staying after their visas had expired or under other common immigration violations, now they can be kept in detention if there is a "special interest" if they are considered to be dangerous. Most of these arrested individuals because of "special interests" were foreign Muslim men (HRW, 2002).

After September 11, racial profiling became a recurrent tool to identify potential terrorists in the US, and most Americans will racially profile Arab males and noncitizens. As Vandenberg (2004:627-628) explains, the long history of racism in the United States can result in viewing as enemies those of members of minorities or immigrant origin, and "by permitting racial profiling to be an acceptable practice, noncitizens will be treated more like criminals and the rights of every U.S. citizen will subsequently decrease". And the fact that the perpetrations of the attacks were Arab male immigrants has led many to believe that it is necessary to pay closer attention to Arab-looking men (Cole, 2002). Proof of this perspective is the fact that after the 9/11 attacks, more than 1,200 noncitizens -mostly from Arab and South Asian origin- were apprehended (Taylor, 2002; Vandenberg, 2004), and later on in early 2002, the Department of Justice announced the apprehension and removal of 4,000 to 6,000 men of Arab countries such as Iraq, Iran, Libya, Sudan, Syria, Qatar, Somalia, Tunisia, Yemen, Pakistan, among others (Vandenberg, 2004). Thence as Taylor (2004:80) affirms "The arrest of hundreds of young men with Middle Eastern backgrounds has come to symbolize the fears within immigrant communities in the United States that current immigration enforcement policies are a product of federal discrimination" which raises serious questions on the protection of the rights of non-citizens of these origins, which may be sacrificed in exchange of ensuing the security concerns of the majority of the population.

9.1.3. Detention

Section 412 is probably one of the most contentious sections of the Act. It expands the Attorney General's powers of detention under the Immigration and Nationality Act (INA). She can certify that an alien is a terrorist when there are reasonable grounds to believe that she is affiliated with a designated terrorist organization or engaged in terrorist activities. And even when she cannot establish such connection, the person can also be detained if the Attorney General has reasons to believe that he endangers national security. Then this alien can be placed in removal proceedings, charged with a criminal offense or released within seven days of being taken to custody. However, if the removal of aliens is unlikely in the near future or if it is threatening for national security "or the safety of the community or any person", they can be detained for up to six months. In addition to this, judicial review to habeas corpus is also limited and the right of appeal of any final order is also restricted.

Human Rights Watch (HRW, 2002) has contained that the Department of Justice has used immigration detention as a preventive detention to conduct criminal investigations and has deliberately maintained in custody these detainees for long periods of time even though lacking evidence that they would be a danger to society. After being detained, every person has the right to be represented by a legal counsel -and this is both ensured in international law but also in US constitutional law. And this becomes even more necessary in those cases relating to immigrants who are not familiar with the laws of a country that is not their own. Nonetheless, and as Human Rights Watch pointed in their investigations, many of the people who were detained after 9/11 could not exercise their right to counsel, and while immigration detainees do not have the right to free counsel for their immigration proceedings, they do have this right when they are being interrogated as part of a criminal investigation. This organization found that "special interest" detainees were in fact questioned in custody as part of a criminal procedure when in fact, they were later on charged with immigration violations. Most of the times, these interrogations were made by FBI and Immigration and Naturalization Service (INS) agents.

During the interviews that this organization conducted to some of these detainees, they found out that some were told they would have

the right to a lawyer and a phone call after FBI questioning. And after this phone call, they were then held incommunicado and in isolation for two weeks and denied access to any other phone call. In other cases, detainees were told they would get a lawyer only after the interrogation and were pressured to answer questions from FBI agents. Most of these persons were held in custody without being informed of their "Miranda rights"[101]. Even more, they were not only denied these rights, but were also subject to abusive treatment (HRW, 2002).

In connection with what has been said, Sinnar gives an interesting insight on the changes introduced by Section 412 on detention for immigrants in the United States. She argues that the certification process triggers mandatory detention and while before the USA PATRIOT Act aliens suspected of involvement in terrorist activities could be arrested and then granted or denied bail depending on the discretionary decision of the INS, she would still retain a number of procedural rights to contest that determination. However, the USA PATRIOT Act introduces changes to these procedures (Sinnar, 2003: 1426-1427):

> *He had the right to request a hearing with an immigration judge to review the denial of bond, and could appeal a negative decision to the Board of Immigration Appeals. Beyond administrative review, an alien could also contest detention through appeal to a district court on a habeas petition. Under the new law [USA PATRIOT Act], detention is mandatory for aliens certified by the Attorney General, and any alien that the government has "reasonable grounds to believe" meets any of the broad grounds for inadmissibility or deportation in section 412, or is otherwise considered a national security threat, may be certified. Thus, certification could apply to an alien whose sole offense was a donation to an*

[101] "Miranda Rights" are those found in the Fifth Amendment, which must be read by the police before custodial interrogation starts. These rights are that to remain silent, to know that anything the person says can and will be used against her in a court of law, the right to an attorney, and the right to get one appointed if not being able to afford one. They are made to protect against self-incriminating statements and to make sure one knows he has the right to have an attorney. They are called "Miranda rights" because of a historic 1966 US Supreme Court case called Miranda v. Arizona.

undesignated organization intended for charitable purposes, and who neither presents a danger to the public nor appears likely to abscond. Aliens may potentially be certified by the Attorney General for reasons other than threat to the public or bail risk. 30 Certified aliens are automatically ineligible for bail; there is no opportunity for an adversarial hearing to contest their detention. In sum, section 412 introduces an irrebuttable presumption that aliens subject to certification are unfit for release.

9.2. The legal aftermath of 9/11

The USA PATRIOT Act has not been the only piece of legislation developed in the line of securitizing migration, but it has been reinforced by other laws, edits and orders, which have entered into force ever since. Sadly, these incorporations have been upheld by part of the population. As the United Nations Special Rapporteur on the human rights of migrants, already noted back in 2008, xenophobia and racism towards the immigrant population worsened after September 11, causing "a particularly discriminatory and devastating impact on many of the most vulnerable groups in the migrant population, including children, unaccompanied minors, Haitian and other Afro-Caribbean migrants, and migrants who are, or are perceived to be, Muslim or of South Asian or Middle Eastern descent" (Bustamante, 2008).

In this section I will look more deeply into the norms that were passed shortly after 9/11. This will be useful to see the reaction of the government to a terrorist attack and to have a broader view of the analysed USA PATRIOT Act and put it within the context of the national framework on security and migration developed at the time.

As explained in the Institute for Social Policy and Understanding's report (ISPU, 2004) which conducts a scrutiny of the USA PATRIOT Act, the dangers have thence been exacerbated by, for instance, the Bureau of Prisons surveillance order, approved by the Attorney General, which allows federal agents to breach the attorney-client privilege by listening to their conversations without obtaining judicial permission, whether before or after trial. And also related to the Act is the Attorney's General edict for increased surveillance of certain religious and political organizations, such as mosques and Islamic centres, allowed by the dismantling of the regulations prohibiting the Justice Department from conducting COINTELPRO operations, which were originally thought to protect US citizens from abuses by

this Department. Thence by rescinding these operations "and thereby authorizing the FBI to monitor and conduct surveillance on certain religious and political groups without any evidence of wrongdoing, the edict opens the door to a new wave of COINTELPRO operations which are well known from past experience to be associated with effects that are unwanted in a free and democratic society: harassment and intimidation of people who disagree with the government on issues such as civil rights and the conduct of war". It must be noted that provisions that were to expire in this Act were reauthorized by succeeding legislation -USA Freedom Act of 2015- in 2005, 2009 and 2015.

A key piece of legislation on national security is the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act), which was introduced on July 9, 2003. One of its biggest incorporations was the declaration that authorities of the state and local law enforcement personnel to enforce Federal immigration laws. Section 101 allows them to investigate, apprehend, detain and remove aliens from US territory. In addition to this, it also penalizes states and localities if these authorities fail to implement statutes which permit the enforcement of immigration laws. While there is not directly an obligation to do so, failing to enforce them does have consequences, which would be to discontinue providing federal funding, as seen in Sections 102 and 105. Furthermore, these state and local personnel count with remedies and protections, such as being immune from personal liability from suit for civil damages if they were acting in the scope of their duties (Section 110).

The CLEAR Act further contributes to allowing the detention of immigrants in the country. The text establishes in Section 103 that noncitizens being unlawfully present in the US are to be fined and imprisoned for a year and subject to asset forfeiture. Furthermore, it increases both civil and criminal penalties for illegal entry, while also reducing the time of amount granted to voluntarily leave the country.

Furthermore, Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003 also introduces pretrial detention for anyone committing an act of terrorism even before investigations commence. While before, the government had to show that the person accused was a flight risk or a danger to the community, with this Act the judge can deny bail even without the government having to show that the

accused is dangerous or likely to flee. Thence a person who is presumably not guilty and has not been found guilty of any crime can be held for months without even proof that she is dangerous or likely to flee. Another measure was the passing of the REAL ID Act of 2005 where the government wanted to reinforce national security by, for instance, denying driver's licences to illegal immigrants.

While the immediate response to the September 11 events was predominantly legislative, in the following years it was supplemented with presidential directives, regulations, and policy initiatives. These measures were once again connecting the strengthening of national security to dealing with immigration. One example is the Absconder Apprehension Initiative approved in 2002, directed to locate and apprehend approximately 314,000 non-citizens who were ordered deported but did not leave the country. The mission was conducted by immigrant and criminal law enforcement officials (Miller, 2005).

The Visa Security Program, the program screening visa applications and also putting together these with terrorist watch lists and other intelligence information, has also played a critical role in relating immigration to security. In 2010, the program screened 950,000 applicants of which 26,000 were vetted and another 1,000 had recommendations for visa denials (Chishti and Bergeron, 2011). And since 2003, the U.S. Visitor and Immigration Status Indicator Technology Program (US-VISIT) has been collecting biometric information of all non-citizens entering the country. The Student and Exchange Visitor Information System (SEVIS) and the Electronic System for Travel Authorization (ESTA), launched in 2002 and 2009 respectively, are also other systems dedicated to collecting biometric data from foreigners to check them against criminal databases.

US intelligence has also been strengthened during these years. With the Intelligence Reform and Terrorism Prevention Act of 2004, the National Security Act of 1947 was reformed, and a new position of Director of National Intelligence as head of the intelligence community arose. Within the Office of the Director of National Intelligence, the National Counterterrorism Center was established as a knowledge bank for information about terrorist suspects and to centralize all counter-terrorism efforts (Kaczmarek et al., 2018).

The Department of Homeland Security was established in 2002 mainly as a consequence and response to the 9/11 terrorist attacks. Through the Homeland Security Act, the Immigration and Naturalization Service was dissolved and replaced by this new office. Very importantly, the Department addresses national security matters including all immigration-related functions, an addition that has remained ever since. This Department has seen a dramatic increase in staffing and budget since its creation. That same year, the National Security Entry-Exit Registration System (NSEERS) was expanded to require male nationals from Arab and Muslim-majority countries who had registered in the US before 9/11 to turn up to an immigration office and register with the INS. As explained in Chapter 6, those who did not, could be considered out of status and be sent back to their countries of origin.

In 2006, the Justice Department created the National Security Division to combat more effectively security threats to the nation, combining law enforcement and intelligence services. This was the first new Justice Department division in 49 years (Department of Justice, 2011).

In May 2006, the Immigration and Customs Enforcement was in charge of "Operation Return to Sender", an operation to look for dangerous immigrant fugitives and terrorists and which began. With the raids conducted by federal immigration agents, more than 23,000 people had been arrested nationwide and criticisms arose as to whether they were looking for criminal suspects or just targeting foreign-looking immigrants based on race (Mckinley, 2007). And later on, in 2008, the Foreign Intelligence Surveillance Act (FISA) of 2008 was approved, an Act which allowed intelligence agents to monitor terrorist communications much faster. The USA PATRIOT Act also expanded the FISA to allow the government to obtain personal records of ordinary Americans from libraries and Internet Service Providers although not having a connection with terrorism (ACLU, 2008).

