# THE INTERNATIONAL LEGAL ORDER: PEACE AND SECURITY IN A MULTIPOLAR WORLD

***Literature Study***

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At the request of IOB

THE MINISTRY OF FOREIGN AFFAIRS OF THE NETHERLANDS

November 2021

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# Executive Summary

This report concerns the "international legal order": a global order based on the rule of law that is aimed at promoting international peace and security. This order is marked by a commitment to human rights and international agreements, and it is supported by effective multilateral institutions.[1] The report presents recent international developments pertaining to international peace and security on the basis of academic literature as well as non-academic sources, including reports by governments, international organizations, international institutions, research and policy institutes, NGOs and CSOs, as well as think tanks and journalistic accounts.

*Recent Developments*

Developments impacting the international legal order in the period 2016-2021 stem from both 'within' and 'without' the liberal order. In addition, the international legal order is impacted by legal developments.

The internal challenge to the international (legal) order comes from a rise in nationalism, sovereignism, populism, authoritarianism and illiberalism in 'liberal' democracies. This puts multilateralism under pressure and challenges the international system. These developments moreover bolster anti-democratic leaders outside of the West and complicate the promotion of liberalism or liberal internationalism to the rest of the world.

Externally and in parallel, the rise and increased influence of states in the Global South and the BRICS – above all China – challenges the hegemony of the US, while at the same time bringing new, and to an extent diverging, values and norms to the international arena.

Essentially, the current international order is characterized by decreased cooperation and increased contestation. Yet it remains to be seen whether China will strive to replace US hegemony. Moreover, scholars tend to believe that the international order is rather (becoming) multipolar, multiplex, or even multi-hub.

New technologies continue to change structures in society and international relations. Domains such as cyberspace, which are not under sovereign control, are creating contestation and new competition. Related to new technologies, hybrid or 'political warfare' has become increasingly normalized, blurring the lines between peace and war. With all major states engaging in gray-zone operations, activities such as information operations, election interference, and cyberattacks are becoming a common challenge.

Further, non-state actors (NSAs) are gaining influence on the international plane. They fulfill roles traditionally filled by states, such as: (1) foreign and security policy functions; (2) economic, public health or humanitarian functions; (3) political or social organizing functions.

Lastly, concrete action to conquer climate change, like the initiation of an energy transformation, is transforming global power dynamics, dependencies and alliances. China is becoming a key provider for integral raw materials, the EU's dependency on Russia's oil exports will be decreasing and thereby largely affecting Russia's economic stability, and the Global North is forging new relations with sun rich countries to secure renewable energy. Next to this, challenges to the legal status of climate agreements prevail.

Legal developments impacting the international order are (de-)juridification and (de-)judicialization, the rise of informal law-making, and the debate around the legality of the use of force and the Responsibility to Protect.

Trends of (de-)juridification and (de-)judicialization represent two ongoing, if contradictory, developments in the ways in which international actors seek recourse to (international) law. On the one hand, there is a growing appeal of casting political issues in

[1] Neither nationally nor international exists consensus on how to define the "international legal order". For the definition used in this report, *see* Analistennetwerk Nationale Veiligheid (2019), "Internationale Rechtsorde als zesde Nationaal Veiligheidsbelang", p. 17.

legal frames and of turning to courts to redress them (juridification and judicialization). On the other hand, there is a pull away from legal regimes and jurisdictional competences, which seems to coincide with the rise of populism and illiberal electoral regimes (de-juridification and de-judicialization).

By consequence, and due to the observed crisis in traditional forms of multilateralism, states increasingly tend to choose means of informal law-making and informal cooperation in addition to the long-standing practice of formal law-making. These new multilateral processes allow for the involvement of nontraditional actors to participate in informal law-making, as affirmed by the inclusion of non-state actors in specific governance areas. The complementary dynamic of both formal and informal law-making mechanisms arguably leads to a progressive development of international law.

Lastly, there is a debate around the legality of using force regarding self-defense as well as humanitarian interventionism. States diverge on their interpretation and practice of self-defense. While the US and many of its allies argue for a broad interpretation, the BRICS, as well as non-aligned countries (NAM) are speaking out for a strict and narrow interpretation of the right to (collective) self-defense and the use of military measures as a means to protect civilians.

### *International Institutions*

The report subsequently reflects on how these recent developments impact the functioning and relevance of four key institutions: the United Nations Security Council (UNSC); the International Court of Justice (ICJ); the International Criminal Court (ICC); and the Human Rights Council (UNHRC).

The United Nations Security Council (UNSC) continues to play a significant role in international affairs due to its important mandate to ensure international peace and security, but it faces major challenges and critique. Most prominently: (1) The Security Council's veto power induced paralysis and deadlock. This has led states to increasingly act unilaterally, and to measures geared towards accountability being blocked. (2) The contestation of norms and values through the assertive role of states from the Global South in the Security Council. Challenges here pertain to diverging approaches to sovereignty and the role of the state economically and politically. (3) Concerns regarding representation and institutionalized inequality through the dated set-up of the Security Council.

The International Court of Justice (ICJ) remains a respected authority in international law, and in recent years has claimed international attention with high-profile judgements. Critique of the Court pertains mostly to the lacking enforcement power and state acceptance of its judgements. As it stands, 74 states have currently accepted the compulsory jurisdiction of the Court. A recent development is the introduction of an article that provides for an *ad hoc* committee to monitor the implementation of Court ordered provisional measures.

The International Criminal Court (ICC), mandated to exercise jurisdiction over persons charged with the most serious crimes of international concern, has been challenged by accusations of politicization due its alleged inconsistent case selection and focus on crimes committed in non-Western, notably African, states. Additional issues include the Court's dependency on state cooperation and a lacking enforcement power, most prominently reflected in the difficulties with following through on arrest warrants. Positive developments include the scholarly finding that the ICC has a deterring effect. It also includes the implementation of an ICC Review Process that tasked experts to diagnose the problems facing the Court and to develop actionable recommendations.

The Human Rights Council (UNHRC), responsible for the promotion and protection of human rights around the globe, faces challenges pertaining to the membership of countries with questionable human rights track records. The Council is also accused of politicization in practicing excessive scrutiny of certain countries while turning a blind eye to

comparable situations and shielding states from action against them. Moreover, the UNHRC has increasingly become a political arena, where the US and China clash over their diverging approaches to human rights. Areas of progress are reflected in the UNHRC's ability to act more efficiently than the paralyzed Security Council in response to conflict situations, as well as in its Universal Periodic Review, and its well-functioning commissions of inquiry in several countries.

### *Alternative initiatives for peace and security*

The report further reflects the literature on two initiatives related to peace and security: (a) alternative accountability mechanisms; (b) sanction regimes related to international peace and security.

**Alternative accountability mechanisms.** Due to the general difficulty of the UNSC to find consensus on taking measures in conflict situations, states – in cooperation with non-state actors – have been looking for alternative ways to implement measures that may contribute to accountability. Investigative mechanisms for Syria (IIIM), Iraq (UNITAD) and Myanmar (IIMM) have been established to this end. Generally, these mechanisms are tasked with collecting, collating and analyzing evidence of atrocity crimes to an international criminal prosecution standard to ensure that criminal proceedings are possible in the future.

The initial reception of the initiatives has overall been very positive, largely for representing a new approach to international criminal justice, and for providing new avenues to (potentially) hold international criminals accountable.

General reservations to the UN investigative mechanisms center on efficiency and actual impact of the mechanisms, as prosecutions might (not yet) be "politically feasible". Further challenges are related to (1) ensuring reliability and processing of the extensive amount of evidence; (2) avoiding duplication of work and to be rightly understood for its role in ensuring accountability by third-parties; and (3) methodological challenges revolving around uncertainty as to *which* prosecutorial entity will eventually process the case-files.

**Targeted sanctions** issued to key individuals or groups are resorted to by the UN and EU. The most frequently used sanctions are asset freezes and travel bans. Targeted sanctions are considered flexible, agile, visible and therefore attractive policy instruments for governments. They fulfill political and symbolic purposes. Targeted sanctions may also serve other objectives, such as: strategic communication vis-à-vis targets and relevant third parties, retributive punishment, or upholding self-identifications, e.g., of defending human rights, in situations where non-intervention could be construed as complicity.

Scholarly debates in this context mainly revolve around targeted sanctions' effectiveness and implementation issues. Their effectiveness is difficult to measure as targeted sanctions are frequently combined with other foreign policy tools (diplomacy, negotiation). Implementation of asset freezes or travel bans at times is found to be slow or incoherent.

Further challenges to targeted sanctions stem from (1) cooperation with a multitude of actors around implementation, among which notably for-profit actors, whose role is considered "indispensable" in targeted sanctions' implementation; (2) bringing the practice of listing individuals in line with human rights standards and, (3) non-intended counterproductive effects, e.g., increased levels of political instability in states.

### *Future Developments*

Finally, five challenges that will likely impact the international legal order in the next five to ten years are outlined.

The **"collapse" of multilateralism.** The current weakening of the multilateral order continues, potentially resulting in the collapse of multilateral institutions and the formation of a "renegotiated" international (legal) order.

**Nuclear proliferation.** With US hegemony – a key pillar of the current nuclear order – eroding, the former barriers to proliferation will continue to decrease. In addition, there is a

growing divergence between nuclear and non-nuclear states that will need to be bridged.

Moreover, new technological developments and capabilities come with a great risk of destabilizing and endangering the current nuclear order. Thus, there will be a growing need for an efficient establishment and enforcement of a 21st century nuclear order that is adapted to new global (power) dynamics.

The development of new weapons, such as chemical, biological, radiological and nuclear weapons (CBRN-weapons) significantly increases a global "risk of escalation". In the long term, new weapons of mass destruction are forecasted as top critical threat that results in "loss of life, destruction and/or international crises". This threat exists especially in case of uncontrolled proliferation of these weapons amongst non-state actors.

The multiplication of adverse effects of technology. In the short term, this introduces insecurities in terms of a risk of cybersecurity failure. In the medium term, reports indicate a "technology governance failure", understood as a lack of a global regulatory framework for the use of digital infrastructures. In the longer term, this introduces threats of digital power concentration with related dangers for private sector accountability and oversight, access to public resources, privacy and freedom of speech.

Climate action failure is identified as *the* risk for the next 5-10 years. Current projections reveal a most probable "collapse" of the global economy, a breakdown of global trade and resource scarcities, all resulting in the engagement of major powers resorting to military means to secure food, water and energy supplies for their populations. The darkest scenarios even precipitate a significant danger of escalation if new weapons, including nuclear weapons, are resorted to. These climate change related developments further lead states to ignore or reject international norms.

# List of Abbreviations

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| AI: | Artificial Intelligence |
| ASP: | Assembly of States Parties to the Rome Statute |
| AU: | African Union |
| BRICS: | Brazil, Russia, India, China, South Africa |
| CEND: | Creating an Environment for Nuclear Disarmament |
| CoI: | Commission of Inquiry |
| CSO: | Civil Society Organization |
| EU: | European Union |
| FFM: | Fact Finding Mission |
| GGE: | Group of Governmental Experts |
| ICC: | International Criminal Court |
| ICJ: | International Court of Justice |
| IIIM: | International, Impartial and Independent Mechanism (Syria) |
| IIMM: | Independent Investigative Mechanism for Myanmar |
| IPNDV: | International Partnership for Nuclear Disarmament Verification |
| LMG: | Like-minded Group |
| NAM: | Non-Alignment Movement |
| NATO: | North Atlantic Treaty Organization |
| NGO: | Non-Governmental Organization |
| NPT: | Nuclear Nonproliferation Treaty |
| NSA: | Non-State Actor |
| OEWG: | Open Ended Working Group |
| R2P: | Responsibility to Protect |
| RwP: | Responsibility while Protecting |
| TPNW: | Treaty on the Prohibition of Nuclear Weapons |
| UN: | United Nations |
| UNHRC: | United Nations Human Rights Council |
| UNITAD: | UN Investigative Team to Promote Accountability for Crimes Committed by Daesh/ISIL |
| UNSC: | United Nations Security Council |
| UPR: | Universal Periodic Review |

# 1. Introduction

This report presents a literature study of international developments pertaining to peace and security in the international legal order between 2016 and 2021. At the request of IOB,[2] the literature review aims to inform an evaluation of the international legal order policy of the Ministry of Foreign Affairs (MFA) of the Netherlands. The aim of this policy is formulated as follows:

> "a strong legal order and respect for human rights creates a more stable, safer, freer and more prosperous world. This requires (1) the existence of well-functioning international institutions and organizations that receive broad support, as well as (2) a continuous effort against impunity".[3]

The findings presented in this study are based on a literature review of academic sources, reports of research and policy institutes, government publications, formal documents issued by international organizations, NGO and CSO reports, as well as think tanks and journalistic accounts.

The report first discusses the methodology underlying the literature review (chapter 2). Subsequently, the study provides a literature review on prominent international developments that impacted the international order, both across geopolitical and legal contexts (chapter 3). These findings set out the context in which the functioning and relevance of international institutions is assessed in the literature (chapter 4), and in which other initiatives related to peace and security are reviewed in the literature (chapter 5). Finally, by means of a conclusion, prospects for future developments related to the international legal order aired in the literature are reflected on in brief (chapter 6). Each chapter starts with a summary of that chapter.

[2] *Directie Internationaal Onderzoek en Beleidsevaluatie (IOB), Ministerie van Buitenlandse Zaken.* English translation: Policy and Operations Evaluation Department, Ministry of Foreign Affairs of the Kingdom of the Netherlands.

[3] Explanatory Memorandum of the budget of the Minister of Foreign Affairs 2015-2020.

# 2. Methodology

This study offers a review of the literature on key developments pertaining to peace and security in the international legal order as well as on the functioning and relevance of its main institutions in light of these developments between 2016-2021. In this chapter the methodological design of this literature review is laid out in detail.

## 2.1. Literature Review

The brief set by IOB for this research stipulated the conduct of a literature study on prominent developments impacting the international legal order, as well as on the relevance and functioning of its main institutions in the context of international peace and security initiatives. This literature study was to form part of a larger study with the overarching aim of evaluating the Dutch international legal order policy. To this end, extensive research was carried out of both academic and non-academic sources. The findings of the literature study are presented in this final report.

### *Research questions*

In close coordination with IOB, four research questions were formulated to structure the literature study:

1. Chapter 3: According to the literature, what international developments relevant to the five priorities of MFA's international legal order policy have taken place in the period 2016-2021 – and are likely to have continued relevance in the near future?

2. Chapter 4: According to the literature, have these international developments impacted the functioning and relevance of: the United Nations (Security Council), the International Court of Justice, the International Criminal Court, and the Human Rights Council? If so, how?

3. Chapter 5: How are the following initiatives assessed in the literature:
    a. Alternative accountability mechanisms;
    b. Targeted sanction regimes;

4. Chapter 6: According to the literature, what international developments relevant to the five policy priorities are expected to take place *in the next five to ten years*?

### *Selection of materials*

The literature review is based on an extensive desk-research of academic and non-academic materials. The broad range of non-academic materials includes: reports and other publications by governments, international organizations and international institutions, reports issued by research and policy institutes, think tanks, NGOs, CSOs and journalistic accounts.

Throughout the report, for both academic and non-academic materials, care has been taken to ensure a current selection of literature preferably published after 2015. Further care was taken to select key materials. The centrality of sources has been assessed on the basis of: number of citations (in case of academic materials), impact factor of the academic journals and their renown within the disciplines of International Relations and International (Criminal) Law, reputation of the organization or institute and their relevance to a specific topic. Materials were selected to the best of our ability with an eye for ensuring diversity in range of authors representing different (political) viewpoints, backgrounds, geographical positionality, and gender. Findings were triangulated across multiple sources.

### *Data analysis*

The research took place in two parts. In a first phase, on the basis of a preliminary literature search a scoping exercise was carried out to draft an overview of the issues to be covered in the report. This resulted in an overview of literature, gaps in the literature, fine-tuning of the research questions and scope, all consolidated in a draft overview of the report.

In a second phase, in conjunction with the actual writing of the report, the literature search was expanded to ensure a wide and representative presentation of sources and to further detail examples and developments.

### *Presentation of findings*

The findings of the literature study are presented in this report. Across three substantive chapters (3-5) the first three research questions are addressed. In a further fourth substantive yet brief chapter (6), a reflection on future developments is offered by means of conclusion.

At the end of the report, the academic and non-academic materials used as basis for the study and referenced throughout are presented in two bibliographies: (1) a bibliography presenting the full list of sources separated out per chapter and section, so as to provide a quick referencing tool; (2) a comprehensive bibliography with the full overview of all sources used in alphabetical order.

## 2.2. Challenges of the Study

The international legal order is an extremely broad concept of potential relevance to a wide array of policy areas. Moreover, a variety of developments are considered to impact the international legal order in one way or other. A scoping and selection of developments for inclusion in the study has been necessary to ensure completion of a coherent literature review broad enough to contextualize wider developments, whilst also detailed enough to aid evaluation of specific international institutions and initiatives in peace and security. In doing so, choices of selection were made in close conversation with IOB.

As this study presents a literature review, it should be taken into consideration that despite a careful selection of sources, there are commonly no insights into how the respective data presented in those sources has been collected. In addition, although the importance of integrating various perspectives was valued and carried out to the extent possible, the scope of the study did not allow for a careful review of all existing perspectives offered in the context of the international legal order. In the same vein, the research carried out in the context of this report is conditioned by the Western positionality of its authors. Furthermore, the sources used are limited to those published in English, Dutch and German.

Lastly, it should be mentioned that developments are taking place faster than research and literature arises. Therefore, circumstances may have changed by the date of this study's publication. The most notable developments anticipated to affect the future of the international legal order have been included in a concluding reflection (chapter 6).

# 3. Recent developments impacting the international legal order

**This chapter answers the following research question:**
According to the literature, what international developments relevant to the five priorities of MFA's international legal order policy have taken place in the period 2016-2021 –and are likely to have continued relevance in the near future?

**Main findings:**

### 3.1. Internal Developments

- Internal challenges to the international (legal) order come from a rise in nationalism, sovereignism, populism, authoritarianism and illiberalism in 'liberal' democracies. This puts multilateralism under pressure and challenges the international system. These developments bolster anti-democratic leaders outside of the West and complicate the promotion of liberal internationalism globally.

### 3.2. External Developments

- Externally and in parallel, the rise of non-Western states – above all China – is the central development. Essentially, the current international order is characterized by decreased cooperation and increased contestation. This development is further amplified by (1) new technologies changing the conduct of international relations and hybrid warfare; (2) non-state actors gaining influence on the international plane and fulfilling traditional state functions; (3) climate change, which is transforming global power dynamics, dependencies, and alliances.