As already noted by Bustamante in 2008, the US failed to comply with international legal obligations, with non-citizens being unable to enjoy some of their most basic human rights. Moreover, as the Rapporteur states in his country visit report, "A primary principle of United States immigration law is that United States citizens can never be denied

entry into the country; neither can they ever be forcibly deported from the United States. By contrast, non-citizens, even those who have lived in the country legally for decades, are always vulnerable to mandatory detention and deportation" (Bustamante, 2008).

As one can easily see, a bunch of legal and organizational changes took place immediately after and the years following 9/11, added to the already punitive practices established in the country since 1996. And while this was just a glimpse of some of these changes in the national framework, we have seen laws and policies being approved in the same line ever since. This has become even more evident during the Trump Administration, when a set of new executive orders on national security and affecting migration were passed just days after arriving to presidency.

9.3. Trump's legislation on security and migration

After September 11, the United States has slowed immigration, conducted mass interviews of young Arab men, required registration of aliens from certain countries, made secret detentions, created the Department of Homeland Security, and even called for vigilance of ordinary citizens and aliens to fight the war on terror (Engle, 2004). The USA PATRIOT Act's Section 402 also allowed for the number of Border Patrol personnel, Customs personnel, and immigration inspectors along the Northern Border to be tripled, and also for adding a sum of $50 million to be directed to the Customs and INS to improve monitoring technology. Thence measures to fight the war on terror involve a wide range of tools, from protecting the border to enhancing surveillance. But in addition to this and up to this day, more laws connecting immigration to security matters have been passed. Part of these, appeared during the Trump administration, where the link between immigration and national security matters was intensified.

On January 25, 2017, only five days after being sworn as President of the United States, Donald Trump issued two executive orders reinforcing the already existing process of securitization of migration in the country. With the Executive Order 13767 on Border Immigration Enforcement and with the Executive Order 13768 on Enhancing Public Safety in the Interior of the United States, the President approved building a massive wall between the US-Mexico

border in addition to other proposals which undermined the basic rights of due process and the basic rights of those seeking asylum in the United States. The first of these instruments argues that the wall has to be built immediately and has to be monitored and supported by adequate personnel "so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism" -Section 2(a)-. Other reasons given in the subsequent sections include to detain individuals who are suspect of committing Federal or State Law -Section 2(b)- or to remove individuals whose claims to stay in the US have been rejected -Section 2(d).

The executive order titled Enhancing Public Safety in the Interior of the United States presents immigrants with criminal conduct, alleging that "Many alien who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety", as said in the introduction of the text. Section 5(a)(b) and (c) also state that aliens can be removed if committing "any criminal offence", being charged with such offence without having resolved it and omitting acts that can constitute a chargeable criminal offence are also considered crimes whose perpetrator, if an alien, has to be removed. This raises questions and concerns to the extent where these statements can be brought. Does an alien driving with an expired licence has to be removed from the US? Or for instance, since crossing the border illegally is a federal misdemeanour, anyone having done this in their past can fall within the definition of Section 5. These categories are so broad that any undocumented person can become a target according to this law.

These executive orders massively expand the use of detention, to allow the apprehension of individuals merely suspected of violating immigration law or criminal law. As condemned by the American Immigration Council, it also directs the Department of Homeland Security to detain all individuals in removal proceedings to the maximum extent of the law, regardless of whether they have had a court hearing or not, and whether the final order on deportation has been taken or not (AIC, 2017). If considering that legal counsel is not always easy to get by these individuals, who are not familiar with complex legal systems of countries not of their own, it makes it even more complicated for them to be able to defend themselves during these procedures.

Two days after passing these executive orders, he also approved Executive Order number 13780 on Protecting the Nation from Foreign Terrorist Entry into the United States. One of the introductions of this executive order was to limit the ability of citizens from seven specific countries to travel to the US. These countries were Iraq, Syria, Sudan, Iran, Somalia, Libya and Yemen. The main reason to do so was to protect the country from the terrorist threat, a threat which is made by organizations that seem to be operating in these seven countries. Terrorism, however, is a dynamic phenomenon, which can occur in many different places around the world, and which is constantly moving from one place to another. Any country may have secret organizations within its territory, and any country can be the object of these assaults. This executive order also limited the number of refugees to be admitted in the US to a maximum of 50,000 since any higher number would be "detrimental to the interests of the United States".

On October 8th, 2017, President Trump sent a letter to the House and Senate leaders[102] putting forth the principles for reforming the nation's immigration system. Three main subjects were addressed. The first refers to border security, and its main goals are to build a southern border wall and "close legal loopholes that enable illegal immigration and swell the court backlog". Another of the measures to be applied regarding border security is to ensure that unaccompanied children crossing the border can be returned. Before these measures were applied, children and their families were already being automatically and arbitrarily detained during immigration proceedings, even when the mother had passed the initial asylum screening (IACHR, 2015). But to add to this, President Trump argued that children arriving to the country illegally instead of being removed, where sheltered in government facilities "at taxpayer expense" and then released to the custody of a family member "who often lack lawful status in the United States themselves". He calls for amending the law in order to "ensure the expeditious return" of these children. Furthermore, as Amnesty International denounced, the situation of these children is already critical in many detaining facilities. They found that those

[102] President Donald J. Trump's Letter to House and Senate Leaders and Immigration Principles and Policies, October 8, 2017. Available at: https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-letter-house-senate-leaders-immigration-principles-policies/?utm_source=link

children seeking asylum held at the Homestead facility of Florida were in prolonged indefinite detention, staying far beyond the 20 days established in the law (AI, 2019). The Administration also proposed to tighten standards in the asylum system and elevate the threshold standard of proof in credible fear interviews to lower the number of asylum applications and make it more difficult to obtain refugee status in the country. Another addition was to hire 370 immigration judges and 1,000 Immigration and Customs Enforcement attorneys to remove illegal border crossers swifter faster. These are just some of the measures proposed for the first of the subjects to be addressed.

The second priority concerned the interior enforcement. The Administration argued that many cities were in violation of 8 § U.S.C. 1373 of federal law, which states that state and local government entities and officials may not prohibit or restrict the sharing of information with the Department of Home Security regarding an individual's immigration status. These cities were called "sanctuary jurisdictions", and according to the letter, they "release dangerous criminals and empower violent cartels like MS-13 by refusing to turn over incarcerated criminal aliens to Federal authorities". In practice, what they are doing is to apply policies and regulations that make it harder for Immigration and Customs Enforcement to arrest non-citizens and make them deportable in response to the harshening measures applied by the Trump Administration. They seek to protect low-priority immigrants from deportation, but they still turn over those immigrants having committed serious crime. The Trump Administration wanted to block them from receiving certain federal grants. However, it must be noted that there is no official definition of "sanctuary".

Last but not least, the third area being addressed refers to the Merit-Based Immigration system. The immigration system prioritized the extended family-based chain over a skill-based system. What Trump was proposing was a merit-based immigration system that would prioritize high-skilled immigration to "protect U.S. workers and taxpayers".

These laws were passed during the first months of Trump's presidency, thence a long list of legislation, policies, reports, proposals and public speeches and comments on securitizing migration followed during his time in the White House. In 2019, authorities under the

Trump Administration forced over 59,000 asylum seekers to return to Mexico during the adjudication of their asylum claims. That same year, the government also announced its intention to decrease the annual number of refugee admissions of the following year to 18,000, the lowest number in the 40-year program's history (AI, 2019).

Policies like Zero Tolerance, approved in April 2018, establishes that immigrants found crossing US borders could be referred by the Department of Homeland Security to the Department of Justice to be prosecuted. And the Migrant Protection Protocols (MPP) stated that all immigrants found trying to enter the country through the Southern border without legal documents are to be sent back to Mexico and forced to remain there while awaiting their removal proceedings. The Inter-American Commission on Human Rights condemned these policies arguing that they were having an impact on the effective enjoyment of human rights by all migrants including: i) the imposition of restrictions on the administrative and judicial mechanisms available to effectively access the right to request and be granted asylum; ii) a dramatic increase in the use of migrant detention, immediately and, in some cases, for long periods, with the effect of separating families and discouraging the pursuit of ongoing asylum proceedings, and of migration to the United States more generally; iii) the implementation of fast-track deportations through procedures without due process guarantees ; and iv) the forced return of individuals to the Mexican side of the border, as they progress through their immigration proceedings in the United States (IACHR, 2019).

It seems appropriate then to say that during his Administration a more advanced framework to bring migration into the security realms was perfected. Immigrants were often related to crime and considered a threat to the community, and migration-related matters became a key part of the national security agenda of the country. And with it, the rights of migrants in the country and those trying to seek refuge were diminished and put aside.

9.4. Overall assessment

Before 2001, the immigration system had already become more severe, some describing it as a "criminalization" of immigration law and others as a "convergence between the criminal justice and

deportation systems" (Miller, 2005; Kanstroom, 2000). However, the connection between immigration and national security became much more evident after September 11, when the figure of the migrant was rapidly connected to that of a potential terrorist.

The USA PATRIOT Act was passed less than two months after the 9/11 attacks. There are a bunch of new measures introduced to reinforce US protection against terrorist threats and strengthen national security. Among these, for instance, there are greater surveillance mechanisms and information sharing between authorities and agencies related to security. One of the most significant provisions in this sense is Section 215, which allows the FBI to force anyone to turn over records on their clients and customers. It also increases powers to conduct secret searches to property without notice to the owner, searches of communications, allowance for looking at certain individual's activities records, and foreign intelligence information searches (Sections 213, 214, 215 and 218 respectively). However, the focus in this Chapter has not been directed so much to analysing all of the controversial provisions of US legislation affecting the general population, but to focus on particular parts of the law that contribute to affirming that there is in fact a securitization of *migration*. Securitization, nevertheless, happens in different spheres of the individual's life, be it a migrant or not. However, the figure of the migrant as a vulnerable person is further threatened and unprotected by securitizing provisions.

The instruments presented connect more closely immigration to terrorism-related activities, with the USA PATRIOT Act at the forefront, facilitating the inadmissibility and deportation of migrants, while also enabling their indefinite detention. Thence this is not only a bill that reinforces border or surveillance technologies to protect from potential terrorist individuals or groups, but it also connects these to immigration and endures measures to detain and deport them.

After 9/11, the Attorney General, DOJ, FBI and NSA designed the largest surveillance program in the nation to track down terrorists and prevent from the terrorist threat and, most importantly, "most of the effort has been directed towards the Muslim community and has been spurred by ethnic considerations" (Wong, 2006). The continuous tendency to surpass national security has resulted in a deliberate, persistent, and dangerous detriment of individual rights, and especially

those of immigrants. As summarized by the Center for Constitutional Rights (2002):

> *"The War on Terror has seriously compromised the First, Fourth, Fifth and Sixth Amendment rights of citizens and non-citizens alike. From the USA PATRIOT Act's over-broad definition of domestic terrorism, to the FBI's new powers of search and surveillance, to the indefinite detention of both citizens and non-citizens without formal charges, the principles of free speech, due process, and equal protection under the law have been seriously undermined."*

Since September 11, immigration policy has been viewed through the lens of security. As Cole develops, while it may not have been *irrational* to focus on Arab-Muslim immigrants after the 9/11 attacks because of the origin of the attackers and in light of Al Qaeda's members' origins, it still does not justify denying them the basic guarantees of due process, political freedom, and equal protection (Cole, 2002: 978). It is also acceptable to waive partly some of our liberties to enhance the security of the nation, but after September 11 the citizens have not been the ones sacrificing their freedoms, but those of the non-citizens are the ones that have been at stake to protect from the citizens' insecurities.

Moreover, during the Trump Administration the rights of non-citizens were also diminished and the link between immigration and national security was reinforced, placing migration as one of the main threats to the country and a necessary object to consider against the War on Terror. Migration was linked to crime and even terrorism and became one of the most important matters to be introduced to the national security agenda of the country. The securitization of migration in the US is evident and has been strengthened not only after 9/11 and the years that followed, but also more recently. Thence in the past two decades, the securitization of migration has become even more evident in the country.

CHAPTER 10
SECURITIZING MIGRATION IN SOUTH AFRICA

South Africa used to be known to have one of the most welcoming and safeguarding refugee systems not just of Africa but of the world. It has also ratified without reservations the 1951 Refugee Convention Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. In the migration history of South Africa, the country has been known to welcome big refugee waves fleeing from armed conflicts and civil wars in the continent and who were seeking protection in this country.

However, since 2011 there has been a significant drop in the numbers of forced migrants compared to the first ten years of the millennium. The only country which has produced substantial internal and external displacement persons is the Democratic Republic of Congo (DRC) (UNHCR, 2019c). But migration is still an important phenomenon in the African continent and it will continue to be as long as political conflicts and environmental change (and its consequences, such as drought and food insecurity) continue hitting the continent. In the Southern Africa region in particular, migration is mostly driven for economic reasons, political instability, and environmental hazards. South Africa is the country with the higher estimated numbers of incoming migrants in the sub-region in mid-2020 with 2.9 million people (UN DESA, 2020). Most of these immigrants are from Zimbabwe (24%), Mozambique (12%) and Lesotho (7%) (UNDP, 2020), and three-quarters of the total number of immigrants in the country are from elsewhere of the African continent (Moyo, 2021).

And in the past decade, the southern region of Africa has started feeling certain reluctance to allow the free movement of migration for economic reasons. New restrictions have been approved and border control has been reinforced by a variety of countries, which has led to more undocumented migration. Today, the continent is not only a refugee producer but also a refugee-hosting space, which has meant that the approach towards these immigrants has become much more restrictive than before (Khan and Rayer, 2020).

The point of this chapter is to analyse to what extent the phenomenon of securitizing migration has also taken place in the African continent, and more precisely, in South Africa. This will be useful to provide a more global picture of the securitization of migration, to show that this phenomenon does not only take place within the West -such as it has happened in the European Union and the United States, as we have seen in the two previous chapters-, but also in other parts of the world. If the treatment over migration and over particularly vulnerable groups such as refugees and asylum seekers has changed so much in countries like South Africa, which used to be a protective one over these groups, we can think that we may really be seeing a change on the way we treat migration and that the securitization mechanisms towards these groups has really been spread across the globe. And what is more, if the laws of the countries have really become much more restrictive and are justifying these measures for national security reasons, we may also be facing a global change in the making of norms in relation to security and migration.

10.1. South African recent legislation on migration

The South African legislation on international migration is based on the 1999 White Paper on International Migration and implemented through the Immigration Act of 2002 and the Refugees Act of 1998. Both laws have been amended recently under the lead of the Department of Home Affairs, and new bills have been passed to address more recent migration movements and gaps in legislation.

This has meant that a series of changes in the way migration, and even refugees, are treated in the country. More restrictions have been established, such as the reinforcement of borders, but other difficulties have also been imposed, such as bureaucratic burdens to obtaining asylum seeker permits to move freely within the country and exercise other basic rights. In this section, we will overview some of these recent changes in the legislation and policies of South Africa in relation to migration to analyse to what extent the securitization of migration has also taken place in this African country.

10.1.1. The White Paper on International Migration

The White Paper on International Migration[103] sets out a framework on where immigration law in South Africa should move towards. White Papers are policy documents drawn by the Government which are used as proposals to set up a policy framework for future legislation. They may include a draft version of the future bill and are usually used for discussion before they are formally presented to Parliament. Released in 2017, this White Paper on migration introduces a series of changes regarding permanent residency, citizenship, the asylum system, and other immigration related issues. While the document recognizes that immigration in the country may be beneficial in some cases, it also links migration to security risks, trafficking, and corruption (Scalabrini, 2019).

One of the changes that the White Paper introduces is to change how permanent residency and citizenship are granted. That is, temporary residency and refugee status would no longer lead to permanent residency, while permanent residency would also not lead to obtaining citizenship (Scalabrini, 2019). Permanent residency then could be renewed but would not count towards obtaining citizenship. The idea is to change the vision that immigrants have a right towards citizenship based on the years they have lived in South Africa, and in this way discourage further immigrants from coming to the country.

Instead, the South African government wants to establish a points-based system to encourage only high skilled migration. The factors that would be considered for obtaining a visa would be based on qualifications, work experience, age, amount of money to invest in the country, type of business and ability and willingness to transfer skills. There is then a clear focus on attracting the skills and investments of those who can contribute to the economy of the country. The document even states that "more skilled refugees could successfully apply to work and stay in South Africa under the Immigration Act if the required systems were established" showing a clear inclination only towards skilled migration.

While the Southern African Development Community (SADC) aimed to promote the free movement of people, goods and capital, in reality

[103] *White Paper on International Migration for South Africa*, 28 July 2017, No. 41009, Department of Home Affairs of South Africa

most member states have not amended their policies in this direction. Various non-binding protocols were approved between member states to achieve these goals, but states have rarely shown real effort in working towards this line. The White Paper on International Migration of South Africa is another proof of this reality, although offers some special conditions for citizens of SADC countries. For instance, there can be Special Dispensation Permits for the nationals of some countries, which are temporary permits that allow to work or study in South Africa for a limited period of time. On a similar trend, there is also the option to apply for a special work visa and a Small Medium Enterprise Visa for SADC nationals. All of these options are based and dependent on bilateral agreements.

More importantly, the White Paper also offers an explanation as to why changes in the migration system must change in the country. It states that South Africa has become an attractive destination for illegal immigrants "who pose a security threat to the economic stability and sovereignty of the country". It is argued that this happens because of different factors, one of which is that "human rights organizations and legal practitioners abuse the loopholes in the system to secure the release of the illegal immigrants, at the expense of the government". It seems that the government is clear mistreating human rights organizations, legal practitioners and even the judicial process, when the attitude towards them should be of service disposition.

The Department of Home Affairs now follows a risk-based approach which seeks to keep security threats out of the country because "immigration that is not managed through a risk -based approach is poorly managed immigration". The White Paper's executive summary states that the current migration system of the country "serves to perpetuate irregular migration, which in turn leads to unacceptable levels of corruption, human rights abuse and national security risks. The new White Paper argues that the current policy does not enable South Africa to adequately embrace global opportunities while safeguarding our sovereignty and ensuring public safety and national security". This link between illegal immigration and national security threats is not a new phenomenon, as we have already seen it in other countries, but it is a clear new way of dealing with immigration in the country which, unfortunately, puts in danger the rights of certain unwanted migrants groups in South Africa.

10.1.2. Border Management Authority Act 2 of 2020

The Border Management Authority Act was passed in 2020 and is meant to make the control of border more efficient. The project of the law was deliberated for many years, but a new border regime was finally approved (Erasmus, 2020). While South Africa's borders used to be managed by different government departments, the Act establishes a single authority, a new Border Management Authority under the Department of Home Affairs, to oversee all aspects related to border control including land, air and seaports of entry. The bill has been very controversial and criticized for creating "an increasingly securitized and militarized presence along the country's borders" (Bornman, 2020).

The border crisis that the government has been referring to and which resulted in this bill is based on problems in relation to illegal migration, contraband, and smuggling, which altogether with corruption have made national boundaries porous. The border is 4,400km long and has 72 ports of entry through which 39 million people pass annually (Erasmus, 2020). Thence one of the reasons to give all the responsibility in these matters to a single body is to reduce corruption and prevent illicit trafficking (Maunganidze and Mbioyozo, 2020), but it is argued that it will also offer better policing and enhanced security at the borders.

One of the most controversial parts of the bill is found in Chapter 6, where Article 18 because of the wide powers given to border officials to search, seize and arrest any person "if the officer on reasonable grounds believes that a warrant will be issued if applied for". The powers given to these officers is quite wide and may be easily used against a wide range of persons for what could be unjustified reasons. The Article is written as follows:

> *(1) An officer may, with or without a warrant, within the border law enforcement area or at a port of entry—*
>
> *(a) enter any premises;*
> *(b) search any person, goods, premises or vehicle;*
> *(c) inspect any goods, documents, premises or vehicle;*
> *(d) seize anything found in that search or inspection that may be lawfully seized;*

(e) question any person about any matter related to the passage of persons, goods or vehicles through a port of entry or across the border law enforcement area and confirm their responses in a written declaration; and
(f) arrest or detain any person reasonably suspected of contravening any provision of this Act.

(2) An officer may, without a warrant, exercise any power in terms of subsection (1) if—
(a) a person who is competent to do so consents to the entry, search, inspection or seizure; or
(b) the officer on reasonable grounds believes that—
(i) a warrant will be issued if applied for; and
(ii) the delay in obtaining the warrant is likely to defeat the object of such warrant.

Signs that such a bill would be passed have long been shown by some of the politicians in the government. Aaron Motsoaledi, former Minister of Health and who later on became the Minister of Home Affairs, used to blame immigrants for the bad state of the health system of the country, and in his new position claims for more border protection. He, and other members of the African National Congress (ANC) -the ruling party- run the 2019 elections with border controls as one of its main demands and have often shown their anti-immigrant position. As Bornman (2020) explains: "It would be easy to dismiss the bill as some form of Trumpian legislation, or something that mirrors the rhetoric and actions against migrants emerging from countries such as Hungary, Poland and the United Kingdom. But this bill has been in development since long before Donald Trump ran for president of the United States". The bill has been criticized for using justifications such as the prevention of smuggling, human trafficking and to stop the terrorist threat as a mechanism for securitizing migration and undermining regional governance initiatives (Landau and Kihato, 2017).

Moreover, the bill was passed the 21st July 2020, in the midst of the Covid-19 outbreak, and this is something that is reflected in the Preamble of the Act. While the document acknowledges that the bill is passed to prevent illegal cross-border movement, smuggling, trafficking of human beings and goods, and to make border law enforcement functions more effective, it also recognizes that it is needed to "protect the Republic from harmful and infectious diseases, pests and substances", which may be another way of reinforcing

border protection and refrain outsiders from entering the country and bringing more Covid-19 cases.

This has been a piece of legislation which has put into practice many of the securitization priorities of the White Paper. Some commentators have noted that the Border Management Act shares many similarities with some of the securitization measures on immigration developed by the European Union which could result in a new paradigm where "millions will be detained in facilities across Africa or condemned to die along land and water borders" (Landau and Kihato, 2017).

10.1.3. Refugees Amendment Act 11 of 2017

In the post-Apartheid period, South Africa ratified some international human rights treaties including the 1951 Geneva Convention relating to the Status of Refugees, the 1967 New York Protocol relating to the Status of Refugees, as well as other regional instruments such as the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (which is a OAU Convention). The latter even broadened the definition of refugee from the previous instruments, to include "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"[104].

The Refugees Amendment Act 11 of 2017 (hereafter RAA 2017) is, as its name says, an amendment to the Refugees Act 130 of 1998 (hereafter RA 1998). The RA 1998 was a progressive law which incorporated international refugee law into the legal framework of South Africa and put the country at the forefront of refugee protection within the region. The refugee system became, ever since, an advanced, modern, and tolerant one, outstanding within the continent.

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[104] See Article 1(2) of the 1969 Convention. Regarding the interpretation and application of this Article see Harerimana v Chairperson of the Refugee Appeal Board [2013] ZAWCHC 209, (2014) (5) SA 550 (WCC) which held that the OAU definition of refugee should be considered to define the concept of refugee in Africa.