### 3.3. Legal Developments

- In terms of legal developments, on the one hand there is a growing appeal of casting political issues in legal frames and of turning to courts to redress them (juridification and judicialization). On the other hand, there is a pull away from legal regimes and jurisdictional competences, which seems to coincide with the rise of populism (de-juridification and de-judicialization). By consequence, states increasingly turn to informal law-making to complement formal law-making processes. Crucially, this practice allows for the involvement of non-traditional actors.
- The developments and value contrasts discussed find expression in state interpretation and practice of self-defense and humanitarian interventionism. Where the United States argues for a broad interpretation, the BRICS and non-aligned countries speak out for a strict and narrow interpretation.

## 3. Introduction

> *"At its core, world order is a description and a measure of the world's condition at a particular moment or over a specified period of time. It tends to reflect the degree to which there are widely accepted rules as to how international relations ought to be carried out and the degree to which there is a balance of power to buttress those rules so that those who disagree with them are not tempted to violate them or are likely to fail if in fact they do".*[4]

> *"International order: the complex amalgam of rules, norms, and institutions that govern relations among states at any given time".*[5]

> *"The international order can be parsed into three elements. The first is the governance of the global commons, or domains outside the control of any single sovereign state (…): international waters, the atmosphere, outer space, polar regions, and—by some definitions—cyberspace. The second is the governance of economic and trade exchanges between states. (…) The third (and oldest) element of international order is the management of peace and security, including through arms control, international legal conventions, confidence-building measures, information exchanges, and military alliances and partnerships".*[6]

This report concerns the "international legal order": a global order based on the rule of law that is aimed at promoting international peace and security. This order is marked by a commitment to human rights and international agreements, and it is supported by effective multilateral institutions.[7]

This international (legal) order was established in the wake of the second world war and has developed through different phases. Generally, scholars tend to speak of the "liberal international order" which is characterized by four key elements: free trade; post-war multilateral institutions; the spread of democracy; and liberal values such as human rights.[8] Whether this order has ever truly been 'liberal' or 'international' remains to be debated: Joseph Nye, a distinguished political scientist, argues that "the order was never global and not always very liberal".[9] Others argue that rather than an inclusive global order, "a limited international order" came into existence in the 1940s, leaving the Soviet bloc, China, India, Indonesia, and other 'third world' countries outside of it.[10] Then, as the Cold War ended, "the inside" order became the "outside' order," meaning that the American-led liberal order could expand outwards as the Soviet Union, and with it the only rival of liberal internationalism, fell.[11]

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[4] Blackwill and Wright (2020), "The End of World Order and American Foreign Policy", p. iv.
[5] Stares et al. (2020), "Perspectives on a Changing World Order", p. 1.
[6] Stares et al. (2020), "Perspectives on a Changing World Order", p. 19.
[7] Neither nationally, nor internationally is there consensus on how to define the "international legal order", for the definition used in this report, *see* Analistennetwerk Nationale Veiligheid (2019), "Internationale Rechtsorde als zesde Nationaal Veiligheidsbelang", p. 17.
[8] Acharya (2017), "After Liberal Hegemony: The Advent of a Multiplex World Order", p. 272; De Wijk et al. (2020), "Adjusting the Multilateral System to Safeguard Dutch Interests", p. 17.
[9] Nye (2019), "The Rise and Fall of American Hegemony from Wilson to Trump", p. 71.
[10] Acharya (2017), "After Liberal Hegemony: The Advent of a Multiplex World Order", p. 272, see also: Nye (2017), "Will the Liberal Order Survive? The History of an Idea"; Nye (2019), "The Rise and Fall of American Hegemony from Wilson to Trump"; Ikenberry (2018), "The End of Liberal International Order?"; See Judt (2005), *Postwar* (Penguin Group Us).
[11] Ikenberry (2018), "The End of Liberal International Order?", p. 9.

Generally, scholars seem to agree that the "liberal" international order either no longer exists[12] or is in serious trouble,[13] due to both internal and external challenges.[14] Duncombe and Dunne even claim that all mainstream and critical International Relations theorists share "a perspective that the liberal world order is being challenged in fundamental ways: first, through a crisis of authority, and second, through 'the rise of the rest'".[15] This could mean that the newly emerging international order will be "strongly contested, less universal, less liberal, and more fragmented";[16] "more fragmented and confrontational";[17] "non-liberal: shaped by liberal democracies and illiberal or authoritarian states";[18] "realist instead of liberal";[19] "less free, less prosperous, and less peaceful";[20] "more mercantilist, protectionist, transactional, and focused on power politics",[21] or "more liberal and less hegemonic".[22]

Scholars also agree that the international order's phase of unipolarity is – and has been – coming to its end,[23] as the US is increasingly giving way in terms of relative power.[24] China is economically and politically on the rise,[25] Russia has become more assertive and is gaining geopolitical influence,[26] and North Korea is testing its nuclear capabilities again.[27] Scholars therefore tend to believe that the international order is now (becoming) multipolar,[28] "multiplex"[29] or "multi-hub".[30] This may

[12] Mearsheimer (2019, p. 7; p. 28), for example, argues that the order was liberal and mostly international from the 1990s onwards. However, "midway through the first decade of the 2000s, serious cracks began to appear in the liberal international order, which have since steadily widened", and by 2019, little could be done "to repair and rescue it".

[13] See Deudney and Ikenberry (2018), "Liberal World: The Resilient Order", for an argument as to why the liberal order will endure.

[14] Acharya (2017); Blackwill and Wright (2020); Colgan and Keohane (2017); Dekker et al. (2019); Deudney and Ikenberry (2018); Duncombe and Dunne (2018); Huang (2021), "The Pandemic and the Transformation of Liberal International Order"; Ikenberry (2018); Lake et al. (2021); Mearsheimer (2019); Niblett (2017); Noesselt (2016); Nye (2017); Nye (2019); Stares et al. (2020); Sweijs and Pronk (2020); Xinbo (2018).

[15] Duncombe and Dunne (2018), "After Liberal World Order", p. 27.

[16] Stephen (2017), "Emerging Powers and Emerging Trends in Global Governance", p. 484.

[17] Huang (2021), p. 20.

[18] Stares et al. (2020), "Perspectives on a Changing World Order", p. 14.

[19] Mearsheimer (2019), "Bound to Fail", p. 44.

[20] Haass (2018), "Liberal World Order, R.I.P"., https://www.project-syndicate.org/commentary/end-of-liberal-world-order-by-richard-n--haass-2018-03.

[21] De Wijk et al. (2020), "Adjusting the Multilateral System to Safeguard Dutch Interests", p. 24.

[22] Xinbo (2018), "China in Search of a Liberal Partnership International Order", p. 997. Xinbo argues that the Shanghai Cooperation Organization and Asian Infrastructure Investment Bank contain more liberal features than other organizations, and that China will want to introduce similar features in international security and economic/financial cooperation.

[23] Fukuyama (2021), "After the End of History: Conversations with Francis Fukuyama".

[24] Sweijs and Pronk (2020), "Between Order and Chaos? The Writing on the Wall", p. 68.

[25] Blackwill and Wright (2020), "The End of World Order and American Foreign Policy", p. iv, Allison (2018), "The Myth of the Liberal Order: From Historical Accident to Conventional Wisdom," p. 130.

[26] Niblett (2017), "Liberalism in Retreat", p. 17, Allison (2018), "The Myth of the Liberal Order: From Historical Accident to Conventional Wisdom," p. 130.; Snyder, T. (2018). The Road to Unfreedom: Russia, Europe, America. Tim Duggan Books.

[27] Blackwill and Wright (2020), "The End of World Order and American Foreign Policy", p. iv.

[28] Blackwill and Wright (2020), "The End of World Order and American Foreign Policy"; De Wijk et al. (2020), "Adjusting the Multilateral System to Safeguard Dutch Interests"; Duncombe and Dunne (2018), "After Liberal World Order"; Ikenberry (2018), "The End of International Liberal Order"; Mearsheimer (2019), "Bound to Fail"; Stares et al. (2020), "Perspectives on a Changing World Order"; Sweijs and Pronk (2020), "Between Order and Chaos? The Writing on the Wall"; Thompson et al. (2021), "Geopolitical Genesis: Strategic Monitor 2020-2021".

[29] Acharya (2017), "After Liberal Hegemony: The Advent of a Multiplex World Order".

[30] "The distinction between a multipolar system and the multi-hub structure of international law is not just semantic. In a multipolar system, a fixed group of Great Powers or poles engage in rivalry and balancing,

mean that, instead of one, there will be "multiple" [31] or "bounded orders,"[32] some go further by concluding that the absence of *one order* will naturally lead to some kind of *dis*order.[33]

While the global distribution of power is clearly shifting, many states still appreciate the benefits of the "old" international order, abide by its rules, and understand that the US "retains sufficient power and influence to enforce compliance".[34] Rising powers are (as of yet) not considered to be in a position to overturn the current order completely,[35] nor is it suggested that China will replace the US as an "illiberal hegemon".[36] However, China's increase in power has made Beijing confident that it can successfully and credibly challenge the United States across all domains.[37] The literature is inconclusive as to whether China will ultimately choose to do so.[38] In addition, the recent rise of tensions between the US and Russia concerning the Ukraine pose new challenges of which the longer term and structural effects are yet to transpire. In conclusion, it makes sense to characterize the current status of the international order as *transitional*, meaning that "elements of the old order are still discernible, albeit functioning below their peak, while features of the new order are clearly emerging and playing a more influential role".[39]

In the sections that follow, the most important developments that have been, and currently still are, impacting the international legal order, sometimes called the "rules-based order", will be discussed. The rest of the chapter is divided into sections on (1) internal, (2) external and (3) legal developments impacting the international order.

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dominating a far larger group of weaker, subordinate states. In contrast, in the multi-hub structure a growing number of states play issue-specific leadership roles in a more flexible and fluid system. In the right circumstances, many different states can act as hubs, leading international legal processes or articulating preferences that attract followers and alter substantive norms. In other circumstances, those same states may follow the lead of others. Whereas in a classical multipolar system, the status of a pole usually turned on its ability to coerce followers, in the multi-hub structure, with a wide range of states capable of assuming leadership in a flexible system, the ability of a hub to attract followers will often be as or more important than its ability to coerce them. The multi-hub system thereby empowers states that are not hubs in a particular instance with choices as to which of a number of hubs to follow on any given issue or even to build the issue-specific power necessary to assume leadership themselves". See: Burke-White (2015), "Power Shifts in International Law: Structural Realignment and Substantive Pluralism", p. 6.

[31] Blackwill and Wright (2020, p. v.) put forward the idea that the old order has given way to multiple orders, where many countries choose their own paths to order, without much reference to the views of others. Similarly, Acharya (2017, p. 272) describes a "multiplex world" in which elements of the liberal order survive, but are subsumed in a complex of multiple, crosscutting international orders.

[32] Mearsheimer (2019), "Bound to Fail", p. 44.

[33] See for example: Doyle (2017), "New World Disorder", Stephens (2015*), "*America in Retreat: The New Isolationism and the Coming Global Disorder"; Slaughter (2017), "The Return of Anarchy?".

[34] Stares et al. (2020), "Perspectives on a Changing World Order", p. 1. See also: Acharya (2017), "After Liberal Hegemony: The Advent of a Multiplex World Order"; Thompson et al. (2021), "Geopolitical Genesis: Strategic Monitor 2020-2021", p. 49-51.

[35] Acharya (2017), "After Liberal Hegemony: The Advent of a Multiplex World Order"; Thompson et al. (2021), "Geopolitical Genesis: Strategic Monitor 2020-2021", p. 75.

[36] Ikenberry (2018), "The End of Liberal International Order", p. 17.

[37] Thompson et al. (2021), "Geopolitical Genesis: Strategic Monitor 2020-2021", p. 59.

[38] Huang (2021). See also, for example, De Wijk et al. (2020, p. 26): "it would be a mistake to conclude China seeks world supremacy" versus Duncombe and Dunne (2018) who argue that China's rise may not be peaceful.

[39] Stares et al. (2020), "Perspectives on a Changing World Order", p. 1. Referring to: Antonio Gramsci, Selections From the Prison Notebooks, edited and translated by Quintin Hoare and Geoffrey Nowell Smith (London: Lawrence and Wishart, 1971), 276. See also: Xinbo (2018).

## 3.1. Internal developments

Many scholars argue that the most serious challenges faced by the international legal order come from "within", that is, from liberal internationalism itself as well as from traditionally liberal-western democracies, rather than from external changes like the rise of China.[40] Most importantly, the United Kingdom (UK) and the US, "leading patrons of the liberal world order,"[41] seem to have lost faith in the system they have created.[42] Multiple scholars therefore speak of a "crisis of authority"[43] that has resulted from internal difficulties and discontents that democracies are facing.[44] Most scholars point to two major events that have led to these discontents: the financial crisis of 2007-2008,[45] and the unsuccessful wars in Afghanistan, Iraq (and Libya).[46] In turn, this has led to a rise in nationalism, sovereignism, populism, authoritarianism and illiberalism in 'liberal' democracies; and is further putting multilateralism under pressure.

### 3.1.1. Nationalism/sovereignism/populism/illiberalism/authoritarianism on the rise

First, the financial crisis damaged many people's lives, and has led to a disillusionment with economic globalization,[47] or hyperglobalization "which sought to minimize barriers to global trade and investment, but resulted in lost jobs, declining wages, and rising income inequality throughout the liberal world".[48] The social contract that had previously ensured "crucial political support for the order" has eroded, leaving many middle and working-class voters in Western democracies to believe that "the system is rigged".[49] The global financial crisis also "called into question the competence of the elites who manage the liberal international order".[50] Second, failed attempts to (forcefully) spread democracy have resulted in migrant flows to liberal countries,[51] which have further sparked a surge in nationalist, xenophobic politics.[52] Apart from this, the illiberal practices by western powers "that characterized the US "war on terror" and the invasions of Afghanistan and Iraq have been clear indications of a complex disengagement from liberal values, (…) by states that helped to institutionalize human rights as a pillar of the international order".[53]

The combined effects of growing income inequality, economic stagnation, fiscal crises, and extensive migrant flows have led to skepticism about the merits of international cooperation.[54] This is

[40] See, for example: Acharya (2017); Colgan and Keohane (2017); Huang (2021); Ikenberry (2018); Mearsheimer (2019). Sweijs and Pronk (2020) argue that "it is important to recognize that it is the combination of national and international vectors that converge to undermine bastions of the existing international order, both from within and from without, both bottom-up and top-down". p. 2.
[41] Deudney and Ikenberry (2018).
[42] Colgan and Keohane (2017).
[43] Duncombe and Dunne (2018); Ikenberry (2018). See also: Blackwill and Wright (2020).
[44] Ikenberry (2018).
[45] See, for example: Archaya (2017); Allison (2018); De Wijk et al (2020); Huang (2021); Ikenberry (2018); Lake et al (2021); Mearsheimer (2018); Niblett (2017); Noesselt (2016); Xinbo (2018).
[46] See, for example: Archaya (2017); Allison (2018); Blackwill and Wright (2020); Duncombe and Dunne (2018); Mearsheimer (2018).
[47] Acharya (2017).
[48] Mearsheimer (2018), p. 8.
[49] Colgan and Keohane (2017), p. 37; See also: Deudney and Ikenberry (2018); Hill (2021), "There is nothing for you here: Finding opportunity in the 21st century", https://www.brookings.edu/events/there-is-nothing-for-you-here-finding-opportunity-in-the-21st-century/.
[50] Mearsheimer (2018).
[51] Blackwill and Wright (2020); Mearsheimer (2018).
[52] Ikenberry (2018); Deudney and Ikenberry (2018); Mearsheimer (2018).
[53] Duncombe and Dunne (2018).
[54] De Wijk et al. (2020); Deudney and Ikenberry (2018); Hill (2021).

illustrated by the rise in populism, sovereignism, nationalism, illiberalism and authoritarianism.[55] The share of the European populist vote increased nearly 70%, from 14% in 2000 to 24% in 2019.[56] For the first time since 2001, autocratic states are the majority: 92 countries, home to 54% of the global population, and almost 35% of the global population live in autocratizing countries.[57] As Hungary became classified as an "electoral authoritarian regime", the European Union now includes its first non-democracy.[58]

The resulting political and societal polarization has meant that democratic governance has become less effective at solving problems.[59] Whereas Europe and the US may have once assumed (or hoped) that liberal democratic models would "gradually win the day",[60] Freedom House's 2021 report "The Antidemocratic Turn" states that "the idea of democracy as an aspirational end point has started to lose currency in many capitals".[61] While the third wave of democracy had peaked by 2000,[62] the "third wave of autocratization" has been both accelerating and deepening.[63]

### 3.1.2. Multilateralism under pressure

Multilateralism is an institutional form that "coordinates behavior among three or more states on the basis of generalized principles of conduct".[64] A distinction can be made between instrumental and functional multilateralism. Through functional multilateralism, "small and middle powers can restrain more powerful nations and gain additional influence", meaning that they will follow rules even when it is not necessarily in their short-term interest.[65] Major powers tend to engage in instrumental multilateralism: they believe that "international institutions and the international rule of law should in all instances serve their interests. When this is no longer the case, they tend to conclude that the rules-based international order should be modified or abandoned".[66] Examples include Brexit, but also the decisions of former US president Donald Trump to withdraw from the Joint Comprehensive Plan of Action (the Iran nuclear deal), the Trans-Pacific Partnership (TPP), the Intermediate-Range Nuclear Forces Treaty, the Paris Agreement, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Human Rights Council (HRC), and the World Health Organization (WHO).[67] While the US and the UK are so-called major powers, small and middle power Western democracies have also made policy choices that are most aligned with their direct national interests, undermining the authority and overall functioning of multilateral institutions,[68] and potentially their own long-term interests. These decisions are likely to be related to the widespread surge in nationalism (or anti-*inter*nationalism) experienced by Western democracies as discussed above. According to the anti-internationalist view, multilateralism is undemocratic because it is "distant, elitist and

[55] Acharya (2017); Deudney and Ikenberry (2018); Duncombe and Dunne (2018); Mearsheimer (2018); Csaky (2021); Lührmann and Lindberg (2020); Colgan and Keohane (2017); De Wijk et al. (2020); Ikenberry (2018).
[56] De Wijk et al. (2020).
[57] Lührmann and Lindberg (2020), "Autocratization Surges–Resistance Grows", p. 9.
[58] Lührmann and Lindberg (2020), "Autocratization Surges–Resistance Grows", p. 9.
[59] De Wijk et al. (2020).
[60] Perthes (2016), "President Trump and International Relations", https://www.swp-berlin.org/en/publication/president-trump-and-international-relations.
[61] Csaky (2021), "Nations in Transit 2021: The Antidemocratic Turn", p. 1.
[62] Acharya (2017).
[63] Lührmann and Lindberg (2020), p. 9.
[64] Ruggie (1993), "Multilateralism: The anatomy of an institution", p. 14.
[65] De Wijk et al. (2020).
[66] De Wijk et al. (2020).
[67] Blackwill and Wright (2020); Huang (2021).
[68] Huang (2021); De Wijk et al. (2020), p. 31.

technocratic"[69] and international institutions enjoy too much influence.[70] Thus, some scholars argue that multilateralism is "in crisis".[71]

In 2019, France and Germany launched the 'Alliance for Multilateralism', "an informal network of countries united in their conviction that a rules-based multilateral order is the only reliable guarantee for international stability and peace and that our common challenges can only be solved through cooperation".[72] So far, eighty-eight countries have joined the alliance. Conspicuous by its absence is the US.