Nevertheless, with the approval of the RAA 2017 and its entering into force on January 1, 2020, the refugee system and refugee protection of the country has substantially and detrimentally been altered (Ziegler, 2020). From the one hand, it complicates access to the asylum regime while, on the other, it denies asylum-seekers certain rights which they used to enjoy. This change has not come from one day to another, but it has been built by the implementation of different restrictive policies which have slowly but steadily constricted refugees' rights. These legal incorporations meant more restrictions to asylum status through "pre-screening procedures; refusal to renew permits originally issued at another Refugee Reception Office (RRO) elsewhere in South Africa; close of RROs and foot-dragging in implementation of court orders that instructed their re-opening; as well as corruption in their operation, and refusal to issue permits to delayed applicants" while in terms of their substantive rights they have "restricted access to employment, education, basic medical care, and marriage (at least) until and unless asylum-seekers are formally recognised as refugees" (Ziegler, 2020:69). They can even lose their refugee status for voting or participating in any political activity of their country of origin. As declared by Jon Temin, director of Africa programs at Freedom House, "the South African government should immediately revise the Refugees Amendment Act to safeguard the rights of refugees and asylum seekers, and ensure that the Act conforms to South Africa's constitution and international law" (Freedom House, 2020).

One of the practical problems that refugees face in South Africa is related to admissibility after crossing the border, as they face refusal to entry the country, which is an infringement of the principle of non-refoulement. Once a refugee enters the country, she automatically enjoys the protections given by the RA 1998 and should therefore also have an opportunity to apply[105]. What is more, if one is able to enter the country, she must gain an asylum-seeker permit dispensed by a Refugee Status Determination Officer. According to Section 21 of the RA 1998, applications for such permits must be in person. However, an appointment system which adjudicates dates as far away as six months to a year has been set up. And while these asylum seekers wait for their appointment, their status is considered to be that of an illegal migrant. Other similar problems are also not rare, such as those in

[105] *Abdi & Another v Minister of Home Affairs & Others* [2011] ZASCA 2, 2011 (3) SA 37 (SCA)

relation to being refused the renovation of a permit because it was originally issued at another Refugee Reception Office, refusal to issue a permit that has been submitted with delay -although that should not be a justification to deny someone refugee status as it would deny the rights established in the 1951 Convention, refusal to renew permits to detainees, among others (Ziegler, 2020).

Furthermore, Section 4(1)(h) denies recognition to those who have entered the country illegally and Section 4(1)(i) those who have failed to report to the Refugee Reception Office within five days of entry into the country. However, let's explain the complications to reporting within five days. The Regulations accompanying the Refugees Amendment Act alter the position of newcomer asylum seekers. Regulation 7 states that those arriving to the country and wishing to apply for asylum must declare their intention to do so when entering South Africa. Only then will they be issued an Asylum Transit Visa in the terms of Section 23 of the Immigration Act, which is valid for five days only. Once they have declared their intention to apply for asylum and have obtained an Asylum Transit Visa, they can go to a Refugee Reception Office in less than five days to formally apply for asylum. As said, according to Section 4(1)(i) of the RAA 2017, if they fail to report to a Refugee Reception Office within five days of entering the country, they will be excluded from refugee status. The problem is that obtaining such a visa is not an easy task, and asylum seekers may unintentionally forget to apply for this visa or do not know how to do so. Five days is a short period for filling lengthy asylum applications without any or very limited assistance. But what is more, there is a practice called "nationality days" at these Offices which establish specific days for specific nationalities to assist them in their applications. For instance, the Somali nationality day is on Thursdays, meaning that Somalis may only enter Refugee Reception Offices on Thursdays. If a five-day Asylum Transit Visa is issued on a Thursday for a Somali national, the moment of her arrival, this visa will unavoidably have expired by the following Thursday, when the newcomer wants to enter a Refugee Reception Office to apply for asylum. And if violating this period, she is then at risk of being excluded from having her refugee status recognised as she is in violation of the immigration laws of the country. If, to this practical barrier to applying for asylum, we add the decision of the Director-General of Home Affairs of 2011, Mkuseli Apleni, of closing three of the six Reception Offices in the Country[106] (that of Johannesburg, Port

Elizabeth, and Cape Town) more complications are added to the chances of applying for asylum, which increases the hurdles to being recognised with this legal status (Ncube and Tracey, 2020).

But even when one has gained recognition, she may still have issues maintaining such status. That is because RAA 2017 has introduced a series of circumstances which will lead to the cessation of the status of refugee, thus having expanded the reasons under which refugee status could be withdrawn. Among these cases, engagement with consular authorities of the country of origin may be a basis for withdrawal of refugee status and, given that certain legal documentation such as birth certificates, which are often asked by the authorities of South Africa, can only be issued by the country of origin, in many cases one may find herself either uncapable of getting these documentation or under the threat to have her refugee status unrecognised or removed (Ziegler, 2020). Failing to report to a Refugee Reception Office within one month or more after the expiry of their asylum permit will also lead to cessation of refugee status according to Section 22(12). Once one of the conditions to lose refugee status are met, she "may not re-apply for asylum and must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act" as established by Section 22(13).

More concerning is Section 28(1) which states that refugees and asylum seekers can be removed from South Africa "on grounds of national security, national interest or public order". Definition of these three grounds are not given anywhere in the document. Such vague wording may contribute to providing wide interpretations which may lead to detention and removal. Some have even called these measures as moving South Africa "closer to Donald Trump's America" (Shivji, 2020) and is, again, another proof of the intention to securitize migration in the country. Such legislative changes and introduction of restrictions have been characterized by a shift towards a security-oriented model by the Department of Home Affairs (Duncan, 2020), which in turn gives "excessive emphasis on security in government

[106] The Port Elizabeth Refugee Reception Office reopened in 2018 after Lawyers for Human Rights brought an application on behalf of the Somali Association of South Africa's Eastern Cape branch challenging the decision to close this Port Elizabeth's office and the Court ruled that closing these offices increased barriers for asylum seekers to accessing asylum and was irrational and unlawful. This was held in Minister of Home Affairs and Others v. Somali Association of South Africa, Eastern Cape (SASA EC) and Another (831/2013) [2015] ZASCA 35

policy" in justification of responding to the terrorist threat (Hobden, 2020).

Even though different parts of the migration legislation are questionable and may lead to arrest and repatriation in cases where it should not, if the legislative branch may have wronged, it is the turn of the judiciary to make sure that all of the provisions are interpreted according to international human rights norms, which are predominant over national law. In *Ruta v. Minister of Home Affairs*[107], Mr. Ruta had entered South Africa illegally in 2014 and remained under such status until he was arrested in 2016 for a traffic violation. The Department of Home Affairs wanted to deport him to Rwanda, his country of origin, but he requested to apply for asylum as he claimed he would face death if returned to that country, an application which was opposed by the Department arguing that he had already been in the country for over a year and it was not too late to apply. The Constitutional Court ruled that the principle of non-refoulement, a customary international norm which has been widely recognized in human rights law, had to be considered in this case. Similarly, even though he had no refugee status by the time, the 1951 UN Convention protects those who have not yet been granted such status. As a consequence, the Court found that even though delay might be a factor for determining an asylum claim, Mr. Ruta's application could still be made and could not be disqualified for making such application only because of his delay in doing so (Ncube and Tracey, 2020). While this is a 2018 decision, it will be interesting to see how South African Courts will continue interpreting the Refugee Amendment Act of 2017 and whether they will consider if any provisions are in violation of international law.

10.1.4. Recent legislative proposals

At the time of writing, South African authorities have published a draft for a new National Labour Migration Policy and Employment Services Bill aimed at introducing quotas to foreign nationals working in the country, which will be passed in the next few months after a consultation process. Whilst this is not in response to Covid-19, it has become an additional measure making it more difficult for migrants to

[107] *Ruta v Minister of Home Affairs [2018] ZACC 52*, South Africa: Constitutional Court, 20 December 2018.

come to the country and integrate within the host society in these especially difficult times.

Under the new Bill, foreign nationals would only be allowed to work in South Africa if they have a work visa, an asylum seeker permit with the right to work or if they are permitted to work by an international agreement. The idea is to allocate quotas for the employment of these nationals to ensure that there are no locals qualified to take over a particular position by conducting a labour market test "to regulate the extent to which employers can employ foreign nationals"[108]. These quotas will be established by the Minister of responsible for labour and employment. Thence the ultimate goal of this proposal is to prioritize nationals over immigrants in the labour market of the country. It is just another measure restricting the rights of migrants in the country and making it more difficult for them to make a living while being in South Africa.

David Sithole, a Zimbabwean Uber drive in Cape Town, explained how he got in the country after the 2010 FIFA World Cup South Africa, since the government issued "Event Visas" for free to visitors of South Africa that year. It was actually the first country to ever issue such a visa for an international event. Now, Mr. Sithole, who has been living in South Africa for almost twelve years, is afraid for himself and other migrant friends to have even greater struggles finding a job to sustain themselves in the country.

Different is the situation of Matthew Ncube, also Zimbabwean, who came to South Africa in more than twenty years ago looking for better perspectives for himself and his wife. During his years in South Africa he has had two children and is currently the supervisor at a restaurant in Cape Town. Mr. Ncube first came to the country with an asylum permit, which was then replaced with different Zimbabwean special permits. He currently holds a Zimbabwean Exemption Permit (ZEP). The history of these recent special Zimbabwean permits in South Africa dates back to 2010, when the government implemented the Dispensation of Zimbabweans Project (DZP). The DZP wanted to provide amnesty to Zimbabwean nationals who were illegally staying

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[108] Newsroom of the South African Government, "Employment and Labour Minister releases SA National Labour Migration Policy for public comment", February 22, 2022. Available at: https://www.gov.za/speeches/employment-and-labour-minister-releases-sa-national-labour-migration-policy-public-comment

in South Africa -some with fraudulently obtained South African immigration documents-. The project expired by the end of 2014 and was replaced by the Zimbabwean Special Dispensation Permit (ZSP), which was valid for a period of three years until December 31, 2017. This was later on replaced by the current ZEP, which expired on December 31, 2021. However, acknowledging that more than 180.000 Zimbabweans are in possession of this permit (Chirume, 2021), the Director General of the Department of Home Affairs confirmed that while extensions would not be granted and no exceptions be made, these people would have a grace period of 12 months to legalize their status in the country through the mechanisms established to all other migrants as written in the Immigration Act 13 of 2002. Mr. Ncube has been in the country for almost five years now, but there are thousands of Zimbabweans who have resided in South Africa for even longer and got accustomed to the 4-year renewal of the permit. The decision of the government not to renew their permits anymore, got them by surprise in early December 2021, and may now be wondering what to do next. And while some may decide to stay and regularize their status through the Immigration Act, some will not even qualify, and others will struggle even knowing finding helpful information.

Such struggles to qualify to stay are due to the renewed Critical Skills List which became effective in February 1, 2022, replacing the last one which was passed in 2014. The Critical Skills List stipulates skills and qualifications which are necessary in South Africa at a given time and which can allow a foreigner to qualify for a work visa or permanent residence permit. The listing of jobs, however, has been drastically reduced from 2014 when there were 215 occupations, to the current number of 101. The areas in which there has been a most drastic cut have been in the medical, trades, and academic fields. Zimbabweans who may qualify for these positions and wanting to regularize their situation according to the Critical Skills List may be just a few. And the same situation applies to other immigrants in the country, as not all of them might find it easy to stay in South Africa according to this list.

10.2. Xenophobia in South Africa

Xenophobic sentiment in South Africa country is not new. The first refugees in the country date back to 1687 and were the Huguenots (French protestants) who fled religious prosecution from France and came from Holland organized as a colonial program when the Dutch where ruling South Africa (Coertzen, 2011). When South Africa became a nation state, then it welcomed many refugees from Eastern Europe, Rhodesia (today Zimbabwe) and Mozambique, but they were all refugees from European descent and were automatically accepted just because they were white. On the other hand, black refugees from the same countries were repatriated or ignored, and Black Africans were only allowed in the country "as migrant labourers who could be sent back when no longer needed" (Khan and Rayer, 2020).