The BRICS' stance on multilateralism and reform was most recently reflected in the Delhi Declaration, which was adopted in September 2021. Brazil, Russia, India, China and South Africa have agreed to take measures "in a bid to accomplish further strengthening and reforming of the multilateral system to transform the current global governance into a more responsive, agile, effective, transparent, democratic, representative and accountable system to member states".[73] According to the BRICS' statement, strengthening and reforming the multilateral system includes "making instruments of global governance more inclusive, representative and participatory to facilitate greater and more meaningful participation of developing and least developed countries, especially Africa, in global decision-making processes and structures […]".[74] Essentially, these aspirations, although promoted by a different group of states, are similar to the aims of the Alliance for Multilateralism.[75]

That multilateralism is changing,[76] and increasingly seen in instrumental terms, is signified by the recent AUKUS pact. The trilateral security pact between Australia, the UK and the US (announced on 15 September 2021) has surprised the EU, and created a rift in the Transatlantic relationship, between France and its three 'allies'[77], but also more broadly between the EU, the UK and the US, and within NATO. While the AUKUS pact is a multilateral partnership forged in an attempt to counter China,[78] "the date, manner, and content of the announcement of the new security pact signaled a profound disregard, if not outright contempt, for the Europeans".[79] The result being that some commentators argue that Biden has not kept his promise to return to multilateralism,[80] and is instead opting for

[69] Keohane et al. (2009).
[70] De Wijk et al. (2020), p. 31.
[71] Moreland (2019), "The purpose of multilateralism: A framework for democracies in a geopolitically competitive world", https://www.africaportal.org/publications/purpose-multilateralism-framework-democracies-geopolitically-competitive-world/, p. 1; Wientzek and Sebastian Enskat (2020), "The Trojan Horse of Multilateralism", p. 96f; Bruneé (2018), "Multilateralism in Crisis", p. 336; De Wijk et al. (2020).
[72] Alliance for Multilateralism, "What is the "Alliance for Multilateralism?", https://multilateralism.org/the-alliance/.
[73] Outlook India (2021). "13th BRICS Summit Pledges To Build On Multilateralism And Reform UN Security Council", https://www.outlookindia.com/website/story/world-news-brics-vows-to-instil-new-life-in-discussions-on-reform-of-un-security-council/394140.
[74] Ministry of External Affairs Government of India (2021). "XIII BRICS Summit: New Delhi Declaration", https://mea.gov.in/bilateral-documents.htm?dtl/34236/XIII_BRICS_Summit_New_Delhi_Declaration, Para. 14.
[75] Alliance for Multilateralism (no date). "What is the Alliance for Multilateralism", https://multilateralism.org/the-alliance/.
[76] Thompson et al. (2021).
[77] France and Australia had a multibillion-dollar submarine deal.
[78] Brands, H. (2021), "Australia Sub Deal Should Upset China, Not France", https://www.bloomberg.com/opinion/articles/2021-09-21/u-s-u-k-australia-sub-deal-should-upset-china-not-france.
[79] Grare (2021), "Trumpism by another name: What AUKUS tells us about US policy in the Indo-Pacific", https://ecfr.eu/article/trumpism-by-another-name-what-aukus-tells-us-about-us-policy-in-the-indo-pacific/.
[80]Grare (2021).

"minilateralism".[81] More importantly, this quasi-unilateral move by the US can be seen as an example of the fact that "America and its allies no longer serve as an example to others of the strength of liberal systems of economic and political governance".[82]

In concluding this section on internal developments, two points can be made. The first is that clearly, different political or economic (value) systems are becoming *more* attractive, or at least a viable alternative, to many public citizens throughout the Western world. This is a reassuring development to anti-democratic leaders outside of the West.[83] The second is that the problems currently faced by liberal Western democracies both domestically and amongst themselves, make it very difficult to sell liberalism or liberal internationalism to the rest of the world.[84] As one scholar noticed back in 2011, "we are becoming suspicious of the very things we have long celebrated – free markets, trade, immigration, and technological change. (…) [T]he United States succeeded in its great and historic mission – it globalized the world. But along the way, it forgot to globalize itself".[85] Some have downplayed the risk that these internal developments pose to the liberal order, arguing that the economic benefits of globalization will ensure that states continue choosing liberalism, regardless of surges in nationalism and populism. "But the fact is that politicians respond to electoral incentives even when those incentives diverge considerably from their country's long-term interests".[86] Research shows not only that a (small) majority of people is dissatisfied with the way democracy works in their countries,[87] but also that the number of people expressing a desire to live in a democracy is decreasing.[88] The survival of liberalism, and the liberal international order, depends on its ability to deliver returns.[89]

[81] Scott (2021), "AUKUS must walk and chew gum at the same time", https://www.lowyinstitute.org/publications/aukus-must-walk-and-chew-gum-same-time.
[82] Niblett (2017).
[83] Acharya (2017).
[84] Acharya (2017).
[85] Zakaria (2011), "The Post-American World - Release 2.0", p. 61. Interestingly, public opinion in China and India are strongly in favor of globalization. See: Stokes (2016), "Unlike the West, India and China Embrace Globalization", https://www.pewresearch.org/global/2016/10/24/unlike-the-west-india-and-china-embrace-globalization/.
[86] Colgan and Keohane (2017).
[87] Wike et al. (2019), "Many across the globe are dissatisfied with how democracy is working".
[88] Sweijs and Pronk (2020).
[89] Niblett (2017); Ikenberry (2018).

## 3.2. External developments

The international order is also being challenged from "without". That is, "by processes that are only loosely related to liberalism itself and from states previously excluded from or weakly integrated into that order".[90] The external development impacting the international order most written about is the rise of China,[91] emerging powers such as the BRICS,[92] or "the rest".[93] While the rise of a number of new (potentially major) powers, thereby creating a multipolar world, has many security implications,[94] their growing influence also creates greater heterogeneity in preferences, ideas, values,[95] norms, needs, capacities, purposes, priorities and outlooks.[96] As such, the current international order is characterized by decreased cooperation and "increased contestation of norms and rules".[97] Other external developments that are impacting the international legal order are: the development of new technologies and the (subsequent) creation of new international 'spaces', "gray-zone" operations or hybrid warfare, a growing role of non-state actors and climate change.

### 3.2.1. Emerging powers

"Rising powers challenge the existing order".[98] China's rise and Russia's comeback have made the world multipolar. The 2020-2021 Strategic Monitor regards the US, China, Russia and the EU as major powers, based on their security policy, military power, and/or economic position.[99] Whereas China and the US fulfil all the conditions of a major power; Russia and the EU fulfil only some. Although they wield influence, Russia and the EU serve as weaker major powers and cannot match the US and China.[100] Moreover, internal and economic problems faced by Russia make it unlikely that it will narrow the significant gap with China and the US.[101]

Western policy-makers once hoped that (rising) non-Western powers would, by being included in institutions and the international economy, choose democracy and liberalism.[102] Neither China nor Russia has fulfilled that hope. Instead, China has become an economic powerhouse with significant military capability;[103] Russia possesses the largest stockpile of nuclear weapons.[104] Together, they have built regional institutions such as the Shanghai Cooperation Organization (SCO) and the Eurasian Economic Union (EEU) that "legitimize a parallel political order that challenges norms of democratic

[90] Lake et al. (2021), p. 241.
[91] See, for example: Allison (2018); Blackwill and Wright (2020); De Wijk et al (2020); Huang (2021); Lake et al (2021); Mearsheimer (2018); Niblett (2017); Nye (2017); Nye (2019); Thompson et al. (2021); Xinbo (2018).
[92] See, for example: Huang (2021); Hurrel and Sengupta (2012); James (2008); Patrick (2016); Stares et al. (2020).
[93] See, for example: Duncombe and Dunne (2018); Lagadec (2012); Sweijs and Pronk (2020); Zakaria (2011); Zarakol (2019).
[94] See, for example: De Wijk et al. (2020); Duncombe and Dunne (2018); Mearsheimer (2018); Stares et al. (2020); Thompson et al. (2021).
[95] Hurrel and Sengupta (2012).
[96] Bruneé (2018).
[97] Sweijs and Pronk (2019), "Between Order and Chaos? The Writing on the Wall", p. 78.
[98] De Wijk et al. (2020). See also, for example: Noesselt (2016).
[99] Thompson et al. (2021), p. 155.
[100] Thompson et al. (2021).
[101] Thompson et al. (2021), p. 72.
[102] Mearsheimer (2018) shows that the US aimed at embedding China and Russia in as many institutions as possible, fully integrate them into the open international economy, and help turn them into liberal democracies.
[103] Sweijs and Pronk (2020), p. 20.
[104] Thompson et al. (2021), p. 70.

governance and rejects any external interference in support of human rights".[105] On the economic front, China's Belt and Road Initiative (BRI) and the Asian Infrastructure Investment Bank (AIIB) are to be understood in light of China's dissatisfaction "with the perceived shortcomings of existing multilateral financial institutions,"[106] and are "designed to shift the world's economic center of gravity".[107] China's BRI and the AIIB may have the effect of fundamentally changing "the distribution of power between institutions," as it challenges the rules, practices or missions of the established bodies.[108] China has also started a program of constructing and militarizing artificial islands in the South China Sea,[109] and is expected to expand its foreign military base beyond Djibouti, seeking to possess bases on three continents.[110] As a result, the US's position in Asia is challenged, also due to the relations China is forging with American allies such as the Philippines and Thailand.[111]

Next to China and Russia, three other countries have been predicted to become emerging (economic) superpowers: India, Brazil and South Africa. The context for the rise of the BRICS has been created by a complex set of factors, which include, at least: "a clear shift in the global economic power away from the West to the East, an impasse in sharing global economic decision-making power between the developed West and the rising East, the US' resort to violence to protect the order, and the abuse and misuse of financial and diplomatic sanctions against most BRICS member states and other non-compliant developing countries by the West".[112] Together, the BRICS countries have taken a common stand on many regional and international issues.[113] They created the New Development Bank (NDB), also-called the BRICS Development Bank, as an alternative for the Western-dominated World Bank, and the Contingency Reserve Arrangement (CRA) as a countermeasure to the International Monetary Fund (IMF).[114]

While the BRICS network, including the new institutions they have established, plays a role in fragmenting the architecture of the international order,[115] divergences between the BRICS countries hinder the creation of a new type of global political actor.[116] The BRICS "differ substantially in terms of demographic, economic, military, and political weight as well as in terms of regional and global ambitions".[117] China and India, for example, are currently in a dispute over their contested border in the region of Ladakh. While they agreed to a military disengagement in early 2021, tensions remain high and the relationship is strained.[118] Among the BRICS, China and Russia are most aligned. The Strategic Monitor 2020-2021 considers the "de-facto alliance" to be "as much dictated by strategic

[105] Niblett (2017), p.20.
[106] Xinbo (2018).
[107] Thompson et al. (2021), p. 39.
[108] Xinbo (2018).
[109] Thompson et al. (2021), p. 38.
[110] Thompson et al. (2021), p. 40.
[111] Niblett (2017); Measheimer (2018).
[112] Nuruzzaman (2020), p. 53.
[113] For example, in March 2014, the BRICS abstained from a UN General Assembly vote on Russia's annexation of Crimea.
[114] Nuruzzaman (2020).
[115] Acharya (2017).
[116] According to Noesselt (2018), "The minimal consensus that welds these actors together is their feeling of being underrepresented in the existing post-World War II institutional order". See also, for example: Thakur (2014); Hooijmakers and Keukeleire (2016).
[117] Hooijmakers and Keukeleire (2016), p. 393. See also, for example: Stares et al. (2020).
[118] For more on the relationship between India and China see, for example, Acharya (2017); Stares et al. (2020).

pragmatism and economic necessity as by a shared vision for a global order".[119] The relationship is nevertheless asymmetric, and the two countries have competing interests.[120]

Whether or not the emerging powers are aiming for the overthrow of the current world order remains to be seen.[121] In a white paper published by China – China and the World in the New Era – it states that China "will never seek hegemony,"[122] and is "playing an important role in building a fair and equitable international political and economic order".[123] In addition, China writes that the UN is at the core of the global governance system, and that it aims to uphold its authority and role.[124] Thus, while China has invested significant resources in building alternative international institutions, regional forums, security organizations, and infrastructure investment projects, it also continues "to utilize traditional Western-dominated international institutions to benefit from the current order, showing its support for the current order".[125]

### 3.2.2. Diverging economic, political and judicial values

Next to a change in the global balance of power, the emerging powers are challenging the existing order by "disrupting it with their own political systems, interests and ideologies".[126] As the influence of non-Western, non-liberal or non-democratic countries is increasing "big questions of social, economic and political organization that were supposedly resolved with the end of the Cold War and the liberal ascendancy" are being renegotiated.[127] There is a "troubling divergence" between how major powers conceive of the world order,[128] including the economic, political and judicial values that underlie the order. Not only is it worrisome for liberal internationalists that challengers like China are able to offer alternative sources of economic power, security, aid, ideology, and institutional platforms on a domestic level,[129] these divergences also make it harder to reach consensus on matters of international security at the global level.

For example, predominantly Western countries view *security* in terms of "human security," whereas China and Russia consider it in terms of "territorial" or "national security".[130] As a result, China and Russia strongly oppose external interventions, emphasizing the importance of sovereignty above all else. This stands in stark contrast to the belief that national sovereignty is contingent on a government's behavior towards its own citizens, to which the US and many other Western countries adhere. Thus, Russia and China are expected to reject any proposal for future humanitarian interventions in the UN Security Council.[131] Other examples include Chinese advocacy for putting

[119] Thompson et al. (2021), p. 109.
[120] Thompson et al. (2021), p. 134.
[121] More often mentioned as seriously attempting to delegitimize and overthrow the order is Russia, as well as Turkey and Iran, for example, rather than China. In the Strategic Monitor 2020-2021, Russia is mentioned as the most problematic global actor, but one that still seems not to want to entirely destroy the rules-based order. See: Thompson et al. (2021), p. 134, p. 77.
[122] State Council Information Office of the People's Republic of China (2019), "China and the World in the New Era, https://www.mfa.gov.cn/ce/cede//det/zgyw/t1705112.htm, p. 27.
[123]State Council Information Office of the People's Republic of China (2019), p. 8.
[124] State Council Information Office of the People's Republic of China (2019).
[125] Huang (2021), p .20.
[126] Huang (2021), p. 5.
[127] Hurrel/ Sengupta (2012). "Emerging powers, North–South relations and global climate politics", p. 463.
[128] Blackwill and Wright (2020), p. 24.
[129] Huang (2021).
[130] De Wijk et al. (2020).
[131] De Wijk et al. (2020); Acharya (2017). As Patrick (2016) writes, "when it comes to sovereignty, it is arguably western countries that are most revisionist".

social–economic rights above individual human rights,[132] or the emphasis on development and infrastructure instead of trade.[133] In general, the BRICS advance a clear preference for a strong influence of the state in the international system, while the liberal west generally moves in the opposite direction.[134]

These divergences (free trade versus mercantilism, liberalism versus authoritarianism, interventionism versus sovereignism, and others) have turned the international arena "into a contested field for competing models of governance in the international order".[135] As of now, "there is little prospect that the major powers will converge on a single model of world order, with a shared understanding of constraints, limits, and the means of enforcement".[136]

### 3.2.3. New spaces and technologies

New technologies are changing the very structures of our society. They most notably affect how people consume information[137] and alter military capabilities, energy production,[138] and thus inter-state relations.[139] According to recent research, fundamental changes to the global economy linked to technological change have played a role in the decreasing support for multilateralism and the liberal international order.[140] This would have been the result of the fact that existing international institutions have not been able to mitigate or move along with the accelerating pace of innovation.[141] The question however, is how to mitigate the negative effects of new technologies, as well as how to govern the common spaces these technologies have opened up (such as cyberspace and outer space). These questions need to be addressed specifically at the international level. This is because "new technologies often expose gaps in, and provide a motor for, innovations in global governance".[142] The difficulty in reaching international consensus, as discussed above, is exemplified by efforts to clarify the international laws applicable to cyber operations. The disagreements between China and Russia on the one hand, and a group of western countries on the other, have led to the creation of two, parallel, UN working groups that have further polarized the debates.[143] Domains such as cyberspace, that are not under sovereign control but are important for all states' security, prosperity and welfare, are becoming "congested, contested and competitive".[144] The US, China, India, Russia and others are all exploiting these new operational domains.[145]

At the same time, states are competing to control new and emerging technologies.[146] The US and China are in a "technological rivalry".[147] China is planning to dominate global markets in a wide range of high-tech products, wishing to become a global leader in Artificial Intelligence (AI) technology by 2030.[148]

[132] Dekker et al. (2020).
[133] Acharya (2017).
[134] Burke-White (2015), p. 47.
[135] Huang (2021).
[136] Blackwill and Wright (2020).
[137] Blackwill and Wright (2020).
[138] Maas 2019, p. 4.
[139] Rosenbach and Mansted 2019 (Belfer Center for Science and International Affairs).
[140] Mansfield and Rudra (2021), "Embedded Liberalism in the Digital Era".
[141] Mansfield and Rudra (2021); Lake et al. (2021).
[142] Patrick (2016), p. 18.
[143] See, for example, Finnemore and Hollis (2016), "Constructing Norms for Global Cybersecurity".
[144] Lynn III (2011), "A Military Strategy for the New Space Environment", p. 8.
[145] Stares et al. (2020).
[146] Thompson et al. (2021), p. 47.
[147] Stares et al. (2020); Dekker et al. (2020).
[148] Mearsheimer (2018); Thompson et al. (2021).

Leading technology firms such as Huawei are now playing an integral role in the politico-economic strategies of major powers.[149] This development makes European policymakers concerned about becoming too reliant on technologies produced by foreign countries.[150] As the gap between physical and digital slims,[151] digital technologies are increasingly considered as a prominent geopolitical resource that fosters and incentivizes relative power shifts.[152]

### 3.2.4. Hybrid warfare and gray zone operations

New technologies have also created new possibilities for hybrid warfare, or "gray zone operations".[153] Scholars suppose that the possibilities offered by, for example, cyberspace, lower the boundaries for launching an attack.[154] As a result, hybrid or 'political warfare' is becoming increasingly normalized, and the boundaries between war and peace have started to blur.[155] The Strategic Monitor 2020-2021 concludes that hybrid tactics are increasing in importance, as all major states engage in gray zone operations.[156] Activities such as information operations, election interference, and cyberattacks are generally considered to fall below the threshold that would lead to military escalation, but are nevertheless provocative and meant to be damaging. In addition, democratic states are more vulnerable to these kinds of operations, as they tend to be "more open, more interconnected, and slower to respond to potentially subversive or harmful activities".[157]

The spread of disinformation has seriously increased since the beginning of the COVID-19 pandemic, with Russia, China and Iran all accused of doing so. Whereas China and Iran have supposedly spread misinformation to save their own reputation, Russia has tried to sow discord within Western democracies.[158] Yet, this is not new: since 2004, Russia has been using cyber operations, disinformation campaigns, and financial resources to influence the domestic politics of at least 27 European and North-American states.[159] What is new, is the number of states that have access to "hybrid warfare" weapons: 100 countries in 2017, compared to six in 2010.[160] In addition, some states, such as the UK, have disclosed their intentions to use offensive cyber measures against others, as a means to defend themselves.[161] Many states, including China, Russia, the US, France, Germany, the UK, and the Netherlands have invested in government agencies that engage and/or respond to hybrid operations.[162]

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[149] Thompson et al. (2021), p. 46.
[150] Thompson et al. (2021), p. 45.
[151] Eichhorn, Nedea and Smed (2020), p. 215.
[152] Eichhorn, Nedea and Smed (2020), p. 215; Maas (2019), p.6.
[153] Torossian et al. (2020), "Hybrid Conflict", p. 2.
[154] Shea (2018), "Cyberspace as a Domain of Operations", p. 140.
[155] Broeders et al. (2019), "Foreign Intelligence in the Digital Age", p. 3.
[156] Thompson et al. (2021).
[157] Thompson et al. (2021), p. 6.
[158] Ellsworth (2020), "Canadian Intelligence: 3 countries spread virus lies", https://www.aa.com.tr/en/americas/canadian-intelligence-3-countries-spread-virus-lies/2064934; Thompson et al. (2021), p. 34.
[159] Treverton et al. (2018), "Addressing Hybrid Threats", p. 10; Hanson et al. (2019), "Hacking Democracies", p. 22; Thompson et al. (2021), p. 70-71; See, for example, Scott and Cerulus, "Russian Groups Targeted EU Election with Fake News, Says European Commission", https://www.politico.eu/article/european-commission-disinformation-report-russia-fake-news/; Browne (2020), "Russian Jet Violated NATO Airspace While Attempting to Intercept US B-52 Bomber", https://www.cnn.com/2020/08/31/politics/russian-jet-nato-b-52/index.html; Cordesman and Hwang (2020), "Chronology of Possible Russian Gray Area and Hybrid Warfare, Operations".
[160] NCTV (2015), "Cybersecuritybeeld Nederland", p. 22; Maurer (2018), "Cyber Proxies", p. 171; Levine (2017), "Russia Tops List of 100 Countries".
[161] Sweijs and Pronk (2020), p. 30.
[162] Sweijs and Pronk (2020), p. 30.

Another implication of these hybrid tactics is that democracies are realizing that information can be weaponized, and thus may pose a risk to national security.[163] Social media play an important role in gray zone operations, facilitating repression and the spread of misinformation.[164]

### 3.2.5. Non-state actors

In the Strategic Monitor 2020-2021, it is argued that the weakening of the multilateral system, and the increase in competition between major powers has resulted in non-state actors (NSAs) becoming more powerful and influential.[165] While some NSAs fulfil vital tasks, they all pursue self-interested agendas. On the one hand, the growing importance of NSAs can be useful, for example in combating climate change or providing humanitarian aid. On the other hand, NSAs wield political influence in ways that are yet to be fully understood.[166] In other words, NSAs are increasingly capable to take up "prominent, influential roles that do not always further the interests of the state.[167]

The most influential and powerful NSAs can be divided into three 'roles' traditionally filled by states: (1) foreign and security policy functions (mostly private military companies);[168] (2) economic, public health or humanitarian functions;[169] (3) political or social organizing.[170] Outsourcing these functions can have adverse effects: NSAs can influence state policy and play a political role following their own agenda, even as they fall outside formal structures of accountability. As a result, they can undermine public confidence in electoral processes.[171] In addition, social and political movements that are organized primarily via social media are vulnerable to the influence of extremist elements, and foreign disinformation, they thus may exacerbate polarization, or may themselves be extremist (with their followers unaware of the full scope of the NSAs activities).[172] In addition, while NSAs possess significant economic, institutional and financial power, they lack the corresponding international legal personality.[173] This means that NSAs cannot be held directly responsible for their conduct under public international law themselves. By extension there remains a lack of clarity as to who is responsible for regulating their conduct under public international law.[174]

[163] See, for example: Sharp (2018), "Hiding in Plain Sight"; Hwang (2017), "Digital Disinformation: A Primer"; Keir and Hagestad (2013), "Divided by a Common Language".
[164] Thompson et al. (2021), p. 134.
[165] Thompson et al. (2021), p. 6.
[166] Thompson et al. (2021), p. 89.
[167] Thompson et al. (2021), p. 89.
[168] There are different reasons for states to outsource this type of role: deniability, increase influence abroad, costs. Thompson et al. (2021), p. 90-91.
[169] NSAs may take on humanitarian functions that states are either unwilling or unable to do for political or financial reasons. Examples include Médecins sans Frontières, the Gates Foundation, or the outsourcing of vaccine developments (Thompson et al. (2021), p. 92); See also, for example, Duncombe and Dunne (2018).
[170] These type of NSAs organize in response to perceived failures by states, Thompson et al. (2021), p. 94.
[171] Thompson et al. (2021), p. 96.
[172] Thompson et al. (2021), p. 96-97.
[173] Zarei and Safari (2016), "The status of non-state actors under the international rule of law: A search for global justice", p. 234; See, for example, Nijman (2013), "Non-State Actors and the International Rule of Law: Revisiting the 'realist theory' of international legal personality".
[174] Ngende 2019, 0. 193; Zarei and Safari, p. 233; OHCHR (2015) "Fact-Finding Missions and Commissions of Inquiry", p. 16.

What is more, NSAs do play an increasingly important role in international legal processes. Most notably, they do in areas of (1) international norm-creation[175] and law-making;[176] (2) adjudication;[177] and (3) norm implementation.[178] The growth of NSAs in this field changes the dynamic and outcomes of international legal processes, now that NSAs, through their increasing prevalence and public presence, can influence states' international legal intentions[179], and, at times, counteract them.[180] Consequently, the international legal order has become comprised of competing and overlapping areas of influence between state and (transnationally operating) non-state actors, which can be observed, for instance, in the 'collapse' of the public-private distinction, as evidenced by the mushrooming of transnational public-private governance initiatives (e.g., TPPP or TGI).[181]

Further, as international legal obligations under public international law are in principle solely delegated to states and specific international organizations,[182] the growth of NSAs within the international legal context fuels discussion on whether, or to which extent, NSAs (should) carry international legal obligations too, that is, obligations and duties under international law to respect. Currently this question is pertinent in relation to for example the application of the Arms Trade Treaty (ATT) to multinational corporations, or, the compliance and protection of armed organized groups (such as ISIS) with and under international humanitarian law (Art 3, Geneva Convention).

At the same time, NSAs active presence in international legal processes raises questions about the democratic deficit of NSAs participation in international legal processes due to the lack of accountability structures for NSA,[183] and whether states' international regulatory competences are surpassed by these new players' increased public influence.[184]

### 3.2.6. Climate change and climate security

Based on the current trajectory, climate change will have direct and indirect security impacts, such as through extreme weather events, increasing food insecurity, and migration flows, but also by the

[175] See, for example, Eggenschwiler and Kulesza (2020), "Non-State Actors as Shapers of Customary Standards of Responsible Behavior in Cyberspace".
[176] Consider for example the strong influence of NGOs in the ICC Statute and the Ottawa Convention on Landmines; See, for example, Bianchi (2017), "Non-state actors and international law".
[177] See, for example, Bianchi (2017), "Non-state actors and international law".
[178] NSAs see to it that states implement international standards, as for example in fields of housing, cybersecurity, or the environment.
[179] For example, their roles vary from participating in consultations on specialist (legal) matters at international fora (for example by allying with international organizations), to making essential contributions to the dissemination of international legal norms to the wider public; For an elaborate overview of this tendency, see, for example, Stolk and Vos (2020), "International legal sightseeing".
[180] A telling example lies in the field of climate change governance, where transnational city alliances started to locally enforce international environmental goals laid down in the Paris Climate Agreement when the US government made clear its intent to withdraw from it; Kang-Riou and Rossati (2018), "'The Effects of Juridification on States Exiting International Institutions", p. 279, 293; Aust and Nijman (2021), "The emerging roles of cities in international law: introductory remarks on practice, scholarship and the Handbook", p. 4.
[181] Westerwinter (2021), "Transnational public-private governance initiatives in world politics: Introducing a new dataset", p. 138; Liste (2020), "The Workings of Power in Transnational Law", p. 9; Zumbansen (2013), "Transnational private regulatory governance: Ambiguities of public authority and private power", p. 123.
[182] See, in this context, Adaafu Oba Esq (2021), "Globalization and Human Rights: The Role of Non-State Actors"; Nijman, (2013).
[183] Whether this is deemed to be a challenge for better or worse, usually depends on the perceived controversial nature (or not) of the agenda pushed by a particular NSA. McConnell (2018), "Extracting accountability from non-state actors in international law: Assessing the scope for direct regulation", p. 114.
[184] In the context of the public influence of private actors in the field of international economic law, see Schill and Vidigal (2021), "National Security, Private Actors, and Political Risk: Judicial and Non-Judicial Responses" p. 504; Alter (2017), "The Future of International Law", p. 34.

exacerbation of geopolitical relations and conflict.[185] Thus, the insecurities brought on by climate change can manifest at individual, state, and system levels.[186] As a result, climate change is at the forefront of international political and legal agendas.[187] In an attempt to mitigate the crisis, countries are (planning on) decreasing their dependence on fossil fuels. This change will alter existing dependencies between states, but it will also create new demands for various raw and sometimes rare materials for application in cleaner energy consumption and technological advancement.[188] States are already making new resources available that shift, and to an extent fragment, supply chains whilst also bringing new exporters on to the playing field. Centrally, this is shaping new geopolitical tools and leverage points.[189]

The EU's emerging need for alternative energy products requires new raw materials mainly provided by China.[190] Other clean energy components, like green hydrogen, are enhancing relations between the EU and sun-rich areas in for example North Africa.[191] China as new important player and dominant exporter of clean energy components, is simultaneously strengthening its alliances with, and influence over, the (Sub-Saharan) African renewable energy infrastructure.[192]

In parallel, the Global North reaffirmed its obligation to support the Global South on implementing climate change measures and to deliver more resources for vulnerable countries to "adapt to the dangerous and costly consequences of climate change that they are feeling already".[193] In this context, the EU has expressed its willingness to forge trilateral cooperation with China and African countries as a "relatively new mode of development cooperation that takes global power shifts into account and addresses the needs of a multipolar world"[194] to implement and realize the climate goals of the Paris Agreement.[195] Importantly, this strategy inverts the often-perceived competition between the EU and China over the African continent into collaboration and a joint approach.[196]

The general trend now at international climate change forums, summits and discussions is to put focus on allocating responsibility for mitigation measures, rather than on working jointly towards a realistic and firm plan of action. In other words, there is a general understanding that the Global South should not bear the brunt of industrialized countries' responsibility for the majority of CO2 emissions.[197] Even so, as became evident again most recently at the COP26, although states like China and Russia,

185 Thompson et al. (2021), p. 27. See also: Efron et al. (2020), "Environment, Geography, and the Future of Warfare"; See Cusato (2021), "The Ecology of War and Peace"; Thompson (2021), "The geopolitical fight to come over green energy", https://engelsbergideas.com/essays/the-geopolitical-fight-to-come-over-green-energy/.

186 Thompson et al. (2021).

187 See, for example, Dixson-Declève (2021), "Anchoring Transformation: Policy Anchors for Ensuring a New European Social Economic Paradigm" (The Club of Rome); see also United Nations Framework Convention on Climate Change: FCCC/CP/2021/9. Report of the Global Environment Facility to the Conference of the Parties, https://undocs.org/FCCC/CP/2021/9.

188 Pascual, C. (2015). "The new geopolitics of energy", p. 3.

189 Pascual 2015, p. 3

190 National Intelligence Council (2021), "Global Trends 2040. A More Contested World ", p. 41.

191 National Intelligence Council 2021, p. 41.

192 Lema et al. (2021), "China's investments in renewable energy in Africa: Creating co-benefits or just cashing-in?", p. 2.

193 Mountford et al. (2021), "COP26: Key Outcomes From the UN Climate Talks in Glasgow", https://www.wri.org/insights/cop26-key-outcomes-un-climate-talks-glasgow.

194 Weigel and Demissie (2017), "A new climate trilateralism? Opportunities for cooperation between the EU, China and African countries on addressing climate change", p. 2.

195 Demissie and Weigel 2017, p. 2.

196 Demissie and Weigel 2017, p. 2; Langendorf et al. (2012), "Triangular Cooperation: A guideline for working in practice", p. 15.

197 See Gupta and Chu (2018), "Inclusive development and climate change: the geopolitics of fossil fuel risks in developing countries".

but also India and others, have agreed to a wide range of measures under the Paris Agreement, they simultaneously continue to rely on the Global North.[198] While this all reflects a general sluggishness to avoid hard hitting and potentially restrictive measures, occasionally commendable agreements are made. For instance, at the COP26, the United States and the EU formed an agreement to reduce methane emissions by at least 30 percent until 2030, which has potential to reduce warming by 0,2 degrees Celsius.[199]

Currently, in terms of legal developments, one of the central challenges and biggest concerns is the inability and unwillingness of states to commit to binding legal obligations that would effectively mitigate CO2 emissions.[200]

While legal frameworks to tackle the threat of climate change are evidently still developing, the fact that the separation of global and local regimes is rather difficult, meaning that "governance regimes mix the local and the global"[201] adds to uncertainties. Moreover, and to an extent as a result of this, international accords such as the Paris Agreement, inflict debate over whether their often vaguely-worded provisions provide enforceable legal obligations.[202] Given precisely this mix of national and international legal regimes, the more transnational reach of human rights law has become a 'go-to' resort for those seeking environmental justice before a court of law. Notably, the right to life; right to private and family life; and especially for young applicants the right not to be discriminated against, have been advanced in such cases.[203]

In light of what many consider to be too slow a process, individuals and activist groups are litigating climate change issues against states and private companies.[204] Already in 2017, over 800 lawsuits have been filed around the world.[205] Often, groups file "constitutional claims asserting that government policies in regard to climate change violate their constitutional rights because the policies will increase GHG emissions and hence the risk of catastrophic climate change".[206] As a result, governments are increasingly held accountable for their legislative and policy commitments, impacts of resource extraction are being effectively linked to climate change, and there is increased liability for failure to act, even for failed effort, to adapt to climate change.[207] Importantly, these developments have given substance to "claims of a transnational climate justice movement that casts courts as important players in shaping multilevel climate governance.''[208] In addition, this brings to the fore the integral role that domestic law plays in enabling important decisions and frameworks of international

[198] Landwehr and Holtz (2021), "Das erhoffte Signal bleibt aus".
[199] European Commission (2021), "COP26: EU helps deliver outcome to keep the Paris Agreement targets alive", https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6021.
[200] See Atapattu, S.A. et al. (2021), "The Cambridge Handbook of Environmental Justice and Sustainable Development".
[201] Etty, et al. (2018), "Transnational climate law. Transnational Environmental Law".
[202] Etty et al. (2018), p. 194.
[203] Global Legal Action Network (2021), "The Covid-19 crisis has not made the climate emergency go away", https://youth4climatejustice.org/.
[204] Badrinarayana, D. (2018), "A Constitutional Right to International Legal Representation: The Case of Climate Change", p. 51. See, for example, Reclame Fossielvrij (2021), "Klacht studenten gegrond – Reclame Code Commissie Shell-reclames met claim 'CO2-neutraal' zijn misleidend", https://verbiedfossielereclame.nl/shell-reclame-co2-neutraal-misleidend-reclame-code-commissie/.
[205] Burger and Gundlach (2017), "The status of climate change litigation: A global review", p. 10; Nachmany, N. et al. (2014), "The GLOBE climate legislation study: a review of climate change legislation in 66 countries", p. 37ff.
[206] Badrinarayana (2018), p. 51.
[207] Burger and Gundlach (2017), p. 4.
[208] Peel and Lin (2019), "Transnational climate litigation: The contribution of the global south".

law, specifically in the blurry realm of climate change.[209] It can therefore be asserted that the legal framework on climate change "has broken through the traditional boundaries of international law".[210]

## 3.3. Legal developments

The international order is facing changes in the ways in which international actors take recourse to (international) law. This section discusses the profound changes in the role of law and courts in the international order, broadly referred to by "trends" of juridification and de-juridification, as well as characteristics of international legal (law-making) processes, where, next to the long-standing practice of formal law-making, a rise of informal law making is observed. Lastly, the chapter discusses the current debate around– and status of the legality of using force in the legal realms of self-defense as well as humanitarian interventionism. The latter pertains predominantly to the emergence of the Responsibility to Protect (R2P) doctrine with its controversial understanding of conditional sovereignty.