It was not until 1994 with the fall of the Apartheid government that the new executive decided to move away from the policy of exclusion to one based on the protection of fundamental rights. With the ratification of the OAU Refugee Convention in 1995 and of the UN Refugee Convention and its Protocol in 1996, South Africa was entering a new era in which a new refugee approach would begin. One year later, in 1997, the Green Paper on migration was approved, which evolved into two White Papers[109], one for Refugee Law and one for Immigration Law (Khan and Rayer, 2020).

Even with these legislative changes incorporating a new and more friendly framework towards immigration, and specially refugees, xenophobic sentiments persisted among certain groups. As Abdul Hassan, chairperson of the Somali Association of South Africaplaces, explains: "They [South Africans] didn't get what was promised to them after the 1994 elections. So they think that the little that they have [is] being shared by [people] from African countries who have come to South Africa. They [South Africans] don't want that" Adjai and Lazardis, 2013).

Thence in the imaginary of South Africans, immigrants were seen as a burden on the social and economic system, which relied on already scarce resources. Black South Africans finally had full citizenship

[109] Green Papers are documents used as proposals and set out for discussion while White Papers are statements of policy which establish the proposals for legislative changes. Green Papers precede White Papers. And White Papers precede formal Bills.

rights when the Apartheid era came to an end, but the economic policies of the new South African government at the time, such as the Redistribution and Development Program 1994-1996 and the Growth, Employment and Resdistribution Strategy from 1996 onwards did not build enough houses, nor alleviate unemployment, which meant that for black South Africans life did not improve as much and as fast as they had hoped in the first place. Therefore, the foreigner is seen as a threat to black South African's access to resources, and particularly in the informal sector. Xenophobia in these groups is then, as a matter of fact, an expression of disillusionment on the government's ability to alleviate their frustrations (Adjai and Lazardis, 2013).

Besides the more progressive changes in the law, the reality that the migrant community faced in the country was one of exclusion. As Nduru (2005) pointed, police officers reported to routinely confiscate and destroy refugees' documents to justify arresting them as illegal migrants. And all this happened before the more restrictive changes in the law that have succeeded in recent years and which have been analyzed in this chapter.

As the 2017 White Paper explains, the immigration system which was based on the 1999 White Paper had its focus "biased towards formal rights rather than on understanding that international migration must be managed professionally, securely and strategically to achieve national priorities". Therefore, the main priority of the new White Paper is to address migration according to national security objectives, rather than looking after immigrants' rights.

One of the reasons which reinforce this xenophobic feeling towards migrants and which promotes the securitization of migration in South Africa is that the government has taken an active role in targeting foreigners by blaming them for negatively contributing to the worsening of the economic system of the country, which continues to foster this negative image of the immigrant coming to South Africa among the population. There have been certain political moves directed towards the migrant population to accuse them of damaging the economy of the country. One example is that of Operation Hardstick by which the Limpopo police was instructed to shut down those businesses owned by refugees and asylum seekers (Carciotto, 2020). Later on, the Supreme Court of Appeal[110] ruled in 2014 that the

actions taken by the police were unlawful. In other occasions, foreigners have also been accused of dominating the informal trade sector and on being the source of the country's socio-economic problems, beliefs which even led to xenophobic demonstrations in Gauteng and KwaZulu-Natal during 2015 (Kharsany, 2015). Unfortunately, actions in the same negative lines have also been approved by provincial governments such as those of Limpopo, which wanted to remove Zimbabwean migrants from the province and have even led to their deportation (Carciotto, 2020) and several other xenophobic violent actions against non-nationals have taken place during the last decade (HRW, 2020).

Some of the conditions that foreigners face in South Africa are a result of governmental actions to detain undocumented persons. Documentation raids have often taken place and have led to arrests to both documented and undocumented migrants, who have later on remained under arrest for several days or even weeks while their legal status was being verified and without access to their lawyer. Some have even reported being beaten by law enforcement officials. But some of the mistreatment also comes from nationals who verbally and physically harass them because they blame them for high unemployment and crime rates, among other issues (HRW, 2020).

A 2018 public survey found that 44 percent of respondents believed that immigrants should not be allowed to live in the country because "they take jobs and benefits away from South Africans" (FHR, 2018). The government launched a National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) in March 2019. This program wanted to combat all these phenomena by ensuring that foreigners would receive all the services they are entitled to, promote their integration, and ensure a more humane way of treating migrants, including refugees and asylum seekers. Nevertheless, xenophobic incidents continued occurring in that same year, with the government being unable to effectively stop them. Human Rights Watch conducted a series of interviews in which it found that foreigners had been harassed and attacked by South Africans - including government and law enforcement officials- in the regions of Western Cape, Gauteng, and KwaZulu-Natal, between March 2019 and March 2020. In these cases, they had been blamed for

[110] *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143 (26 September 2014)

unemployment, crime and neglect by the government, among other things, and argued that employment, healthcare, education as well as housing opportunities should be only made available to nationals (HRW, 2020).

Furthermore, the current migration system in South Africa does not consider gendered aspects of migration and thus fails to compensate the vulnerabilities that these groups suffer. While women represent almost half of the migration population in the continent, migrant women in the country have quadrupled in the last 15 years (Mbiyozo, 2018). And while South Africa's National Development Plan 2030 implements as some of its goals those in relation to both migration and women and some legislation has been passed to achieve gender equality in some sectors, in the case of migration this has not been the case (Farley, 2019).

As it has been said, the Refugees Amendment Act 11 of 2017 introduced a series of changes that make the process of applying for asylum excessively bureaucratic and poses many difficulties to obtaining the status, such as the limitation of 5 days to report to a Refugee Reception Office or the closure of some of these offices around the country. And this is just one of the many examples which can be found in these most recent legislative changes. While in theory the South Africa refugee system used to be one of the most generous, its implementation is in truth much more restrictive and is based on domestic legitimacy gains through exclusion and "a state-led bureaucratized merging of refugees and migrants, in the shadow of institutionalized xenophobia leading to increasing securitization" (Moyo et al., 2021).

10.3. Immigration during the Covid-19 Pandemic

Moral panic relating to the movement of people across borders, which is what happened in most places during the outbreak of the Covid-19 pandemic, can justify the implementation of security measures which restrict immigration and reinforce border control in order to respond to a global health threat (Feldbaum et al., 2020). But if to this exceptional situation, we add the particularities of immigration in South Africa, the situation has not been easy for those trying to seek refuge the country. Even though migration patterns have changed in

the last decades in the country, South Africa hosts the largest number of migrants from elsewhere in the Southern African Development Community (SADC) (STATS SA, 2021) and it is the country with the highest incidence of HIV affected people globally (UNAIDS, 2020). Within a context of panic within a global health security threat, South Africa has been able to use the Coronavirus as a justification to stop documented migration into the country and restrict informal employment (Mukumbang, 2020, Vearey et al., 2021), which is the way in which many migrants in the country make a living.

South Africa was one of the countries which responded most quickly to the Covid-19 virus when it was declared a pandemic on 11th March 2020. President Ramaphosa announced a state of disaster only four days later which included travel restrictions, school closures, and the cancellation of visas. And from 26th March, the government imposed one of the world's strictest lockdowns (Moyo et al., 2021). The travel restrictions consisted in only allowing citizens and residents into the country and only allowing those returning to their country of origin to leave South Africa. However, those who chose to be repatriated and had overstayed their visas in South Africa, if when crossing the border the officials recognized this expiration, they were declared undesirable and banned from returning to South Africa for five years (Du Plessis, 2020).

When it comes to refugees and asylum seekers, mobility restrictions involved the closure of Refugee Reception Offices all over the country. This meant that no further asylum claims could be made, but it also meant that those who had started the process and were waiting for an appointment were still to lodge their applications. If any of these peoples who would have applied for asylum in normal circumstances were now entering the country, they would become illegal migrants without any chance to change this status, as they would be moving around the country without the transit visa that is necessary to stay in South Africa.

For the rest of immigrants, one of the national priorities of the government was to stop regional migration. Shortly after the outbreak of the pandemic, the government of South Africa announced plans to construct a 40-kilometre fence along the borders with Zimbabwe. The reasons for building such fence were, from the one hand, to ensure that illegal migration crossed into the country. From the other, that

infected persons would also refrain from entering (AlJazeera, 2020). Today, the building of this fence is under criminal investigation since the government was accused of corruption for overpaying between R14-17 million and not following the framework of bid specification, evaluation, and adjudication (BusinessTech, 2020). Even though the Minister of Defence declared that the fence might be useless, intentions to securitize the country persist as he admitted that the Department was then considering deploying drones and further technologies to secure the border (Ndenze, 2020).

The government released the COVID-19 Social Relief of Distress Grant to try to help those affected by the economic hardships caused by the severe lockdown of the country. Nevertheless, among migrants in the country, only those with recognized refugee status with Section 24 permits and permanent residents could access such grants, and only after a court decision were asylum seekers with Section 22 permits also allowed to be eligible (Moyo et al., 2021). And as it was pointed out earlier, in the midst of the pandemic, in July 2020, the Border Management Authority Act 2, which reinforced border control among other things, was released, which included among the justifications for its passing, the protection of the country from harmful and infectious diseases coming from outside the country.

Due to a range of added vulnerabilities, migrants have higher rates of poverty, unemployment, and face more difficulties in finding good housing conditions, and access to education and health systems. And in times of economic regression, these detrimental conditions are reinforced. As the International Organization for Migration (IOM) states, "Some of the 272 million international migrants worldwide are more vulnerable than others because of personal, social, situational and structural factors. Their vulnerabilities may be exacerbated in crisis situations, as it is the case with the CODI-19 pandemic" (IOM, 2020). During the Covid-19 pandemic, where there has been this economic regression in most countries, in addition to a change in the job sector in which home office has been prioritized for a long period of time, migrants have found it hard to accommodate to these new circumstances since many have jobs where physical distancing is difficult. They have generally less stable employment conditions and are also at a much higher risk of Covid-19 infection than most nationals because of the conditions in which they live. Many times, in higher density buildings and neighborhoods, sharing apartments

among several migrant families. In times of economic and social difficulties, discrimination strongly increases, which makes it even harder for them to find a job (OECD, 2020) and integrate into the hosting country. Thence in times of crisis such as the one due to Coronavirus, not only are they under harder and more vulnerable economic and living circumstances than usual, but they also face higher risks of being infected, and of being excluded.

Countries have closed their borders, making it difficult for refugees and asylum seekers to flee their home countries and find refuge elsewhere. Life has become harder to certain groups within hosting countries. From the one hand, for those which had recently arrived and were still getting used to a new life or maybe even looking for shelter and employment. For those who had already been there for a while, depending on their personal situation, new difficulties might have made them even more vulnerable in these times of crisis. Unfortunately, this has impacted migrants around the world and has not just been a particularity of South Africa. However, the South African government was fast in reacting by closing the borders after the Coronavirus outbreak was declared, and also confining its citizens for long periods of time. If this were not enough, the Covid-19 variant that emerged in the country (first called South African variant, and later the SARS-CoV-2 Beta variant or Beta variant) meant that the government persisted in extending these security measures over time to address the health crisis situation faced in the country. Altogether, this has contributed to hindering the lives of immigrants in the country.

It is then easily understandable that the migrant population has been especially affected by these security measures to fight the Coronavirus, and South African immigrants have not been an exception. This does not only have practical implications for the lives of migrants, but it also reinforces the that in times of crisis, governments use and abuse of certain measures to refrain and control immigration in the name of national security. The securitization of migration does not only take place or advance faster after a terrorist attack, or after a new government less keen to immigration arrives to power, but it may also take place in times of a sanitary crisis, as the Coronavirus has shown. The Covid-19 pandemic has become the perfect storm to justify the deterioration of migrants' rights to protect and secure the security of the country.