### 3.3.1. Trends of (de-)juridification and (de-)judicialization

Currently, two ongoing, but in fact contradictory, developments in the international legal order are observed. On the one hand, there is juridification/judicialization, that is: a growing appeal to legal rights frames and courts (e.g., to settle political disagreements).[211] On the other hand, there is de-juridification/de-judicialization, that is: the "thinning of legal regimes" and "narrowing of jurisdictional competences",[212] a backlash development that in parts of the world seems to coincide with the rise of populism and illiberal electoral regimes.[213]

For nearly two decades, the growing appeal to legal rights frames on political matters by international actors (states, international organizations, and more recently non-state actors) and the proliferation of international courts has been considered as part of the development of "juridification of international relations/politics".[214] This has often been treated as "a linear and intensifying trend".[215] Generally, the term *juridification* is used to refer to a growing use of law as a medium to tackle a variety of social and political issues that were traditionally addressed by diplomatic and administrative action.[216] Consequently, as political issues are increasingly advanced in legal terms, they became fragmented into

[209] Peel and Lin (2019), p. 681.
[210] Etty et al. (2018,) p. 191.
[211] Basedow (2021), "Why de-judicialize? Explaining state preferences on judicialization in World Trade Organization Dispute Settlement Body and Investor-to-State Dispute Settlement reforms", p. 2; For literature on juridification and judicialization headed by the EU, see for example: Nanopoulos (2020), "The Juridification of Individual Sanctions and the Politics of EU Law" (Bloomsbury Publishing); Kelemen and Pavone (2018), "The Political Geography of Legal Integration"; Bruzelius (2020), "How EU Juridification shapes Constitutional Social Rights".
[212] Moser and Rittberger (2021), "The CJEU and EU (De)constitutionalization—Unpacking Jurisprudential Strategies", p. 20.
[213] Klug (2021), "The judicialization of politics?", p. 295; Petrov (2021), "(De-)judicialization of politics in the era of populism: lessons from Central and Eastern Europe".
[214] See, for example, Croce (2020), "Juridification as politics: An institutional view"; Croce (2018). "The politics of juridification"; Alter et al. (2019), "Theorizing the Judicialization of International Relations"; Sieder (2020), "The Juridification of Politics".
[215] Petrov (2021), p. 1.
[216] More broadly, juridification has been understood as a form of legal framing, whereby people come to see themselves as legal subjects through the process of claiming rights; Blichner and Molander (2008), "Mapping Juridification", p. 7,39. See Croce (2020), p. 2; Sieder (2020), p. 6.;

different specialized legal regimes (e.g., in areas of sports law; trade; intellectual property; environment; technology; cyber; health).

In an increasingly juridified world, the role of the judiciary increases in global governance. Through a process of *judicialization,* political battles are displaced to the courts. By consequence, the role of the judiciary increases *vis-à-vis* other branches of government.[217] This in turn incentivizes individuals and interest groups to frame their policy claims in legal terms, thus providing ever-more fuel for judicial governance.

Recent examples of juridification and judicialization include the increase in case load of prominent international dispute settlement mechanisms (Permanent Court of Arbitration; Investment Court Mechanisms (ICS));[218] states turning to courts in order to supplement or remedy political disagreements (ICJ, Gambia v. Myanmar case); increased litigation of issues lacking effective remedy in political processes (on equality; environmental protection; nuclear energy); extension of human rights regimes (e.g., to indigenous traditions; to nature (e.g., rivers' legal "right to live").[219] The development of juridification and judicialization is moreover further amplified through transnational NSAs' increased political activism and engagement in international legal processes.[220]

Where juridification and judicialization represent greater recourse to legal language to decide political issues, as well as a shift of power toward courts, processes of *de-juridification* and *de-judicialization* represent the opposite.[221] These involve instances of backlash: "the reacquisition of power by executives and legislatures" and the "withdrawal of previously judicialized policy issues from the purview of international courts".[222] These are noted to "eventually [lead] to a de-constitutionalization of policy".[223] The literature identifies two main actors capable of dejudicializing a policy area: (1) states, that can collectively remove an area from judicial purview, e.g., by withdrawing their signature from a treaty, and (2) litigants, who can dejudicialize an area simply by declining to bring cases.[224]

Recent examples affirming notions of de-judicialization include "the rise and fall of the South African Development Community Tribunal (SADC)";[225] Poland's and Hungary's backlash against constitutional courts (amidst other regions with "illiberal electoral regimes"); the response of Russia and other countries to rulings of regional and international human rights courts; the transfer of dispute resolution to other bodies beside the courts (e.g., the turn away from investor-state dispute resolution by e.g., the US);[226] populist attacks on international institutions in Hungary, Venezuela, and other

[217] Abebe and Ginsburg (2019), "The dejudicialization of international politics?", p. 519; Sieder (2020), p. 6; Mitchell and Owsiak (2021), "Judicialization of the Sea: Bargaining in the Shadow of UNCLOS", p. 3.
[218] Basedow (2021), p. 4.
[219] See, for example, Ramstedt (2020), "The right to freedom of and from religion in non-State legal orders: The case of indigenous peoples"; Sieder (2020); Anaya and Anghie (2021), "Symposium The Impact of Indigenous Peoples on International Law"; In the context of legal rights for rivers, see, for example, Álvez-Marín et al (2021), "Legal personhood of Latin American rivers: time to shift constitutional paradigms?"; Macpherson et al. (2020), "Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects".
[220] Alter et al. (2019), p. 457
[221] For a most recent and elaborate analysis of de-judicialization, see Abebe and Ginsburg (2019); See Mayrl and Venny (2021), "The dejudicialization of religious freedom?", p. 344.
[222] Abebe and Ginsburg (2019), p. 521.
[223] Moser and Rittberger (2021), p. 20.
[224] See Kosmatopoulos (2021), "Master peace: expert power and techno-morals in Lebanon"; Abebe and Ginsburg (2020), p. 529.
[225] Abebe and Ginsburg (2019), p. 527; See Alter et al. (2016), "Backlash against international courts in west, east and southern Africa: causes and consequences", p. 306.
[226] That the US showcases a preference for de-judicialization is exemplified by its growing critique of the WTO, advocating for de-judicialization of ISDS, and return to diplomatic dispute resolution, see Abebe and Ginsburg (2019), p. 520).

countries; several states leaving the International Criminal Court (ICC) or threatening to do so (Kenya, Namibia, Uganda);[227] and Brexit (removing the UK from EU legal control and influence).[228]

Current academic reflection on the rise of these contradictory trends provides explanatory accounts on their confluence. For one, scholars suggests that "more liberal" states (e.g., Western European states) turn to courts, whereas more nationalist-populist states (e.g., Hungary, Poland, the US under Donald Trump) feel less inclined to take recourse to courts,[229] and at times even attack them. As such, trends of de-juridification and de-judicialization seem often to coincide with a recent rise of populism and authoritarian regimes. It is possible to note for example in the European context, that an "intrinsic part of populism concerns a form of legal skepticism", that is, "populists are wary of the institutions of and limits of liberal constitutionalism".[230] In other words, the populist view generally perceives human rights and law as not-neutral, "but rather as instruments of particular groups in society".[231] More in particular, a recurring argument is that liberalism favors a process of juridification.[232] Hence, "[r]ight-wing populists agitate against embedded constitutional democracy as a regime that promotes extensive juridification and a culture of rights that is deeply grounded in liberal ideas"[233] and that is seen to favor 'elites'.

More broadly, it is noted that strong populist movements or populist presidents "make it more likely that governments opt for challenging the authority of courts [and institutions] over alternative strategies such as acceptance, non-compliance, or avoidance".[234]

### 3.3.2. Informal law-making

Scholars observe a rise in informal law-making, accelerated by new players.[235] This development may be due to two different trends: first – and related to the process of de-juridification – increasingly less treaties are being concluded each year,[236] even where there is a clear need for new legal frameworks. Second – and related to the process of juridification – non-state actors seek recourse to law to address political issues and lobby state support and access to (alternative) law-making avenues, this results in an *informalization* both of the relations between states and non-states as well as of law-making procedures themselves.[237]

States increasingly tend to choose informal means of law-making and cooperation to govern international relations. This has led to a legal "output informality" meaning that law-making efforts do

[227] See, for example, Voeten (2017), "Liberalism, populism, and the backlash against international courts" (On file with author).
[228] See, for example, Solomon and Fossum (2021), "Continuity beyond Brexit? EU Juridification and the Protection of Rights".
[229] Alter et al. (2019), p. 457.
[230] See Blokker (2018), "Populist constitutionalism".
[231] Blokker (2021), "Populist Understandings of the Law: A Conservative Backlash?", p. 16.
[232] Blokker (2021), p. 16.
[233] Blokker (2021), p. 19; Koskenniemi (2001), "The gentle civilizer of nations: the rise and fall of international law 1870–1960"; Koskenniemi (2009), "The Politics of International Law Twenty Years Later".
[234] Voeten (2018), p.2.
[235] Wouters (2019), "International Law, Informal Law-Making, and Global Governance in Times of Anti-Globalism and Populism", p. 248; Pauweleyn (2014), "Informal International Lawmaking", p. 736; Carter (2017), "Legislation in Europe – a comprehensive guide for scholars and practitioners", p. 87.
[236] Zimmerman and Jauer (2021), "Possible Indirect Legal Effects under International Law of Non-Legally Binding Instruments", p. 5; Ginsburg (2020), "Authoritarian international law?", p. 224; Wouters (2019), p. 253.
[237] Westerwinter et al. (2021), "Informal governance in world politics", p. 7; Zimmerman and Jauer (2021), p. 5; Van Mulligen (2015), "Framing deformalisation in public international law", p. 637. See Roucounas (2019), "A Landscape of Contemporary Theories of International Law".

not obviously lead to the conclusion of a formal international treaty or binding legal agreement. Rather, products of informal law-making involve guidelines, strategies or declarations, or the setting-up of an international conference.[238] The processes through which these informal laws are made take place beyond traditional international legal structures in rather loosely organized networks or fora (such as in international committees or ministerial meetings) instead of a traditional international organization.[239] This allowed for the involvement of non-traditional actors to participate in informal law-making, as affirmed by the inclusion of NSAs in specific governance areas.[240]

Where traditional international law-making requires a 'one-size fits-all' implementation and has typically huge transaction costs (as it includes rules established by an institution according to certain processes), informal law-making is, due to its agile form, lower in costs and provides an avenue for adapting pre-existing hard law in case of unexpected developments. The complementary dynamic of both formal and informal law-making mechanisms, arguably leads to a progressive development of international law.[241]

Still, the increased informalization of international law is not without problems. Questions revolve around the legal impact of informal (soft) law, as well as around accountability and legitimacy.[242] The choice to act outside the prescribed framework for concluding binding arrangements raises fundamental questions of legitimacy and the rule of law.[243] The shift to informality may facilitate the creation of "a parallel world" of instruments and norms[244], it is contended, which may be welcome in terms of substantive interests and broad actor involvement, but which will also foster uncertainty as to their legal weight.[245]

### 3.3.3. The legality of the use of force and R2P

Perhaps one of the most hotly debated topics of international law, both in academia and practice, is the legality of the use of force, or more specifically, the circumstances under which an exception to the general prohibition on the use of force as established in article 2(4) of the UN Charter is warranted.[246] Under the Charter, there are two concrete scenarios by which the use of force may be legitimized: in self-defense as set out in article 51, and as a Chapter VII authorization by the UN Security Council to protect international peace and security laid out in article 42.[247]

According to the International Court of Justice, self-defense can only be invoked in the case of a prior armed attack by another state.[248] However, the US has interpreted these clauses in rather broad terms when using self-defense against non-state actors, i.e. 'terrorists', and arguably in absence of an armed

[238] Westerwinter et al. (2021), p. 8; Wouters (2019), p. 249; Pauweleyn (2014), p. 738.
[239] Westerwinter et al. (2021), p. 8; Wouters (2019), p. 249; Pauweleyn (2014), p. 738.
[240] Tabassi and Dunworth (2020), "The OSCE: A study of the role of 'soft law' in disarmament", p. 178; Wouters (2019), p. 248; Ayton-Shenker (2018), "A New Global Agenda: Priorities, Practices, and Pathways of the International Community", p. 35.
[241] Ayton-Shenker (2018), p. 35.
[242] Pauwelyn, Wessel and Wouters (2014), "When structures become shackles: Stagnation and dynamics in international lawmaking", p. 745.
[243] Zimmerman and Jauer (2021), p.8.
[244] TMC Asser Institute, "Informal law-making in EU External Relations: Challenges and prospects", https://www.europa-nu.nl/id/vlhil1pg7rry/agenda/informal_law_making_in_eu_external.
[245] Wouters (2019), p. 255.
[246] Gray (2018). "International law and the use of force", p. 9f.
[247] United Nations (1945). Charter of the United Nations and Statute of the International Court of Justice, https://treaties.un.org/doc/publication/ctc/uncharter.pdf.
[248] International Court of Justice (2004), "The Wall Opinion"; International Court of Justice (1986), "Military and Paramilitary Activities (Nicaragua/United States of America)".

attack, particularly in the wake of the events of September 11, 2001.[249] Many states categorically reject the use of force against non-state actors without the consent of the territorial state, most outspokenly Russia, and to a lesser extent China, Iran, Cuba, North Korea, Venezuela, and Nicaragua.[250] There is another block of states joined under the Non-Aligned-Movement (NAM), who are increasingly vocal about their restrictive understanding of Article 51 and their adherence to the non-intervention principle.[251] They assert that "Article 51 of the UN Charter is restrictive and should not be re-written or reinterpreted".[252] Recently, in a 2021 Security Council meeting, Brazil, China, Mexico, and Sri Lanka expressly spoke out against a broad interpretation of the right to self-defense. In the same meeting, Australia, Azerbaijan, Belgium, Denmark, Estonia, the Netherlands, Turkey, the United Kingdom, and the US supported a broad interpretation of the legal framework. Nevertheless, differences of view remain among this latter group, pertaining for instance to the legal relevance of an imminent attack.[253] A practical example of the relevance of these discussions followed within twenty-four hours of the meeting, when the US carried out airstrikes in Syria against several small facilities used by Iraqi militias.[254]

Another potential legal basis for the use of force, although debatable, is the concept of humanitarian intervention: a military operation in a third state (that did not consent to the use of force) to protect civilians from severe human rights abuses, atrocity, or other conflict related threats.[255] Controversy surrounding humanitarian intervention essentially revolves around different understandings of the concept of sovereignty it sets out. The Westphalian understanding of sovereignty should be, according to some states, replaced by a 'conditional' understanding of sovereignty.[256] This gives rise to a collective security framework that agrees on limitations to central state power.[257] In short, this illustrates the query of whether human security (the protection of human rights and civilians from atrocity crimes) or state security (territorial integrity) are prioritized in international law.

Endorsed by all United Nations member states in 2005, the Responsibility to Protect (R2P) doctrine offers a set of standards and conditions for the international community to respond to grave human rights violations.[258] The doctrine sets out that "sovereignty is not just protection from outside interference [but rather] a matter of states having positive responsibilities for their population's welfare, and to assist each other. Consequently, the primary responsibility for the protection of its people rests first and foremost with the State itself. However, a 'residual responsibility' also lies with the broader community of states, which is activated when a particular state is clearly either unwilling or unable to fulfil its responsibility to protect or is itself the actual perpetrator of crimes or atrocities".[259]

[249] Pothelet (2018), "U.S. Military's "Collective Self-Defense" of Non-State Partner Forces: What Does International Law Say?", https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/.
[250] Gray (2018), p. 11.
[251] Gray (2018), p. 11.
[252] Gray (2018), p. 11; NAM (2016): "17th Summit of Heads of State and Government of the Non-Aligned Movement", https://unidir.org/sites/default/files/2020-10/2016_NAM%20Summit%20final%20doc.pdf.
[253] For more information see: Haque (2021), "Self-Defense Against Non-State Actors: All Over the Map. Insights from UN Security Council Arria-Formula Meeting", https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/.
[254] Haque (2021).
[255] Fijnaut and Larik (2020), "Humanitarian Intervention and Political Support for Interstate Use of Force".
[256] Jackson (2013), "Global Politics in the 21st Century", p. 90.
[257] Jackson (2013), p. 92.
[258] United Nations Office on Genocide Protection and Responsibility to Protect (n.d). "Responsibility to Protect", p. 1.
[259] United Nations Office on Genocide Protection and Responsibility to Protect (n.d.), p. 1.

While all non-military coercive measures must be exhausted in such cases, the third pillar of the concept allows for military measures as a last resort when authorized by the Security Council.[260]

Critical scholars, as well as states themselves, most prominently less powerful, non-Western and BRICS countries, put emphasis on the fact that the R2P doctrine has decided on a set of 'behavioral guidelines' which states must follow, as they otherwise run the risk of becoming a subject to intervention.[261] These new standards rely on norms that are perceived as universal, while a closer look uncovers their origin in "the 'advanced' industrialized democracies".[262] As such, "[t]he internationalist vision of the universality of human rights is clearly linked to liberal internationalism and the progress of the liberal world order as a vehicle 'for the pursuit of ethical purposes beyond ourselves.'"[263] In other words, critics identify a subsystem within the international order composed by common values of closely linked liberal democracies that to a large extent define the conditions of sovereignty and who do not themselves have to fear interference on their territory due to their political and economic position in the international community.[264]

While R2P enjoyed general support at the time of its initial creation, its misuse in the case of Libya in 2011 triggered criticism, particularly from Russia, South Africa, India and Brazil, who had voiced doubts about the concept since its inception.[265] As a proactive response to NATO's overextension of its mandate in Libya, Brazil later that year introduced the framework of the "Responsibility while Protecting" (RwP) to the Security Council.[266] Essentially, this approach prioritizes responsible and cautious ways of intervening, while emphasizing the broad scope and effectiveness of non-coercive measures that can be taken apart from using force. It thereby also supports an early response to conflict situations rather than only invoking the doctrine as a measure of last resort with no prior attention to the situation or attempts to settle it by peaceful means.[267]

As a concluding remark on the current status of the Responsibility to Protect it should be mentioned that a majority of UN member states decided to "include R2P on the annual agenda of the General Assembly and to formally request that the Secretary-General reports annually on the topic",[268] reflecting not only its continued (or reemerging) relevance, but also its further development within the United Nations. [269]

[260] United Nations Office on Genocide Protection and Responsibility to Protect (n.d.), p. 1.
[261] Lake (2017), "Laws and Norms in the Making of International Hierarchies", p. 42; Simpson, G. (2004), "Great powers and outlaw states: Unequal sovereigns in the international legal order"; Parfitt, R. (2019), "The Process of International Legal Reproduction: Inequality, Historiography, Resistance".
[262] Lake (2017), p. 42.
[263] *See* Duncombe and Dunne (2018), "After liberal world order".
[264] Etzersdorfer and Janik (2016), "Staat, Krieg und Schutzverantwortung", p. 81.
[265] Kenkel and Stefan (2016), "Brazil and the Responsibility while Protecting Initiative: Norms and the timing of diplomatic support", p. 43.
[266] Benner (2013), "Brazil as a norm entrepreneur: the "Responsibility While Protecting" initiative", p. 1; Kenkel and Stefan (2016); Global Centre for the Responsibility to Protect (2011), "Responsibility While Protecting", https://www.globalr2p.org/resources/responsibility-white-protecting/.
[267] Benner (2013), p. 2.
[268] Global Centre on the Responsibility to Protect (2021), "Summary of the 2021 UN General Assembly Plenary Meeting on the Responsibility to Protect", https://www.globalr2p.org/publications/summary-of-the-2021-un-general-assembly-plenary-meeting-on-the-responsibility-to-protect/.
[269] Global Centre on the Responsibility to Protect (2021), "Summary of the 2021 UN General Assembly Plenary Meeting on the Responsibility to Protect", https://www.globalr2p.org/publications/summary-of-the-2021-un-general-assembly-plenary-meeting-on-the-responsibility-to-protect/.