10.4. Overall assessment

In this chapter we have seen how recent legislative changes in South Africa have affected immigration and, in particular, the rights of asylum seekers and refugees. In recent years, the government has shown through the White Paper on International Migration of 2017 its plan to further control immigration and prioritize skilled migrants only. New laws like the Border Management Authority Act 2 of 2020 and reforms like that of the Refugees Amendment Act 11 of 2017 have difficulted the processing of visas for those seeking refuge, but also the integration of the overall migrant population in the country. Critics have repeatedly said that the asylum system in the country is characterized by years-long backlogs and lengthy appeals, and rejection rates reached as high as 96 percent in 2019 (Moyo, 2021).

The history of this Southern African country is partly, but importantly, linked to xenophobia. First, against the black population during Colonial times, and which lasted until the very end of the Apartheid. But later on and to this day, immigrants have also been victims of several attacks in the hands of South Africans. These attacks have been more common specially in times of regression and economic crisis. But what is more, the Covid-19 pandemic has made life even more difficult for these groups which, already vulnerable, are struggling to keep their jobs and get access to health. The government has used these strenuous times to progress in their plans to securitize migration by setting stricter border controls and making it more burdensome to apply for asylum and to get visas to stay legally in the country. It has even established a points-based system so that only those with sufficient skills or economic stability can stay in the country.

The Department of Home Affairs now uses a risk-based approach that connects immigration with national security. The 2017 White Paper is clear in this sense: "The current paradigm exposes South Africa to many kinds of risk in a volatile world and by default strengthens colonial patterns of labour, production and trade. It also serves to perpetuate irregular migration, which in turn leads to unacceptable levels of corruption, human rights abuse and national security risks". This risk-based approach will be used to manage "the

secure and efficient cross-border movement of people", which are associated with "serious risks such as terrorism and drug smuggling". This strategy will be used to prioritize the deportation of "high-risk migration" over "low-risk migration". What is considered to be a high-risk migrant is yet to be completely identified, as risks to national security can be broadly interpreted.

This was a country that used to be friendly towards asylum seekers and refugees, but while in the paper they used to have many rights, in practice it was harder to enjoy them. Today, with these legislative changes, even more. This complex situation serves again as another example of how securitization measures are taking place globally, and not only in Western countries. The way in which countries deal with immigration are more commonly linked to national security strategies which regress in the rights that migrant communities had gained in many countries. The terrorist threat has been one of the most popular arguments which have been used to connect immigrants, and even refugees, to terrorist attacks and potential security threats for the country. But the Covid-19 has also been used as another justification to continue approving measures that refrain and control immigration, furthering in these processes of securitizing migration. The cases of the European Union, the United States, and of South Africa are just some of the few examples which can be found in this direction, but many other countries have taken similar steps plans of action to deal with international migration. It will be then gripping to see to what extent we can continue forgetting about the rights of the most vulnerable in the name of security.

CONCLUSIONS

CONCLUSIONS

This final chapter is divided in three main sections. The first offers an exhaustive list of the main conclusions of this thesis. The second puts these conclusions in context and gives a deeper explanation of them all while separating them in three main ideas. The last section exposes hypothetical future prospects in relation to global security governance.

A) Main findings of the thesis

This thesis analyses the changes within the international order and the ways these have affected the role and development of international norms. This study has been done through the case of the securitization of migration, as laws and policies dealing with migration and national security have globally expanded over the last years and are useful to emphasize this change towards prioritizing national security and a more realist model within the international system. This has shown, from the one hand, that states are more inclined towards producing national legislation than dealing with global issues through international cooperation and international norm-making. From the other hand, it is also proof of this tendency to follow national interests over international security and human security, a sign of a change within the international order of the setback of the universal rights and values promoted by liberalism to return to a model based on geopolitics. The following is a compilation of the main conclusions of this thesis.

FIRST. International relations are becoming more based on self-interests and geopolitical calculations. Even though there are interconnected security concerns, states are more resistant to cooperate and share common legislation. Instead, there is a tendency to develop national laws, as we have seen in the cases analyzed through Chapters 8 to 10. We more often see the emergence of patterns, rather than norms, as states are not willing to bind themselves by international legal obligations anymore. The European Union serves as an example of an international organization passing

legislation securitizing migration at the international level, but we cannot talk about the emergence of a global norm or multilateral treaty in this field. Instead, what the wide variety of measures linking migration to security show is a pattern by states of addressing security threats more commonly through national security mechanisms and national legislation instead of tackling them through multilateral cooperation. This is another sign of the comeback of realism and a model based on geopolitics and the imposition of national interests over liberal cosmopolitism and global cooperation.

SECOND. 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. 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. In the European Union and within its member states, we have seen how the high incoming immigration flows together with the increase of the terrorist threat have been the perfect scenario to justify the link between migration and security, a practice which has been spread across boundaries and around the world.

THIRD. The emergence of global norms is a flexible and fluid process in which different actors participate. It is not only a process led by states and international organizations, but there are also civil society organizations and private actors such as multinational corporations and private security companies. These enterprises 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.

FOURTH. The securitization of migration is a reality and is a practice which has been established by different countries around the world, and the privatization of the sector is just one of the many signs of this process. The attacks of September 11 had an important impact on the discourses used to justify these measures, especially emphasizing the need to protect from the terrorist threat. And ever since, counter-terrorism legislation and policies restricting the rights of immigrants have been more commonly applied. Securitization is now an international practice, and often linked to the fight against the "war on terror". However, this is not a homogeneous phenomenon as it has been applied with different degrees depending on the country. Some remain at an "preliminary" stage -following the classification presented in Chapter 6, such as the case of South Africa. Others count with a wider number of laws affecting the rights of immigrants on the basis of national security -those in an "intermediate" or "advanced" stage- which would be the case of the Malaysia and Indonesia, or the United States.

FIFTH. Even though many states have used the terrorist justification to apply these measures, the fight against the terrorist threat is not the only ground on which the approval of these laws and policies is based. As seen in the case of South Africa, non-Western states are also securitizing migration, and they are not always doing so in the name of the war on terror. In the case of this African country, as explained in Chapter 10, these measures have been said to be necessary to protect from illegal immigration, as it is considered a security threat to economic stability, sovereignty, and blamed for higher criminality rates. The securitization of migration is then not only justified in the name of the war on terror, but it is also securitized following a wide range of argumentations other than terrorism.

SIXTH. Practices securitizing migration also show 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 the return of realism strongly affect the rights of unprotected or more exposed groups, which become even more vulnerable with the changes that 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.

B) Findings in a broader perspective

In this section, I will explain the previous list containing the main conclusions of the thesis in more depth to oversee the impact of each and one of them on international law, international relations and ultimately on vulnerable groups. They will also be put in the context of current studies, to establish the relevance of these conclusions for todays and tomorrow's academic research.

The sixth previous points can be put together under three main debates or discussions: that of who is responsible for security governance, that of the changes within the international order towards a more Westphalian model, and that of the consequences of securitizing migration.

b1) Who is responsible for security governance?

Knowing who oversees the provision of international security is important to understand international relations, the process of international law-making, and the structure and functioning of the international order. In a moment when so many unpredictable events and conflicts are happening around the world, it is key to address the issue of who is in charge of maintaining international peace and security.

According to Emil Kirchner, security governance is based on three different processes: coordination, management, and regulation (Kirchner, 2007). The first refers to the control over the implementation; the second to the negotiation procedure, resource allocation, and similar matters; while the latter is the policy result, "its intended objective, its foresting motivation, its effective impact and

the institutional setting created" (Christou et al, 2010). The question of who the actor responsible for each of these parts of the process is, is not so clear, since "the architecture of global security governance has undergone considerable fragmentation in the post-Cold-War era" (Gaskarth, 2013). Today, there are several actors dealing with security issues at different stages, so it may sometimes be hard to clearly define who is the ultimate decision-maker.

One of the changes after the Cold War applies to the military sector where, from the one hand, there has been a certain development of international organizations and, from the other, we have witnessed a privatization of the field. As explained in the first chapter, there are now many organizations and specialized agencies, as well as other public and private actors participating in the international legislative process. There are organizations such as the North Atlantic Treaty Organization (NATO), the Organisation for Security and Cooperation in Europe (OSCE), the Gulf Cooperation Council (GCC) and the Shanghai Cooperation Organisation (SCO) which have been set up precisely to discuss security issues affecting a wide range of countries. And security issues are also discussed during global and regional conferences and meetings such as the World Economic Forum, the G8, G20 and G77, among others (Gaskarth, 2013). Security is an important matter in international politics and this is shown by the creation of specialized organizations in the field, but also because it has remained the centre of international agendas for years. This is not a new phenomenon, but the way we deal with security issues today is, and that is why it is relevant to understand how these changes have been made and what they imply.

Today, there are many actors in charge of controlling national security, and therefore implementing and controlling both migration and security policies at the same time. As explained in Chapter 5, internal and external security are not distinguished spheres anymore. Police officers, the military, and specialized agencies are all involved in providing security. But so are private security companies. Understanding their role and impact on the design of laws and policies is extremely important to know to what extent they are able to influence the final outcome. They are no longer just offering services to provide security, but they are also more often than ever involved in the legislative process and design of security policies both at the national and international levels, both directly assisting governments

and international organizations. Thence their spheres of influences have changed and expanded, and they are often lobbying behind the scenes to pressure for benefiting from passing harder security measures. This does not mean that all private actors participating in designing legislative proposals are necessarily looking for their own profit, as many are specialized organizations bringing legitimacy, support, and reputation to the table. They can watch the correct application of international norms, and make sure that certain standards are complied with. But that will depend on the specific actor, thence making it extremely important to count with reliable contributors without self-interests. Making sure that personal benefits do not come into play is extremely important to make sure that security laws are designed for the best protection of the citizen. In turn, this also makes this topic relevant for future study and analysis, to continue detecting which are the enterprises benefiting from this and which are not, and to further understand and control the role of these businesses in both the legislative and implementation processes.

In the field of international migration states have always wanted to reinforce their power and capacity to control their territory through their frontiers. These have become a symbol of protection of national sovereignty. This sovereignty though, clashes with the necessity of moving negotiations and achieving agreements to deal with migration more efficiently at the international level. International organizations have been and are a good tool to bring this and other matters to the table to try and find a useful solution. However, as it has been repeatedly said, more and more often we find those subjects in relation to migration presented as security problems, and it is important to highlight it when it happens.

The control over frontiers, for instance, has changed over time, leading to a new architecture (Papademetriu and Collet, 2011) which affect both internal and external dimensions of the state. Ferrero (2017:57) gives an interesting perspective on this evolution:

> *"The conjunction of technologies and inter-state cooperation seeks to transform the 'fortress' model of frontiers to a more complex organism, holistic and non-isolated from the rest of politics, in which border security achieves a link with other mechanisms so that they can maintain the integrity of the state. Getting to this equilibrium between security, mobility*

and liberty should be the goal in a system where nationality/citizenship is not anymore (but will be) the main ground for exclusion to enter a country, but it will instead depend on the characteristics of the individual. And it is in this context where securitization appears."

That is the reason why when we talk about migration governance today, most of the times we are also referring to security. And that involves a whole system of complex and advanced mechanisms at different levels, from border surveillance to information sharing and the involvement of a wide range of actors. As pointed out before, the making of international law is not at the hands of the states alone anymore, but there are international organizations, enterprises, civil society, and individuals involved in the different steps of norm development. And this is reflected not only in the way in which these actors influence the law-making process, but also in the way in which migration governance overall is construed, since the interests of them all are brought to the table. Making sure that national security measures are not only designed to protect the country and its population, but also to make sure that no subjective threats are being construed is key. Otherwise, we are under the risk of building security threats according to the interests of the elite in power. And as a consequence, to restrict the rights both of the population and other vulnerable groups such as migrants. This is precisely what this thesis wanted to emphasize, as research on how securitization takes places and then affects vulnerable groups is extremely important to detect when this happens and refrain further abuses.