# 4. Functioning and Relevance of International Institutions

This chapter answers the following research question:
According to the literature, have these international developments impacted the functioning and relevance of: the United Nations Security Council, the International Court of Justice, the International Criminal Court, and the Human Rights Council? If so, how?

Main findings:

## 4.1. United Nations Security Council (UNSC)

- The Security Council continues to play a significant role in international affairs due to its important mandate to ensure international peace and security.
- Prominent challenges include the Council's veto power induced paralysis; contestation of norms and divergent approaches to sovereignty; the dated set-up of the Security Council.

## 4.2. The International Court of Justice (ICJ)

- The ICJ remains a respected authority. Its high-profile judgements pertain to territory, national boundaries, rights to natural resources, international human rights, and the exercise of universal jurisdiction over crimes against humanity, and acts of genocide. Since 2015, ten states have accepted compulsory jurisdiction of the Court, amounting now to a total of 74. The ICJ's recent introduction of an article that provides for an *ad hoc* committee to monitor the implementation of Court ordered provisional measures represents progress in its working methods.
- Challenges of the Court concern the lacking enforcement powers and state acceptance of its jurisdiction.

## 4.3. The International Criminal Court (ICC)

- As of 2021, the ICC has taken up 30 cases, issued 35 arrest warrants, detained 17 people that thereafter appeared before the Court and delivered 10 convictions.
- Positive developments include the scholarly finding that the ICC has a deterring effect and the implementation of a new ICC Review Process.
- The Court continues to be accused of politicization and African bias. Issues of the Court's dependency on state cooperation are most prominently reflected in difficulties with carrying out arrest warrants (with currently 13 people at large).
- Hesitation among certain states to join the Rome Statute and the related difficulty of prosecuting crimes committed in non-state parties pose a challenge.

## 4.4. The Human Rights Council (UNHRC)

- The UNHCR has been able to act more efficiently than the paralyzed Security Council in response to current conflict situations. The UNHCR receives a positive response to its system of Universal Periodic Review and the well-working commissions of inquiry.
- The UNHCR has been critiqued for allowing states with a questionable human rights record to take up membership. Accusations of politicization remain.
- The UNHCR is criticized for a selective choice of investigations and for becoming an arena of political dispute between the US and China.

# 4. Introduction

In the context of significant internal and external challenges to the (liberal) international legal order as outlined in chapter 3, chapter 4 addresses how these developments are impacting the functioning and relevance of international institutions. International institutions are central to the very functioning of the multilateral order itself.[270] This chapter specifically zeroes-in on four key institutions: the United Nations Security Council (UNSC); the International Court of Justice (ICJ); the International Criminal Court (ICC); and the Human Rights Council (UNHRC).

## 4.1 United Nations Security Council

The following section looks at the general fulfillment of the United Nations Security Council's (UNSC) core tasks over the past years. It zooms-in on the most prominently voiced critique surrounding it. More specifically, (1) the recent functioning of the United Nations (UN), and specifically of the UNSC, are noted to evidence paralysis or an "ineffectiveness" to deliver on the central mandate: the maintenance of international peace and security.[271] Furthermore, (2) the instrumentalization of the UNSC as an arena in which to assert and dispute diverting understandings of security (i.e., the prioritization of state security by Russia and China over human security as advocated by the US, the UK and France) is a topic of academic and political concern.[272] This practice (3) continues the long-standing discussion on UNSC reform through a restructuring or expansion of Council membership.[273]

### 4.1.1. Paralysis of the Council

State alliances and geopolitical competition around conflict affected regions block meaningful decisions to fulfil the Council's mandate of protecting international peace and security.[274] Thus responses depend heavily on which states are affected and involved. While Libya saw a speedy NATO-intervention in 2011, which some argue overstepped the UNSC mandate due to the operation resulting in regime change,[275] action in Yemen has been minimal.[276] Similarly, after the military junta in Myanmar ousted the democratically elected government at the beginning of 2021, global calls for UN actions remained

[270] Klabbers (2015), "Introduction to International Organizations Law"; Keohane (2020), "International Institutions and State Power"; Simpson (2001), "Two Liberalisms", p. 537; See Schermers and Blokker (2021), "International Institutional Law: Unity within Diversity".
[271] Mahapatra (2016), "The Mandate and the (in)effectiveness of the UNSC and International Peace and Security: The Contexts of Syria and Mali".
[272] De Wijk et al. (2020). "Adjusting the Multilateral System to Safeguard Dutch Interests".
[273] Acharaya and Plesch (2020). "The United Nations: Managing and Re-shaping a New World Order. Global Governance", p. 222; Patrick, S. (2016). "World order: what, exactly, are the rules?"; Security Council Report (2019a). "In Hindsight: Security Council Reform"; Schaefer, K. (2017). "Reforming the United Nations Security Council: Feasibility or Utopia?"; Security Council Report (2019b). "The Rule of Law: Retreat from Accountability", p. 27.
[274] Security Council Report (2019b); See also: Chapter 5.1 for alternative response mechanisms to conflict situations.
[275] Merkel (2014). "Die Intervention der NATO in Libyen: Völkerrechtliche und rechts-philosophische Anmerkungen zu den Grenzen legitimer militärischer Gewalt", p. 53.
[276] Council on Foreign Relations (2018. "U.S.-Saudi Arabia Relations", https://www.cfr.org/backgrounder/us-saudi-arabia-relations.

unanswered with China blocking a vote in the UNSC.[277]

It is symptomatic for the UNSC's spiraling inability to agree on timely and decisive action that it adopted the "Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocity" in 2015, which neither China and Russia, nor the US have signed, thereby making it virtually ineffective.[278] Moreover, the UNSC's legitimacy has been challenged due to repeated unresponsiveness to African calls for joint authorizations of regional military intervention.[279]

As a result of this paralysis, states have increasingly moved towards unilateral action, or have taken decisions circumventing UNSC votes and resolutions. In the case of Syrian chemical weapon attacks on civilians in 2018, France, the US and the UK commenced air strikes without UNSC authorization, as political interests in Syria made a collective response impossible.[280] Besides these (unilateral) initiatives increasingly undercutting joint UNSC action, they also enjoy less legitimacy and legal basis than collective security action.[281] For example, the strikes on Syria were often criticized for lacking a legal basis and setting unfavorable precedent by disregarding, and thereby fundamentally shifting, core structures of international law.[282] As such, many have perceived the paralysis regarding the Syrian conflict "as evidence of the UNSC's growing irrelevance to international peace and security".[283] Nevertheless, there is also a perspective that sees the prevention of the authorization of the use of force as precisely part of the Council's task and successful fulfilment of its mandate.[284]

Irrespective of these diverging interpretations, of which the latter is generally more contested, it can be established that repeated inaction towards breaches of international law, specifically war crimes, also negatively affect general accountability issues.[285] Apart from the collective fight against ISIS/ISIL, "suspected perpetrators of grave crimes can now expect minimal Council consequences for their actions because of the particular interests of one or more of the Council's permanent members".[286] For instance, in 2015, the UNSC failed "to adopt a resolution that would have established an International Tribunal for the purpose of prosecuting persons responsible for crimes connected with the downing of Malaysia Airlines flight MH17" due to Russia's use of its veto.[287] At the same time, Western states avoid accountability for breaches of international humanitarian law during their involvement in conflicts. These scenarios do not only enable impunity, but they also reflect inconsistency by the Council, including by member states that "strongly promote accountability as a matter of principle" as soon as political alliances are affected.[288]

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[277] Barber (2021). "Response to Myanmar coup shows need for UN reform", https://www.lowyinstitute.org/the-interpreter/response-myanmar-coup-shows-need-un-reform.

[278] Barber, R. (2021). "Response to Myanmar coup shows need for UN reform", In: the interpreter, Lowry Institute. Retrieved from: https://www.lowyinstitute.org/the-interpreter/response-myanmar-coup-shows-need-un-reform. Last access: 18.10.2021; Global Centre for the Responsibility to Protect (2016). "List of Supporters of the Political Declaration on Suspension of Veto", Retrieved from: https://www.globalr2p.org/resources/list-of-supporters-of-the-political-declaration-on-suspension-of-veto/.

[279] Patrick (2016), p. 13.

[280] Security Council Report (2019b), p. 27; Milanovic (2018). "The Syria Strikes: Still Clearly Illegal", https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/.

[281] Security Council Report (2019b), p. 28.

[282] Security Council Report (2019b), p. 27; Milanovic (2018).

[283] Patrick (2016), p. 13.

[284] Patrick (2016), p. 13.

[285] Security Council Report (2019b), p. 1.

[286] Security Council Report (2019b), p. 2.

[287] Security Council (2015). "7498th Meeting (PM). Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims", https://www.un.org/press/en/2015/sc11990.doc.htm.

[288] Security Council Report (2019b), p. 27.

This issue is further reflected in relation to the International Criminal Court (ICC). Under Article 13(b) of the Rome Statute, the UNSC can request the ICC to investigate a situation and refer cases to the Court, "even if it relates to a non-state party or by nationals thereof, to exercise its jurisdiction in light of Chapter VII of the UN Charter".[289] The fact that the majority of the permanent five members of the Security Council themselves have not signed the Court's statute is an issue of concern, highlighting inconsistency and double standards.[290] Moreover, with the ability exclusive to the Security Council to refer situations involving non-state parties to the Court, the Council carries a responsibility "to act fairly and impartially and eliminate any opportunities for bias".[291] When looking at its practice, however, this has not been the case. So far, Darfur in 2005 and Libya in 2011 have been the only non-state parties referred by the UNSC, while cases such as the persecution of Rohingya in Myanmar and the atrocities in Syria have not triggered any referrals due to veto power opposition.[292] What is more, the "Council has also been relatively indifferent towards states' non-cooperation with the ICC on existing referrals, refraining from taking action on the 13 decisions of the court regarding the non-compliance of UN member states".[293] This has led to the critique that the mechanism is yet another framework vulnerable to "international power play".[294]

### 4.1.3. 'Rising' States and the UNSC

In recent years, 'rising' states, above all China, have been actively promoting their role in the Security Council, not least by behaving more assertively on questions of norms and security.[295] Indeed, China and the BRICS in more general terms enjoy an improved bargaining position through the 'Group of 77', now expanded to consist of 134 of the 193 UN member states. The BRICS have considerable influence over the position of these states within the UN.[296] In addition, China has become the largest contributor to peacekeeping operations among the permanent members of the Security Council and the second-largest contributor to the peacekeeping budget.[297] Emerging voices within the UN also create contestations of norms and values, such as exemplified by their reference to sovereign independence. Even so, most powerful states prefer the status quo, and most Western powers prefer 'rising' states to simply integrate into, and accept, existing institutional frameworks, norms and values.[298]

Nonetheless, persistent strategic rivalry does exist and results in enduring value divergences, incompatible regime types, institutional inertia, and ambivalent US multilateralism.[299] These pose

[289] Aregawi (2017). "The Politicisation of the International Criminal Court by United Nations Security Council Referrals", https://www.accord.org.za/conflict-trends/politicisation-international-criminal-court-united-nations-security-council-referrals/.
[290] Mensa-Bonsu (2015). "The ICC, international criminal justice and international politics", p. 41.
[291] Aregawi (2017).
[292] Aregawi (2017); Hale and Rankin (2019). "Extending the 'system' of international criminal law? The ICC's decision on jurisdiction over alleged deportations of Rohingya people".
[293] Security Council Report (2018). "In Hindsight: The Security Council and the International Criminal Court", https://www.securitycouncilreport.org/monthly-forecast/2018-08/in_hindsight_the_security_council_and_the_international_criminal_court.php.
[294] Mensa-Bonsu (2015), p. 41; Hale and Rankin (2019).
[295] De Wijk et al. (2020). "Adjusting the Multilateral System to Safeguard Dutch Interests", p. 79; Piccone (2018). "China's long game on human rights at the United Nations"; Richardson (2020). "China's influence on the global human rights system"; Philips and Braun (2020). "The Future of Multilateralism. The Liberal Order under Pressure".
[296] Richardson (2020).
[297] Richardson (2020).
[298] Patrick (2016), p. 21.
[321] Patrick (2016), p. 21.

constant challenges to the further development -and reform- of international institutions, including the Security Council. As stated, "from Syria to Ukraine to the South China Sea, strategic competition has proven to be alive and well".[300] Conflicting approaches to state control additionally affect agreement on global rules and thereby on the emergence of (new) norms.[301]These points of tension lead major and emerging powers to "increasingly rely on informal, non-binding, purpose-built partnerships and coalitions of the interested, willing, and capable to address global problems ranging from pandemic disease to nuclear security".[302] This, in turn, affects the centrality of the Security Council as the core arena for decision-making, deliberation and integration of Eastern and Western aspirations. This development has been termed "minilateralism", meaning that while "conventional bodies -chief among them, the United Nations and the Bretton Woods institutions- may persist, [...] states increasingly participate in a bewildering array of flexible, ad hoc frameworks whose membership varies based on situational interests, shared values, or relevant capabilities".[303]

### 4.1.4. Security Council Reform

The Council's representativeness has been a topic of contention for many years. Essentially, debates highlight the institutionalized inequality created through the dated set-up of the Security Council, requesting equality and representation, and thereby "legitimate authority of the organ".[304] This has brought forth debate on potential enlargement of the Council.[305]

Overall, UNSC reform is not merely blocked through diverging interests of the current permanent members, but also through general ambiguity in suggestions for change.[306] Over time, parallel interest groups on the matter of reform have emerged. The G4 advocates permanent Security Council membership for Germany, India, Japan and Brazil. While the UK and France have expressed agreement with these requests, Russia, China and the US remain critical.[307] Simultaneously, the Uniting for Consensus Group – including among others Italy, Egypt, Pakistan, Mexico and South Korea – opposes permanent membership and rather advocates for longer-term non-permanent seats.[308] In line with calls for better geographical representation,[309] the African Group has been requesting two permanent African seats with a veto power.[310]

In addition, the commencement of Brexit has refocused attention on EU membership, as the formerly "reliable tandem" of the UK and France is no longer assured.[311] Although the Charter technically does not allow for regional organizations to become UNSC members, several states, most prominently Germany, have repeatedly asserted that the EU should speak with "one voice", suggesting

[300] Patrick (2016), p. 21.
[301] Patrick (2016), p. 21; Lukin (2018). "Russia, China, and the emerging greater Eurasia".
[302] Patrick (2016), p. 22.
[303] Patrick (2016b). "Making Sense of "Minilateralism": The Pros and Cons of Flexible Cooperation", https://www.cfr.org/blog/making-sense-minilateralism-pros-and-cons-flexible-cooperation.
[304] Jetschke and Abb (2019). "The Devil is in the Detail: The Positions of the BRICS Countries Towards UN Security Council Reform and the Responsibility to Protect", p. 170.
[305] Jetschke and Abb (2019), p. 170.
[306] Jetschke and Abb (2019), p. 185.
[307] Pindják (2020).
[308] Jetschke and Abb (2019), p. 172.
[309] Trachsler, D. (2010). UN Security Council Reform: A Gordian Knot? *C*SS Analysis in Security Policy 72; Global Policy Forum (no date). Background on Security Council Reform. Retrieved from: https://archive.globalpolicy.org/security-council/security-council-reform/49885.html%3Fitemid=1321.html. Last access: 18.10.2021.; Security Council Report (2019). The Rule of Law: Retreat from Accountability, p. 2.
[310] Jetschke and Abb (2019), p. 172.
[311] Pindják (2020).

a single seat for the EU in the Council. However, these proposals seem far from realistic, not least due to opposition by France.[312] Nevertheless, France and Germany reaffirmed their bilateral cooperation and prioritization of an admission of Germany as a permanent member to the Security Council when signing the Treaty of Aachen on Franco-German cooperation and integration in 2019.[313] Thus, in considering Security Council expansion and in relation to overcoming challenges posed by Brexit, Germany is prominently considered to serve as the most suitable candidate within the EU.[314]

Overall, it can be said that with the end of the Cold War the Security Council's amount of enforcement action in "addressing situations constituting a threat to international peace and stability" has increased.[315] However, at the same time there remain important issues of political paralysis, while the Council's "representativeness has simultaneously declined".[316] Thus, calls for reform in terms of membership, transparency, working methods, and the veto are becoming louder. Next to these present structural challenges faced by the UNSC, there are a wide range of critical issues emerging in world politics that the Council is and will likely be dealing with. Among them are, as partly outlined in chapter 3, "nuclear proliferation, transnational terrorism, public health threats, and the interacting effects of climate change, resource scarcity, and environmental degradation".[317] On the one hand, this poses additional tests to the Council's functioning, on the other hand it will lend increased attention to the institution, potentially offering chances to improve under pressure.

## 4.2 The International Court of Justice

In the words of the International Court of Justice (ICJ) itself, it has a twofold role: "to settle, in accordance with international law, legal disputes submitted to it by States (contentious cases) and to give advisory opinions (advisory procedures) on legal questions referred to it by duly authorized United Nations organs and specialized agencies".[318] The following section takes a closer look at the recent fulfilment of this function, as well as the Court's main challenges pertaining to the handling of politically charged cases, state compliance and the acceptance of judgements. Notably, the ICJ has initiated some methods for an improvement of its practice that are also elaborated below.

### 4.2.1. The ICJ's functioning and challenges

Since its inception in 1945 – making it "the oldest permanent international court in operation"[319], the ICJ has taken up 168 disputes and has issued 27 advisory opinions.[320] Overall, it can be considered impressive that the ICJ, within the broader international context of hard power play, has managed to

[312] Vincze, H. (2019). One Voice, But Whose Voice? Should France Cede Its UN Security Council Seat to the EU? Foreign Policy Research Institute. Retreived from: https://www.fpri.org/article/2019/03/one-voice-but-whose-voice-should-france-cede-its-un-security-council-seat-to-the-eu/. Last access: 18.10.2021.
[313] Minstère de l'Europe et des Affaires Étrangères (2019). "Franco-German Treaty of Aachen", https://www.diplomatie.gouv.fr/en/country-files/germany/france-and-germany/franco-german-treaty-of-aachen/.
[314] Pindják (2020).
[315] Jetschke and Abb (2019), p. 170.
[316] Jetschke and Abb (2019), p. 171; Hurd (2008). "Myths of Membership: The Politics of Legitimation in UN Security Council Reform"; Hassler (2013)".Reforming the UN Security Council Membership"; Szewczyk (2012). "Variable Multipolarity and UN Security Council Reform".
[317] Stares et al. (2020). "Perspectives on a changing world order", p. 3.
[318] International court of Justice (2020). "Cases", https://www.icj-cij.org/en/cases.
[319] Alter (2020). "The ICJ In Comparison: Understanding the ICJ's Limited Influence", p. 7.
[320] Figures as of 2018, International Justice Resource Center (2018). "International Court of Justice", https://ijrcenter.org/universal-tribunals-treaty-bodies-and-rapporteurs/international-court-of-justice/.

stand its ground on contentious cases. While the international legal order and multilateralism are thought to be under pressure, the Court remains a comparatively respected authority on international law.[321]

In recent years, the ICJ has claimed international attention with high-profile judgements, such as 'Whaling in the Antarctic' (Australia v. Japan 2014);[322] 'Chagos Archipelago' (advisory opinion 2019);[323] and the 'Rohingya Genocide Case' (Gambia v. Myanmar, ongoing).[324] Very recently (2021), the Court decided in favor of Somalia over Kenya in a maritime border dispute that was carried out predominantly due to vast oil occurrences in the disputed area,[325] using the 'standard' delimitation methodology consistent with its case law.[326]

Generally, many of the cases submitted to the ICJ have pertained to territory, national boundaries, and rights to natural resources. However, a significant number of decisions have also touched on questions relevant to international human rights, such as the right to consular assistance for detained foreign nationals, racial discrimination, political asylum, the exercise of universal jurisdiction over crimes against humanity, and acts of genocide.[327]

Overall, scholars note a "general trend" of growing compliance of states with the judgements of the Court.[328] In addition, it is noteworthy that there is a significant number of citations of ICJ judgements and opinions by other judicial institutions and political actors, such as domestic courts and political leaders.[329] The readiness of the ICJ to take on contentious cases together with the overall positive reception of these judgements by the majority of states, signals an increased influence of the Court and its legal analyses on how the international community approaches issues of overarching concern.[330]

Challenges facing the ICJ largely remain institutional issues, rather than circumstances affecting the international legal order. For instance, the ICJ Statute holds that State parties may "at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court".[331] Each State which has recognized the compulsory jurisdiction of the Court has in principle the right to bring any one or more other States,

[321] Vicente (2014). "Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective", p. 21.
[322] International Court of Justice (2014). "Whaling in the Antarctic (Australia v. Japan: New Zealand intervening, 2014)", https://www.icj-cij.org/en/case/148/summaries; Mbengue, M. (2015). "Between law and science: a commentary on the Whaling in the Antarctic case".
[323] International Court of Justice (2019). "Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965", https://www.icj-cij.org/en/case/169; Minas (2019). "Why the ICJ's Chagos Archipelago advisory opinion matters for global justice – and for 'global Britain".
[324] International Court of Justice (2021). "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)" https://www.icj-cij.org/en/case/178; Banerjee and Chaudhury (2020). "ICJ's judgement on the Rohingya and its challenges", https://www.orfonline.org/expert-speak/icjs-judgement-rohingya-its-challenges-61233/.
[325] Nor (2021): "A win-win situation? Kenya – Somalia: What does ICJ's verdict mean for Mogadishu?", https://www.theafricareport.com/137051/kenya-somalia-what-does-icjs-verdict-mean-for-mogadishu/.
[326] Ioannides, N.A.; Yiallourides, C. (2021). A Commentary on the Dispute Concerning the Maritime Delimitation in the Indian Ocean (Somalia v Kenya). Blog of the European Journal of International Law, https://www.ejiltalk.org/a-commentary-on-the-dispute-concerning-the-maritime-delimitation-in-the-indian-ocean-somalia-v-kenya/.
[342] International Court of Justice (2021), "List of All Cases", https://www.icj-cij.org/en/list-of-all-cases.
[328] Vicente (2014), p. 21.
[329] Vincente (2014), p. 21.
[330] Vincente (2014), p. 21.
[331] International Court of Justice (1946). "Statute of the International Court of Justice", https://www.icj-cij.org/en/statute, Art. 36(2).

which have accepted the same provision, before the Court. So far, 74 UN member states have accepted the ICJ's compulsory jurisdiction.[332] Conversely, the "absence of compulsory jurisdiction allows actors who do not have law on their side to block litigation from proceeding".[333] This is considered one of the Court's central limitations.[334]

Moreover, particularly with politically sensitive and high-profile rulings, the issue of the enforcement of judgements is pertinent. Notably, Japan resumed its whaling activities after a break of over one year,[335] and Kenya rejected "in totality" the decision by the ICJ over the maritime border with Somalia,[336] claiming it to embody a "perpetuation of the ICJ's jurisdictional overreach [that] raises a fundamental question on the respect of the sovereignty and consent of States to international judicial processes".[337] Asserting that the judgement overstepped the Court's jurisdiction, Kenya's President Uhuru Kenyatta withdrew its recognition of the compulsory jurisdiction of the ICJ.[338]

Overall, it has been noted that in its general functioning the ICJ does face "institutional constraints" and that leveraging these becomes visible in the Court's pattern of argumentation.[339] In a bid for its decisions to be accepted – and thus enforced – the ICJ pursues a dual strategy of signaling impartiality and seeking the consent of the parties to a dispute. It does so by balancing its analysis of state practice, which necessarily entails an exercise of selection that could "tarnish the image" of an impartial Court.[340]

### 4.2.3. Initiatives for Improvement

It is noteworthy that in December 2020, the Court announced the adoption of Article 11 to its Internal Judicial Practice "as part of the ongoing review of its procedures and working methods".[341] The article provides for the creation of an *ad hoc* committee when the Court orders provisional measures, with three judges to assist the monitoring of their implementation.[342] "The *ad hoc* committee is meant to examine the information submitted by the parties, report to the Court, make recommendations, and the Court shall decide on the subsequent actions".[343] In the last five years, there have been five cases

[332] International Court of Justice (1946), Art. 36(2); Sahni (2021). "Apropos of the ICJ's (illusory) compulsory jurisdiction", http://cilj.co.uk/2021/01/11/apropos-of-the-icjs-illusory-compulsory-jurisdiction/.
[333] Alter (2020), p. 12.
[334] Alter (2020), p. 12.
[335] BBC (2015). "Japan to resume whaling in Antarctic despite court ruling", https://www.bbc.com/news/world-asia-34952538.
[336] Al Jazeera (2021). "Kenya rejects ICJ's verdict on Somalia maritime border row", https://www.aljazeera.com/news/2021/10/13/kenya-rejects-icjs-verdict-on-somalia-maritime-border-row.
[337] President Republic of Kenya (2021). "Statement By H.E. Hon. Uhuru Kenyatta, CGH, President Of The Republic Of Kenya And Commander In Chief Of The Defence Forces On The International Court Of Justice Judgement In Maritime Delimitation Case", https://www.president.go.ke/2021/10/13/statement-by-h-e-hon-uhuru-kenyatta-cgh-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-on-the-international-court-of-justice-judgement-in-maritime-delimitation-ca/.
[338] President Republic of Kenya (2021).
[339] Petersen (2017). "The International Court of Justice and the judicial politics of identifying customary international law", p. 380.
[340] Petersen (2017).
[341] International Court of Justice (2020). "Adoption of a new Article 11 of the Resolution concerning the Internal Judicial Practice of the Court, on procedures for monitoring the implementation of provisional measures indicated by the Court", Patarroyo (2021). "Monitoring provisional measures at the International Court of Justice: the recent amendment to the Internal Judicial Practice", https://www.ejiltalk.org/monitoring-provisional-measures-at-the-international-court-of-justice-the-recent-amendment-to-the-internal-judicial-practice/.
[342] Bordin (2012). "Procedural Developments at the International Court of Justice", p. 398.
[343] Patarroyo (2021).

with provisional measures issued- reflecting that there is "clearly the need for better assurance of implementation in light of the number of cases".[344] In addition, the recent case of Gambia v Myanmar reflects the need for and potential of such a committee. That is, Myanmar is required to submit periodic reports on all measures taken to give effect to the ICJ's order on provisional measures.[345] "What Myanmar is doing —or not doing— to implement the Court's order is of more than passing interest to the Rohingya; it is of existential concern".[346]

In international law, the issue of implementation is a long-standing and general one that continues to require attention. According to Pillay, "[i]n moving the needle even a little, this seemingly innocuous change in monitoring these legally binding orders by the court may, it is hoped, result in greater adherence".[347]

## 4.3 The International Criminal Court

Established in 2002, the International Criminal Court (ICC) is mandated to investigate and, where warranted, try individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.[348] Thus far, there have been 30 cases before the Court, 35 arrest warrants have been issued, 17 people have been detained in the ICC detention center and have appeared before the Court, there were 10 convictions, and 13 people remain at large.[349]

Ever since the Court became operational, however, it has been "facing considerable challenges to its credibility and legitimacy".[350] While it should not be disregarded that any international judicial body is inherently political and can therefore hardly avoid involvement in – and being the instrument of – "political battles",[351] it has been a core – and permanent – task of the ICC to "develop measures to manage the political crises it constantly faces".[352] Most prominent is the widely echoed critique of the Court's politicization and the related "African bias".[353] Next to this, lacking state cooperation poses a continuous challenge.[354] Thus, the literature on the activities of the Court has presented a prominent narrative that the ICC "cannot do it right,"[355] and that it "needs fixing".[356] Nevertheless, the Court is

[344] Pillay (2020). "New Mechanism at the International Court of Justice on Implementation of Provisional Measures: Significance for The Gambia v Myanmar", http://opiniojuris.org/2020/12/22/new-mechanism-at-the-international-court-of-justice-on-implementation-of-provisional-measures-significance-for-the-gambia-v-myanmar/.
[345] Abbott (2020). "Rohingya Symposium: Why So Secret? The Case for Public Access to Myanmar's Reports on Implementation of the ICJ's Provisional Measures Order", http://opiniojuris.org/2020/08/25/rohingya-symposium-why-so-secret-the-case-for-public-access-to-myanmars-reports-on-implementation-of-the-icjs-provisional-measures-order/.
[346] Abbott (2020).
[347] Pillay (2020).
[348] International Criminal Court (2021). "About the Court", https://www.icc-cpi.int/about.
[349] International Criminal Court (2021).
[350] Kokko (2016). "Beyond the ICC exit crisis", p. 1.
[351] Kokko (2016), p. 1; Ford (2016). "The ICC and the Security Council: How much support is there for ending impunity"; de Hoon (2017). "The Future of the ICC: On Critique, Legalism and Strengthening the ICC's Legitimacy, p. 4.
[352] Kokko (2016), p. 1.
[353] Coco and Cross (2017). "Epilogue—The ICC on the yellow brick road", p. 593; Trahan (2021). "International Justice and the International Criminal Court at a Critical Juncture".
[354] Coco and Cross (2017), p. 593.
[355] Robinson (2015). "Inescapable dyads: Why the international criminal court cannot win".
[356] Guilfoyle (2019). "Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis".

commended for its initiatives to improve its practice, such as the ICC review process, and is generally seen to have a deterring effect, albeit with room for improvement.[357]

### 4.3.1 Politicization and the "African bias"

A long-standing challenge of the ICC is the broad and frequently reproduced critique of its vulnerability to politicization. Multiple factors play a role here.

For one, the previously touched upon Security Council referral mechanism (see chapter 4.1.1), which at times has faced veto power induced paralysis, is noted by some to undermine "the legal principle of predictability and put the court's credibility, integrity and perception of legitimacy into question",[358] as it is likely "subject to the political power play of the Council".[359] As stated above, this has become evident through the small number of referrals (Darfur and Libya).[360]

It is worth mentioning, however, that the ICC has nevertheless been commended by some,[361] and criticized by others,[362] for its workarounds of the referral mechanism for non-state parties.[363] For instance, in July of 2019, Prosecutor Fatou Bensouda requested the authorization of an investigation "into the deportation, acts of persecution and other inhumane acts committed against Myanmar's Rohingya population", tactically basing the Court's jurisdiction on the cross-border character of the atrocities, with Rohingyas being deported to Bangladesh, a signatory to the Rome statute.[364] In addition, the Prosecutor started investigating Israeli crimes although the state is not a party the statute, basing jurisdiction on territorial grounds (crimes committed in Gaza and the West Bank).[365]

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[357] Mudukuti (2021). "ICC Review Process: Taking A Closer Look at The IER'S Final Report. International Justice Monitor", https://www.ijmonitor.org/2021/01/icc-review-process-taking-a-closer-look-at-the-iers-final-report/; Appel (2018). "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?".

[358] Aregawi, B. (2017).

[359] Mensa-Bonsu (2015). "The ICC, international criminal justice and international politics", p. 41.

[360] Aregawi 2017). "The Politicisation of the International Criminal Court by United Nations Security Council Referrals"; Hale and Rankin (2019). "Extending the 'system' of international criminal law? The ICC's decision on jurisdiction over alleged deportations of Rohingya people".

[361] Robinson (2021). "Palestinian peace must rest on international law. ICC decision to investigate Hamas and Israel has implications for both sides", https://www.ft.com/content/c55dfa19-7180-42b7-b695-0a84fdfb680f; The Elders (2021). "ICC and Israel-Palestine: an investigation is a step towards justice", https://theelders.org/news/icc-and-israel-palestine-investigation-step-towards-justice; International Federation for Human Rights (2021). "Welcomed ICC landmark decision recognising its territorial jurisdiction over Palestine including Gaza and the West Bank", https://www.fidh.org/en/region/north-africa-middle-east/israel-palestine/welcomed-icc-landmark-decision-recognising-its-territorial.

[362] Cormier, M. (2021). Testing the boundaries of the ICC's territorial jurisdiction in the Afghanistan situation. Questions of International Law. Retrieved from: http://www.qil-qdi.org/testing-the-boundaries-of-the-iccs-territorial-jurisdiction-in-the-afghanistan-situation/. Last access: 03.11.2021. Nigam, T. (2019). Basis and Implications of the ICC's ruling against Myanmar. Public International Law and Policy Group. Retrieved from: https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/5/22/basis-and-implications-of-the-iccs-ruling-against-myanmar; Guilfoyle (2019).

[363] Robinson (2021); The Elders (2021).

[364] Coalition for the International Criminal Court (2019). "Bangladesh (Myanmar/ Bangladesh)", https://www.coalitionfortheicc.org/country/bangladesh-bangladeshmyanmar. Last access: 03.11.2021; International Criminal Court (2019). "Bangladesh/Myanmar. Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar", https://www.icc-cpi.int/bangladesh-myanmar.

[365] Cormier (2021). "Testing the boundaries of the ICC's territorial jurisdiction in the Afghanistan situation. Questions of International Law", http://www.qil-qdi.org/testing-the-boundaries-of-the-iccs-territorial-jurisdiction-in-the-afghanistan-situation/.

A second concern regarding politicization relates to controversial decisions on case selection made by the Prosecution itself, yielding accusations of "selective justice",[366] "double standards",[367] and inconstancy.[368] As such, the legitimacy of the Court is highly contingent on its selection of situations it investigates and for "over a decade those prosecutorial selections have experienced a decline in public confidence".[369] This was most recently reflected in the Prosecutor's decision to focus his "Office's investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K") and to deprioritize other aspects of this investigation", namely those relating to the United States[370] -one of the ICC's most "high profile opponents".[371] Not only does this evidence inconsistency, meaning that not all crimes are investigated equally, but it has also been argued to create a "sort of recipe [that] if you obstruct, if you make cooperation difficult, then you, your conduct or the conduct of your nationals could be shielded from scrutiny".[372]

The most prominent critique in this realm is what has been labeled the "African bias". As of 2020, there were 22 cases under current investigation of the ICC of which 15 were tied to African states.[373] More specifically, before 2016, all eight of the court's preliminary investigations and opened cases were against African nationals.[374] This bias has been at the root of a broadly voiced post-colonial critique of the ICC.[375] In defense of the Court, some have argued that "the majority of African cases were referred by either a State-Party or the UNSC and thereby were out of the ICC's control, while only two (Kenya and Côte d'Ivoire) out of the eight investigations were launched by the ICC's Prosecutor".[376] In relation to the Court's inaction in many situations, others recount that this is mainly due to the ICC's lacking jurisdiction in countries such as Syria, North Korea, and Myanmar,[377] stating that this is undoubtedly a problem, however, it is a structural one "and not one of choice for the ICC".[378]

A concrete consequence of the widely reproduced critique of an African bias materialized when Burundi, the Gambia and South Africa decided to withdraw from the ICC in 2016.[379] This was followed by worries that it would prompt other African states to do the same, as Chad, Kenya, Namibia and Uganda had publicly acknowledged "the possibility of exiting and some African leaders, acting within

[366] Amnesty International (2021). "Afghanistan: ICC Prosecutor's statement on Afghanistan jeopardises his Office's legitimacy and future", https://hrij.amnesty.nl/afghanistan-icc-prosecutors-statement-on-afghanistan-jeopardises-his-offices-legitimacy-and-future/.
[367] Amnesty International (2021).
[368] Anderson (2021). "Afghanistan: a war of positions at the ICC", https://www.justiceinfo.net/en/83498-afghanistan-war-of-position-icc.html
Kotecha (2020). "The International Criminal Court's Selectivity and Procedural Justice".
[369] Kotecha (2020), p. 108.
[370] International Criminal Court (2021). "Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan", https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan.
[371] Cormier (2021).
[372] Anderson (2021).
[373] Rowe (2021), "The ICC-African Relationship: More Complex Than a Simplistic Dichotomy", p. 55; Stahn (2017), "Damned if you do, damned if you don't: challenges and critiques of preliminary examinations at the ICC".
[374] Rowe (2021), p. 55.
[375] Clarke (2019), *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*; de Hoon (2017); Manirakiza (2020), "A Twail Perspective on the African Union's Project to Withdraw from the ICC".
[376] Rowe (2021), p. 55.
[377] Kersten (2015), "The Africa-ICC Relationship – More and Less than Meets the Eye".
[378] Kersten (2015).
[379] Manirakiza (2018); Ssenyonjo (2018), "State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia".

the framework of the African Union (AU), [..] called for a collective withdrawal from the ICC".[380] However, except for Burundi's, the withdrawal notifications were revoked again in 2017.[381] In the same vein, it should be acknowledged that these scenarios do not necessarily reflect a general African opposition towards the ICC. This was not least reflected in the reaffirmation of support for the Court by Botswana, Burkina Faso, Ivory Coast, Democratic Republic of Congo, Ghana, Lesotho, and several more after the withdrawal notices in 2016.[382] In addition, a countermovement may be under way with Sudan having initiated the hand-over of Al-Bashir, and several African states working in cooperation with the Court.[383]

Notably, opposition to the Court goes beyond Africa, with the Philippines withdrawing from the Court in 2019 and Russia revoking its signature of the Statute in 2016 (which it had not ratified, however).[384]