Global governance -on migration and in other areas- also refers to the obedience of norms and rules, which are supposed to be the ones guiding state behaviour and their actions as to what they can and cannot do. In a liberal world order, the law is one of the most important tools to maintain peace and order within the international system. If we are to face a realist system, however, unilateral actions based on national self-interest are always prioritized. The widening of the security agenda, with new international threats destabilizing the safety of the citizen and the nation (as with the case of climate change, terrorism, etc.), has opened up the creation of new threats but it has also unsettled established mechanisms of global governance (Gaskarth, 2013).

b2) The comeback of Westphalian geopolitics

The 21st Century has been marked by a complex succession of events: the terrorist attacks of 9/11 in the United States, the 2008 financial crisis, and a global pandemic, just to mention a few. All of these episodes have led to changes in the functioning of the international system and it is important to have an analysis on why these changes are occurring and what they may lead to. One of the most important dynamics has been the failure of the United States and Europe to establish a world liberal international system. As explained in Chapter 1, these countries wanted to enhance financial institutions through the G8 and the World Trade Organization and reinforce liberal values, human rights, and democratic systems. However, China has emerged as a superpower posing a threat to the hegemonic leadership of the US, and precisely counteracting the so-called liberal system. China has seen the US defence of liberal values as an abuse of the mandate to maintain international order, as a way to interfering into the national affairs of countries where the US may have a national interest. As the US has used the terrorist threat as a justification to invade Iraq and Afghanistan, other countries have seen this as a strategic move to interfere in the domestic affairs and functioning of third countries in the name of democracy. This has led many countries to decide to follow an old vision of great powers based on the Westphalian model instead of being drawn by the intentions of the West. Recognizing these moves is important for scholars in the field to try to predict the impact of these changes and the consequences for future relations between states.

Russia is a clear example of this movement towards unilateralism and a Westphalian understanding of geopolitics. Even though with the end of the Cold War the country was placed at a second stage and was never able to supersede US supremacy, it has nevertheless demonstrated many times its capacity to destabilize international order. It has meddled in US elections, illegally annexed Crimea, backed Bashar al-Assad in Syria, been involved in the assassination of enemies in Britain and Germany, and after increasing tensions in Ukraine by deliberately destabilizing the country and threatening to occupy it, it finally took action and started a war against it in February 2022. Since World War II, military conflict among great powers had

been absent, but Russia decided to put an end to this dynamic. Putin already said it in 2019: "the liberal idea" had "outlived its purpose". Or more clearly: "This liberal idea presupposes that nothing needs to be done. That migrants can kill, plunder and rape without impunity because their rights as migrants have to be protected (…) Every crime must have its punishment. The liberal idea has become obsolete" (Barber, Foy, and Barker, 2019). Thence somehow, Russia's attacks to invade Ukraine have shown that the Westphalian model is still going strong. And as a consequence to Russian actions, Russia's neighbouring states have been afraid of the country's future intentions towards them, everyone was put on guard, and even Germany reversed decades of military hesitancy and spent 100 billion euros in its defence budget right away (Cave, 2022), and the European Union followed by agreeing to "resolutely bolster investment" in defence capabilities and substantially increase defence spending (Brzozowski, 2022). As Cave puts it "Ukraine may also be just the first of several tests for the old order" (Cave, 2022).

The European Union has seen Russia's war on Ukraine as a landmark in its history, and as EU leaders gathered in a summit in the former royal palace of Versailles in Paris in March 2022, they decided to "collectively rearm and become autonomous in food, energy and military hardware" (Boffey, 2022). France, with president Emmanuel Macron, have been pushing the region to become more autonomous, but some EU member states -especially those with economic liberal ideas and strong ties with countries outside of the EU zone- have been reluctant to this idea, fearing that protectionism would end up becoming the new model (Leali and Moens, 2022; Boffey, 2022). While it remains to be seen what the outcome of the Versailles declaration will be in practice, the Russia-Ukraine conflict has become a turning point for the EU and forced its institutions to take a more critical look at its dependency on certain countries and to invest more in defence technologies. The possibility of the EU becoming a more independent region than before certainly reinforces this idea that a return to a model based on geopolitics and self-protection is on its way of being established.

But what is more, while Western countries have wanted liberal democracy to be the system to be spread around the world, in reality states with this system have been disappearing in the last decade, dropping from 42 countries in 2012 to 34 in 2022 (Boese et al., 2022).

Recent conflicts showing this decay are the coup d'état in Myanmar, or the Taliban takeover of Afghanistan after American troops left the country. And former President Donald J. Trump returned to unilateralism through his "America first" because he though that the United States was a victim rather than a beneficiary of the "rules-based order" (Cave, 2022). Even if the new US Presidency of Joe Biden wants to go back to a more multilateralist approach of international politics, the world is now looking at this country with hesitancy and doubting if its government will be able to take the leadership it once had, with China tipping its toes and Russia seeking to expand its territory across boundaries. If there was already a debate on whether a new world order was emerging before Russia's latest military actions in Ukraine, the world is now watching how a new era of great power conflict with a new global order has already begun[111].

And on top of that, the European Union -another symbol of liberal democracy of the past decades- has seen the failure of the Treaty for Establishing a Constitution for Europe because of the French and Dutch rejections, Great Britain left the EU in 2020, and xenophobic right-wing parties have grown and become more powerful across European countries (Mearsheimer, 2019). Through all of these changes, the global financial crisis has become another symbol within the debate on the capacity of the elites to manage the liberal international order (Lanchester, 2018). Altogether, it remains to be seen whether the liberal order will be able to survive, if it will fall against a new realist order, or whether both will coexist together -one led by the United States, and another led by China.

There are many factors stressing the international system and affecting what will later likely become the new international order. Some have already been mentioned: climate change, friction of resources which has already led to interstate conflict such as that of the South China Sea or the Arctic. But the two factors which are more relevant for this thesis are peoples' movements and the terrorist phenomenon. Rising climate and environmental concerns affect peoples' lives and force them to leave their homes. Civil and interstate conflicts force them to flee too. Whatever the reason is, there are many today trying to find better lives abroad, which stresses the international system as the

[111] Ignacio Ramonet, in his article "Una nuevad edad geopolítica" for *Le Monde Diplomatique* argued that February 24th, 2022, the date of the start of the Ukranian war, was the landmark for a new geopolitical era

regime governing migration has shown unable to adapt to the escalation of migratory flows. No state can successfully manage migration by itself, which at the same time this rises tensions between countries.

The terrorist threat has also made states become very defensive and thence increase their national security measures. This threat has been used to justify a set of legislative amendments, the passing of contentious public policies, and even more controversial foreign strategies. Technological advancements have enabled governments to further control their populations, which has somehow diminished the privacy rights of the citizenry on the basis of protecting from the terrorist threat. But what is more, vulnerable groups such as migrants, and specially refugees, have seen a deterioration of their human rights as states have kept on increasing border control and implementing administrative barriers. At the same time, extremist anti-immigrant discourses against the immigrant population have spread, making it even more difficult for them to integrate in their new host countries. On top of that, they have been often accused of participating in terrorist attacks in the West, which has worsened their adaptability conditions in these countries. Altogether, these practices show once more that a return to a realist model is on its way. And this is another way in which this thesis seeks to contribute to the academic literature; by offering a different perspective on how different spheres -such as that of national security and migration- have slowly shown a move towards a realist approach to international relations. The securitization of migration is thence another sign of the changes within the international order and a partial return to a geopolitical model based on prioritizing national security over human and global security from a more liberal or even Cosmopolitanism perspective.

This return to a more realist model does not necessarily mean that the entire system will change and that all actors will base their actions based on geopolitics. There can still be liberal states pushing for the maintenance of Cosmopolitism. We are still yet to see whether the two movements will coexist together or whether one of them will prevail over the other. However, the point of this thesis is to show that with different securitizing practices -such as it is the case with migration- we see the comeback of Westphalian geopolitics as a reality. They are now coexisting with one another and there is not

necessarily a process of substitution between them. But this is only something that time will tell.

b3) Dealing with migration today: Migrants as a security threat

Dramatic increasing refugee flows can be overwhelming and difficult to manage for some states, which is one of the things that have happened in the past years (Loescher, 1993). There may be different reasons why the citizenry may be worried about the arrival of foreigners to their countries. Mandel (1997) explains that there is, for instance, a difference between developing and developed countries. While the first worry about economic disruptions, the latter are usually more concerned about political ones. Thus the way in which migrants are seen by the host society is also dependant on the specific states we are looking at. As it has been previously said, the situation that each state may be facing at a given time -whether there is a time of crisis or need, for instance- but also the history of the country with migration, are also determinant factors affecting the perception of immigrants within the host state. Altogether, linking migration to burdens and risks leads to this general perception that refugees lead the country to scarcity and degradation, and the feeling that refugee flows are a threat is spread across territories. And at times, these arguments are also used as a tool by political parties to blame immigrants for domestic problems, whether these are related to economic regressions or public budget cuts, crime, overpopulation, and a long etcetera. If on top of that, we add ethnic or cultural nationalism as a tool to manipulate the citizens to reinforce their identity in connection to the political leaders and in detriment of the immigrant population, these tendencies to connect migration to national security threats increase the difficulties of integrating them into the country.

As Bello (2017a) states, "When migrants are treated as criminals, detained in immigration centres or deported, this will indeed increase prejudiced attitudes towards them (…) Therefore, the securitization of migration is a spiral that has started with particular frames of interpreting our world. These, mixed with actual facts, policies, practices, narratives and techniques, have engendered a spiralling progression that each of these factors has contributed to speeding. Therefore, it is crucial to stop the intensity of its driving forces in

order to avoid that this securitization flows, from the societal, into different domains".

Furthermore, securitization is linked to exceptionality. The biggest the threat, the higher the justification of applying an exceptional measure that is proportional with the security danger. This only applies to exceptional cases, as ordinary measures such as diplomacy or trade are the most preferable ones, leaving securitization only for cases when nothing else can combat the damages caused by the potential security threat. This is also why extraordinary measures can only be maintained so long as the security threat persists. But once the threat is over, these measures must cease. Thence if we are in a situation where an issue has been securitized, it is preferred to "desecuritize" (Buzan, Waever and Wilde, 1998) it so that it looses its restrictive and exceptional nature. However, securitization measures have remained in place. That is why it is key to conduct analysis making sure that exceptional measures are proportional with the security threats they want to prevent and that push to cease when they are no longer needed. This thesis strived for making such an analysis and claim that, more often than not, states have passed laws securitizing migration and pointed at immigrants as a security threat, a practice that is not reasonable nor well-founded.

As explained in Chapter 5, the securitization of migration has been in part a response to massive refugee flows and the incapacity of Western countries to cope with increasing numbers of immigration and, as states have widely defended, a response to the terrorist threat. Discourses on the latter line have linked migration and national security in the past years and have consolidated the perception among the part of the population that migration can be a threat to the economic, social, and cultural progress of a country, therefore arising extremist right-wing ideas that immigration is negative.

As previously explained, the establishment of this relationship between migration and security has pursued self-interested political purposes in order to legitimize privileged positions (Karyotis, 2007; Messina, 2014) and approve measures that would otherwise be hard to implement. Accepting an issue such as immigration as a common security threat can become an opportunity for politicians to reinforce collective identification and generate greater loyalties (Boswell, 2007), thus it is important to detect when this happens and report it.

This does not mean that all citizens are convinced by the negative discourses offered by certain political groups and ideologies, but the anti-immigrant sentiment has grown in the past years as countries have faced economic difficulties and needed someone to blame. Part of the population has indeed believed these arguments. They have been convinced that their well-being and the welfare state were threatened by the arrival of immigrant -and particularly refugee- flows. Thence it is important to make impartial studies analysing the objectiveness of these threats and to continue producing academic literature demystifying these ideas to protect the rights of all.

But another important factor impacting the perception of immigration in host countries, especially in the West, has been the terrorist threat. Since the perpetrators of these attacks match a specific ethnic profile (Karyotis, 2011), migrants have been associated with rising existential threats, which has also placed them at the core of many national security agendas. As explained in Chapter 5, the securitization of migration is the result of a process which brings migration -which is typically not a security issue- to the security arena, as a result of securitizing speech acts. As a result of these political elite and mass media discourses, new laws and public policies bringing migration closer to national security have been enacted around the world, and the counter-terrorist discourse has shown to be a powerful one to justify this association.

With the established nexus between migration and security, many have blamed immigrants for important contemporary security threats such as that of terrorism. The attacks of September 11 became an important landmark to create a strong linkage between the terrorist threat and migration. However, the Bali bombings or the Mombasa and Kenya attacks have also been altogether a good justification to connect national security to a borders-related issue. These events, along with securitization discourses, have all reinforced the imaginary of the foreigner as a potential terrorist danger. This explains why we have seen so many legislative changes in the field of immigration and the enactment of new counterterrorism laws reinforcing this need to protect from external threats. This does not necessarily mean that all counterterrorist legislation is specifically directed towards migration, but it does imply that part of it connects the terrorist threat with illegal and unwanted migration.

An interesting conclusion in relation to migration and terrorism is that the latter is a driving force to justify the securitization of migration, but this does not necessarily mean that it is the only justification. As seen in the cases of the European Union and the United States, a large legal framework has been developed establishing a nexus between migration and security due to the terrorist threat. However, the case of South Africa is a good example of a country which has also started securitizing migration with different argumentations, as the terrorist threat is not as present as it is in the West. This shows the complexities associated with the securitizing process in the case of migration, as there are many discourses which have led to the justification of applying extraordinary security measures to control migratory flows and the restrict the rights of immigrants within one's territory.

Conflicts around the world always involve migration movements, either with internal displacements or with people fleeing their home countries searching for safety elsewhere. As a response to these migratory flows, immigration legislation and policies have harshened globally, making it more difficult for them to feel secure in host countries. These migrants are in very vulnerable positions, and having their rights restrained once leaving their homes, makes it even harder for them to protect themselves and their families. Today, migration is approached through the lens of national security. Terrorist attacks, economic recession and times of crisis have paved the way for politicians to justify harder security measures, not only restricting the rights of its own citizens at times, but also restricting specifically those of non-nationals in their territories.

This is a sign that the state is more concerned with national security than human security. This is important to highlight because of the changes that the international order is going through as this will have a direct impact on the individual. Instead of placing the individual at the centre of concern, the state remains at the centre. We have not been able to take a more universalist approach to aim for the protection of all human beings and the international community. If there was a time in which international cooperation seemed to go towards this direction, it has not really been able to succeed at this desire. Thence instead of going beyond a state-centric world politics in which each state is responsible only of the security of its sovereignty, territory, and

population, we have remained right there. And while migration is also part of the international debate, it has mostly been dealt with at the state level. We have seen mass refugee flows around the world, and yet many states have been resilient to accept asylum seekers into their countries for considering them a potential terrorist threat, or an economic burden, or both. And an international response has not been appropriately given.

Finally, I find it important to mention the part that racism and discrimination play in this securitization process. As previously mentioned, those using anti-immigrant discourses in the West blame a particular image of the migrant. The male national from Arab and Muslim-majority countries is the most often immigrant looked at with distrust, and the one most often linked to a national security threat. But immigrants from developing countries in general, especially if coming from third non-Western countries, are all equally blamed by some for economic recession, regression in healthcare assistance, or insecurity. However, what the Russian-Ukrainian 2022 conflict has shown is that European countries have not been so unwilling to welcome refugees to their homes. They have not really seen them as security threats -even though this had become the fastest refugee crisis in the world since 1950, as confirmed by Flippo Grandi, UN High Commissioner for Refugees (Aragó, 2022). While refugees from Syria, Libya, and other countries have many times had to arrive illegally to Europe in order to be able to apply for asylum, border barriers have been lifted for Ukrainians (Townsend, 2022; Hedayat, 2022). It is as if this conflict had revealed Europe's "selective empathy on refugees" (Saifi, 2022). This raises concerns, as it once again shows that the connection between national security and migration is a result of a social construction. And this link is established only for immigrants from certain countries, following the interests of the political elite. Thus there is a strong racist component, one that is reinforced only by political and media discourses which later on materialize into further restricting legislation against particular communities.

C) Future prospects

Once we have seen the negative consequences of securitizing measures on immigrants and the symbolism of these practices within

the current changing international order, it is also interesting to try to think on the prospects that are awaiting.

What these case studies selected show is that the securitization of migration is a process which has been spread in countries around the world. It is not just a practice of Western states as a response to the terrorist threat, but securitizing measures can be found in a wide range of countries and are applied following other social and economic arguments. And even though they all may be in different stages, they have somehow established this link between immigration and national security. While the United States started emphasizing this connection more strongly after the 9/11 attacks, it has continued developing norms and policies following the same line ever since. The case of South Africa, on the contrary, is that of a country which is in a more preliminary stage. However, we have seen how new legislation has been passed very recently also considering immigration as a national security threat.

The problem lays precisely in the fact that measures do not seem to cease or decrease. But on the contrary, political discourses on the need to protect from external threats associated with immigration are very vivid today. If we also place this in the context of the current changes within the international order, in which states are adopting a more realist approach, it seems appropriate to affirm that in the short time, more measures making such connection will still be applied. Extraordinary measures restricting peoples' rights should only be in force so long as the threat is still menacing the state. That is precisely the reason why they are 'extraordinary'. However, terrorism seems to have given states the sense that this is a potential danger that is constantly threatening them, and they seem to be unwilling to withdraw the mechanisms they have established. Thus as long as the international order continues to place the state as the main unit within the international system, as long as it prioritizes national security over human security, it seems unlikely that the phenomenon of securitization -on migration, but also in other areas- is reduced.

Thence the changes within the international system and the structure and model of the international order are extremely important for the development of international relations and politics, but also for the attitude of states and the national security strategies they adopt. Recent international events -such as the armed conflict between

Russia and Ukraine- show very clearly that there are states which have long resisted the international liberal order established by the United States, and they are today succeeding in challenging it. China is a great opposer of these liberal values, and with its rise in the past years it is not only challenging US hegemonic power, but it is challenging the functioning of the international order as we know it. Conflicts such as that of the territorial claims in the Arctic and in the South China Sea are other scenarios in which we may see a different way of resolving issues. Thus if a more realist or Westphalian approach is adopted, it can be the end of the world order as we know it.

Nevertheless, that does not mean that it has to be completely dissolved. The United States and the European Union are not willing to give up so easily on the system they have been defending so strongly for the past decades. And while organizations like the NATO seemed to be paralyzed, leaders have gotten together to show unbreakable cohesion in NATO meetings as a response to Russia's threats. The world has faced many events since the end of the Second World War. We have seen the fall of the Berlin wall, the end of the Soviet Union, and the Yugoslav wars, among others. There have been a series of events which have marked the world as we understand it today, but none of them had ever been so important as to change the international order.

What will happen then after this clash between Western interests and those of the states under the leadership of China and Russia? Will the liberal system be able to stand, or will it be substituted by a more realist one? Maybe none. We have been debating about changes within the international order for years now, but we scholars and the media altogether have started talking about an immediate change after the Russian armed attacks to invade Ukraine. But it is still quite early to predict what the international system will look like from now on. In my opinion, we may see two divided systems: one following a liberal model under the leadership of the United States, and a realist one lead by China.

As put by Ikenberry (2022), "China presents a formidable challenge to the United States. The two countries are hegemonic rivals with antagonistic visions of world order. One wants to make the world safe for democracy; the other wants to make the world safe for autocracy". Washington has now focused its resources in intensifying its

competition against Pekin and Moscow. With its troops leaving Afghanistan and its firmness during the Ukrainian-Russian armed conflict, the United States is fighting to maintain the liberal international order and maintain also its status as the main hegemonic power (Klare, 2022).

There is the option that China does not seek to gain global dominance, but that instead it wants to shape global institutions to its advantage within a multipolar world where there are other big powers. The country has always kept its relations and participation within UN bodies and is strongly committed to the global free-trade regime (Nathan, 2022). Plus, its leaders have claimed their objectives for decades: to keep the Chinese Communist Party, gain the territories of Tawain, the East China and South China Seas, and be the main dominant power in Asia (Beckley, 2022). In Asia, not of the world. Thence if there were no other big powers interested in keeping the structure of the international order as it is, China's goals might broaden in scope and aspire for more.

Even though at first glimpse its interests seem not to be in relation to the dominance of the world order, it has become a potent anti-liberal force. It has pioneered a system, for instance, that allows dictators to watch citizens and constantly block their access to finance, education, employment, and travel, which has been sold to over 80 countries (Beckley, 2022). But so long as there are other major powers such as the United States or the European Union not willing to give up on the system they have been building over the past decades, it is unlikely that we see an international order under China's hegemony. And negative views of the country have also spread around the world. The United States and the European Union are not the only actors interested in containing Chinese power, but we see other countries like Indonesia, Japan, the Philippines, Malaysia and Vietnam rivaling territorial claims in the South China Sea, where Australia, the United States and the United Kingdom have also taken part to support these countries against Chinese forces.

China may be a forceful state in the claim for being the first economic power in the world and competing against US power in general but is not likely that it takes changes the international system upside down to establish a Chinese hegemony. However, it has the means and resources to keep on expanding its interests across boundaries, and we

might see the Chinese rise combined with that of the US. A clash between two orders may be under construction today; one based on autocracy, and another based on democracy. This clash between systems is what is currently defining the 21st Century and it will likely be the most important change within the international order in this period. It remains to be seen if one will prevail or if they will both coexist in more or less order.

Whatever the case, this will have an impact on the way in which we look at the values which have been promoted by Cosmopolitism in the past decades. Where universal human rights were supposed to be a priority, national security has re-emerged as the center of interest of the states. This does not mean that states had lost interest in protecting their sovereignty, but more in the sense that most international issues today are looked through the lens of security and perceived and treated as threats instead of being looked as shared problems that could be solved through shared multilateral solutions. And as states like China and Russia keep on pushing against this liberal model established by the West, it is more likely that we continue seeing a change towards prioritizing geopolitical strategies and the reinforcement of barriers instead of thinking of the human security of individuals. The increasing number of practices securitizing migration precisely show these changing moves within the international order. And even though we might have seen changes reinforcing national security and harming vulnerable groups, many nations will fight to make sure this does not become the new tendency, not letting them be the new grounds for generations to come.

This thesis seeks to modestly contribute to emphasizing the importance of securitization processes and the consequences of related measures. It wants to warn that the securitization of migration has an impact on the rights of migrants, but that this is also a sign that the liberal values as we had construed them can be in danger if we do not act to further protect them. Thence instead of focusing solely on protecting the security of the nation, it is also important to reinforce that of the individual, and even more for those individuals who are in particularly vulnerable positions. Trying to establish more diverse and tolerant societies should be the goal of states to enhance social cohesion. Helping those coming from abroad to integrate into host societies should be the solution, not to further isolate them.

Securitization processes are not a new phenomenon. And in the field of migration, they have taken place before. However, in recent years we have faced a new wave of securitization measures, and along with the security changes of the international order, these can be particularly dangerous for the protection of our most basic rights. This should raise concern. And that is why this thesis wants to expose this. Knowing when a specific law is passed to protect ourselves or our countries, or when it is unjustifiably used in the name of security, should be said aloud. It should be paramount to be aware of these measures, to make sure our values keep untouched and that human security always goes first.

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