### 4.3.2. State cooperation

Due to the ICC's complementary – meaning subsidiary to national criminal – jurisdiction, there "needs to be cooperation between the state where the crimes took place for investigations to occur, for evidence to be collected, [and] to arrest the perpetrator".[385] There are four core reasons for the complementary system in place; it 1) "protects the accused if they have been prosecuted before national courts; 2) it respects national sovereignty in the exercise of criminal jurisdiction; 3) it might promote greater efficiency because the ICC cannot deal with all cases of serious crimes; and 4) it puts the onus on states to do their duty under international and national law to investigate and prosecute alleged serious crimes".[386]

However, there is a "disinclination on the part of several states to cooperate with the Court. These states provide little in the way of assistance with investigations and handing over suspects to the Court".[387] This should be read together with the ICC's inability to force a state to comply and assist with its processes. Nor is the ICC able to arrest perpetrators without the aid of the state in which the arrest and extradition is taking place.[388] Essentially, like many international human rights tribunals and treaties, this makes the ICC's enforcement powers rather weak. Even more so, when taking into account

[380] Manirakiza (2018); Ssenyonjo (2018).
[381] International Federation for Human Rights (2017), "Gambia and South Africa to remain in the International Criminal Court", https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/gambia-and-south-africa-to-remain-in-the-international-criminal-court.
[382] International Federation for Human Rights (2017).
[383] Mahdi and Maunganidze (2021), "Why has Sudan decided to hand over al-Bashir to the ICC?", https://issafrica.org/iss-today/why-has-sudan-decided-to-hand-over-al-bashir-to-the-icc;
Kokko (2016), p. 1.; Ssenyonjo (2009), "The International Criminal Court and the Warrant for Sudan's President Al-Bashir: Crucial Step towards Challenging Impunity or Political Decision"; Oette (2010), "Peace and justice, or neither? The repercussions of the Al-Bashir case for International Criminal Justice in Africa and beyond".
[384] Walker and Bowcott (2016), "Russia withdraws signature from international criminal court statute", https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute; Coalition for the International Criminal Court (2019), "Malaysia backtracks on accession to the Rome Statute", https://www.coalitionfortheicc.org/news/20190412/malaysia-backtracks-accession-rome-statute; International Criminal Court (no date), "Republic of the Philippines
Situation in the Republic of the Philippines. ICC-01/21", https://www.icc-cpi.int/philippines.
[385] Sarkin (2020), "Reforming the International Criminal Court (ICC) to Achieve Increased State Cooperation in Investigations and Prosecutions of International Crimes", p. 30.
[386] Seils (2016), *Handbook on complementarity: an introduction to the role of national courts and the ICC in prosecuting international crimes,* p. 3.
[387] Sarkin (2021), "Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process", p. 10.
[388] Sarkin (2020), p. 30.

that it "has no police force or military to capture suspects".[389] This is reflected in the challenges the ICC has faced when carrying out of arrest warrants, as "about a dozen of the ICC accused are fugitives and still not in the hands of the Court".[390] A recent and prominent example is the case of Al-Bashir. Although, as previously mentioned, Sudan has recently initiated the hand-over of Al-Bashir, the prior 10 years reflected failure of the Court to achieve compliance not only with non-member states, but more importantly with its signatories.[391] Notably, "State cooperation issues also affect whether the Court can be funded better, as well as issues such as defending the Court against criticism when necessary".[392]

Moreover, the ICC's reliance on state cooperation, and its explicit showcasing of this dependency, has created the suspicion that it avoids opening cases in which state cooperation is unlikely as to not feed accusations of its shortcomings and to circumvent open display of its limited ability to fulfil its mandate.[393]

Next to these structural issues, political and strategic interests also play a role in compliance. As such, "political elites, who are willing to work with the ICC when they see an opportunity to advance their domestic political goals, can also be hesitant to cooperate with the Court when doing so increases their own risk of prosecution".[394]

### 4.3.3. Areas of Progress

Despite these several challenges the ICC continues to face, it is seen to have a general relevance and future.[395] To say the least, the Court has become an institutional framework for denouncing human rights violations and presenting prospects for a move towards ending impunity and ensuring accountability.[396] In recent years, more scholars have employed different methods to prove that the ICC does have deterring capabilities. As such, it is noted that signatories of the ICC's Rome Statute commit lower levels of human rights abuses.[397]. This is not only an important development in international justice, but it also comforts those who have fallen victim to abusers.[398] Along similar lines, Dancy found in an analysis of internet searches that ICC intervention changes the "discourse in countries", stating that there is "a far higher interest in human rights, and that this interest only increases as ICC involvement extends in time", which proves that the Court's involvement has "a socio-pedagogical function".[399]

[389] Hillebrecht and Straus (2017), "Who Pursues the Perpetrators: State Cooperation with the ICC", p. 163; Sainati (2016), "Divided we fall: how the International Criminal Court can promote compliance with international law by working with regional courts".
[390] Sarkin (2021), p. 10.
[391] Sarkin (2020), p. 30f; Weldehaimanot (2011), "Arresting Al-Bashir: The African Union's Opposition and the Legalities. African Journal of International and Comparative Law"; Pati (2009), "The ICC and the Case of Sudan's Omar Al Bashir: Is plea-bargaining valid Option".
[392] Sarkin (2021), p. 10.
[393] Davis (2015), "Political Considerations in Prosecutorial Discretion at the International Criminal Court", p. 173; Charbonneau (2019), "Multilateralism under threat", https://www.sustainablegoals.org.uk/wp-content/uploads/2019/06/033-035-SDGs-CHARBONNEAU.pdf, p. 34.
[394] Hillebrecht and Straus (2017), p. 164.
[395] Mensa-Bonsu (2015), p. 50.
[396] Jo and Simmons (2016), "Can the International Criminal Court Deter Atrocity?"; Appel (2018), "In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?".
[397] Appel (2018).
[398] Mensa-Bonsu (2015), p. 50.
[399] Dancy (2021), "The hidden impacts of the ICC: An innovative assessment using Google data", p. 729.

In addition, by tasking experts to diagnose the problems facing the Court and to develop actionable recommendations,[400] the ICC's recently established review process is a meaningful step towards improving the Court's shortcomings. "Established under a 2019 ASP resolution, nine experts were assigned to review the areas of governance, judiciary, and prosecution and investigation".[401] The overall process is meant to bring "states, court officials, experts and civil society closer together" in an effort to "bolster the work of the Court and its ability to serve the communities affected by its work".[402] The process has been enjoying rather broad support by State parties and civil society. The International Justice Monitor declared the final report published in September 2020 to be "candid, detailed, and more thorough than expected".[403] As such, the review process was noted to have "adequately determined what the problems are and how to address them" and has already led the ICC to take "several steps to make progress on the challenges it faces".[404]

As a concluding remark it can be stated that the future of the ICC is largely dependent on its ability "to exhibit independence and operate in a professional and transparent manner. It must strive to maintain good working relations with all member states by being perceived not to be pandering to the wishes of those who have chosen to stay outside its membership, but wanting to direct its work".[405] Essentially, its work must now become more consistent by alleviating political bias, it must "prosecute and finalize more cases than it does presently", as well as find ways to "induce better state compliance".[406]

## 4.4. Human Rights Council

The United Nations Human Rights Council (UNHRC) was established to take the place of the UN Commission on Human Rights.[407] The Commission had been composed of representatives of UN Member States, including states "whose own human rights records were far from unblemished", in addition to which the Commission was seen to be too partial to "inevitable politics and horse trading".[408] More specifically, "countries had used their membership to defeat resolutions criticizing human rights violations by their own and other governments and to dismantle special procedures that had been created to monitor practices in countries with a history of poor human rights records".[409]

Established in 2005, the Human Rights Council was set up to avoid "the flaws that had fatally discredited its predecessor".[410] It is composed of 47 United Nations member states and is responsible for "strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them."[411] Essentially, the UNHRC can be described as an "upgrade" from the Commission, with UN member states agreeing on "new election procedures, and on a mechanism for peer review (the Universal Periodic Review [UPR]) in order

[400] Mudukuti (2021); Coalition for the International Criminal Court (2020), "Review of the International Criminal Court and the Rome Statute system", https://asp.icc-cpi.int/en_menus/asp/Review-Court/Pages/default.aspx.
[401] Coalition for the International Criminal Court (2021).
[402] Coalition for the International Criminal Court (2021).
[403] Mudukuti (2021).
[404] Sarkin (2021), p. 30.
[405] Mensa-Bonsu (2015), p. 50; Carter (2013), "The future of the international criminal court: complementarity as a strength or a weakness".
[406] Sarkin (2021), p. 30.
[407] As different form the Human Rights Committee (HRC), which is the ICCPR Treaty Body.
[408] Klabbers (2017), "International Law", p. 124; Klabbers (2010), "Reflections on the Politics of Institutional Reform", p. 76.
[409] Becker (2012), "Defeating the Election of Human Rights Abusers to the UN Human Rights Council", p. 59.
[410] Becker (2012), p. 59.
[411] United Nations Human Rights Council (no date), "Welcome to the Human Rights Council", https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx.

to monitor and assess the human rights performances of all UN member states".[412] More specifically, "[w]hile members of the previous commission had usually been selected by their regional groups and rubber-stamped by the UN Economic and Social Council, new Council members were required to win the affirmative vote of an absolute majority of UN member states (97 votes out of the 193 UN member states) as well as successfully compete against other candidates from their region".[413] Overall, the UNHRC has shown some improvement over its predecessor, however, as will be detailed below, membership issues prevail.[414] Moreover, the Council has been challenged by the growing traction of the "Chinese approach" to human rights, which places socio-economic rights above individual human rights[415] and concerns about "disproportionate attention" for a small number of arguably critical cases.[416]

### 4.4.1. Challenges

The two core challenges and most widely reproduced critique of the Human Rights Council pertain to its membership acceptance and to its politicization.

The UN General Assembly is responsible for electing UNHRC members based on "the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto".[417] Nevertheless, currently, only 45% of UNHRC members are rated as "free" in Freedom House's annual ratings, while 23% of members are rated "not free".[418] UNHRC members notoriously include China, Russia, Saudi Arabia and Venezuela with governments whose human rights "clean slates" are openly questioned.[419]

The widely criticized "clean slate" elections, where "a regional group puts forward the same number of candidates as there are seats available, undermine the diversity and the quality of the Council's membership".[420] This has been noted to violate "the spirit of the Council's membership rules and to undermine the credibility and effectiveness of the Council".[421] As repeatedly suggested, elections should instead promote the inclusion of countries from different regions and backgrounds and be solely based on the respective country's commitment to human rights.[422] However, time and again, member states elect candidates who do not meet the election criteria, even in the face of evidence that they are not fully cooperating with the Council's mechanisms. Worse still, states are unwilling to exercise the "suspension option", as in the case of Burundi in 2020. Regional blocs too often leave the General

[412] Binder and Eisentraut (2019), "Negotiating the UN Human Rights Council. Rising powers, established powers and NGOs".
[413] Becker (2012), p. 59.
[414] Piccone (2017), "Assessing the United Nations Human Rights Council", https://www.brookings.edu/testimonies/assessing-the-united-nations-human-rights-council/.
[415] Sceats and Breslin (2012), "China and the international human rights system", p. 41.
[416] Blanchfield and Weber (2020), "The United Nations Human Rights Council: Background and Policy Issues", p. 1; Freedman (2013).
[417] United Nations General Assembly (2006), "UNGA Res. 60/251. Resolution adopted by the General Assembly on 15 March 2006".
[418] Freedom House (2021), "Countries and Territories", https://freedomhouse.org/countries/freedom-world/scores.
[419] Lamarque (2013), "Clean slate' elections threaten the future of the Human Rights Council", https://www.universal-rights.org/blog/clean-slate-elections-threaten-the-future-of-the-human-rights-council/.
[420] Lamarque (2013).
[421] Universal Rights Group (2018), "Human Rights Council Elections: clean slates continue to undermine the Council", https://www.universal-rights.org/blog/human-rights-council-elections-clean-slates-continue-to-undermine-the-council/.

[422] Lamarque (2013); Global Centre for the Responsibility to Protect (2020), "Atrocity Perpetrators Don't Belong on the UN Human Rights Council", https://www.globalr2p.org/publications/vote-no-to-perpetrators/.

Assembly no real alternatives when putting forward their candidates.[423] Evidently, this greatly affects the Council's ability to fulfill its mandate: each member's quality of commitment to human rights protection and promotion is "central to the Council's ability to fulfill its mandate faithfully", thereby also influencing its credibility.[424] Conversely, setting the bar for membership acceptance too high runs the risk of creating yet another Western dominated institution, lacking not only representativeness but also necessary perspective.

Moreover, there are three phenomena that have triggered critique of politicization: excessive scrutiny of certain countries; overlooking abuses of human rights; and shielding states from action against them.[425] All three are in part a result of the membership issue. Commentators, as well as states themselves involved, have expressed concern with the UNHRC's "disproportionate attention" to a small number of high-profile situations[426] over other pressing situations, as displaying "obvious and pernicious politicization".[427] Aside from the fact that shielding countries from scrutiny negatively affects human rights promotion, the hyper focus on singled out situations even where the most serious concern is warranted, "detracts from the ability to take needed action elsewhere".[428] As such, some allege that "Israel and Syria have at different times found themselves in the category of having excessive scrutiny [...]".[429]

### 4.4.2. 'Rising' States in the UNHRC

With geopolitical tensions heightened over the past years, the Human Rights Council has not remained unaffected.[430] On a broad scale, it has been noted that authoritarian governments use the UNHRC as a platform to garner support for novel interpretations of norms that in effect privilege principles of "non-interference" and strong conceptions of state sovereignty, as a means of shielding themselves from international scrutiny.[431] It has been noted that over the past seven years, "China and the transatlantic states nearly always took opposing positions in the Council, and each side aligned with like-minded states to endorse their favored rights".[432] Along similar lines, Russia, which was elected to rejoin the UNHRC in October 2020 after a four-year absence, has been noted to "undermine the universality of human rights norms by promoting respect for subjective and context-specific 'traditional values'".[433] In a similar fashion, like-minded governments such as Egypt, Saudi Arabia, and Cuba[434] have been

[423] Piccone (2017); Piccone (2021, "UN Human Rights Council: As the US returns, it will have to deal with China and its friends".
[424] Universal Rights Group (2018).
[425] Freedman and Houghton (2017), "Two steps forward, one step back: Politicisation of the Human Rights Council", p.759.
[426] Blanchfield and Weber (2020), p. 1; Dekker et al. (2019), "The Multilateral System Under Stress: Charting Europe's Path Forward", p. 24.
[427] Freedman and Houghton (2017), p.759; Limon (2021), "Superpower rivalry 'captures' the Human Rights Council"; Smith (2010), "The European Union at the Human Rights Council: speaking with one voice but having little influence".
[428] Freedman and Houghton (2017), p.759.
[429] Freedman and Houghton (2017), p. 759; Freedman (2015), "Failing to Protect: The UN and the Politicization of Human Rights".
[430] Lippert and Perthes (2020), "Strategic Rivalry between United States and China. Causes, Trajectories, and Implications for Europe".
[431] Blanchfield and Weber (2020), p. 14.
[432] Renouard (2020), "Sino-Western relations, political values, and the Human Rights Council", p. 80.
[433] Blanchfield and Weber (2020), p. 14.
[434] Blanchfield and Weber (2020), p. 15.

supporting resolutions often described as "illiberal norm protagonism".[435]

Moreover, at the 49th session of the UNHRC in October 2021, "[m]uch of the acrimony was centered on, and much of the growing division generated by, the 'Great Power' rivalry of, on the one side, the US together with its Western (especially Anglo-Saxon) allies, and on the other side, China, Russia, Saudi Arabia, and their partners in the 'Like-Minded Group' (LMG)".[436] At the meeting, with the Unites States' near exclusive focus on China's human rights violations, China used its new-found strength in the Council[437] – which it gained also through the absence of the United States during Donald Trump's presidency[438] – to respond to every criticism with a counterattack "on the US, UK, or Canada (e.g., on racism, the slave trade, or indigenous rights)".[439]

Similar to China's "narrative of sovereignty and the importance of development"[440] in the UN Security Council, in the UNHRC it insists on the pursuit of a "relativistic approach" to human rights based on each country's unique history, culture, values, and political system.[441] This approach is described as "statist" and "development-first" in that it prioritizes the role of governments as opposed to civil society and individual rights-holders, and privileges development rights in particular.[442] Essentially, China does not accept the universal standards of reviewing human rights situations and criticizes country-specific monitoring to be a violation of sovereignty.[443] Some commentators have gone as far as to say that "China is challenging the universality of human rights".[444] This accusation became particularly concrete in the case of Myanmar, where China "questioned the relevance of justice and accountability"[445] and opposed a briefing by the chair of the UNHRC's fact-finding mission on Myanmar in October 2018.[446]

Others, however, find issue with scholars and practitioners placing a "significant portion of blame for the failure of the UN's human rights institutions, including the Council, on how non-Western states fail to adhere to universal human rights standards or how states from the Global South are actively attempting to undermine universal human rights".[447] According to them, this reflects a Western failure to "take into account how states from the Global South engage with human rights at the UN as agents in their own right with their own human rights priorities".[448] Regardless, recent practice has been asserted to not only offer a "vivid portrait of the extent [...] states disagree on basic human rights principles, but the hostile dynamic on display in the council may be a harbinger of the difficult road ahead in Sino-Western relations".[449]

### 4.4.3. Areas of Progress

In light of the Security Council's paralysis in response to recent conflicts, the Human Rights Council has shown to work more efficiently, and has thereby also proven its importance. Through mechanisms such

[435] Stoeckl and Medvedeva (2018), "Double bind at the UN: Western actors, Russia, and the traditionalist agenda", p. 383.
[436] Limon (2021).
[437] Limon (2021).
[438] Lippert and Perthes (2020).
[439] Limon (2021).
[440] Dekker et al. (2019), p. 23.
[441] China Change (2017), "China pushes 'human rights with Chinese characteristics' at the UN", https://hongkongfp.com/2017/10/14/china-pushes-human-rights-chinese-characteristics-un/; Lippert and Perthes (2020).
[442] Blanchfield and Weber (2020), p. 15; Lippert and Perthes (2020).
[443] Philips and Braun (2020), "The Future of Multilateralism. The Liberal Order under Pressure", p. 21.
[444] Dekker et al. (2019), p. 23.
[445] Security Council Report (2019), "The Rule of Law: Retreat from Accountability", p. 27.
[446] Security Council Report (2019), p. 27.
[447] Voss (2020), "The Global South and Norm Advocacy at the United Nations Human Rights Council", p. 729.
[448] Voss (2020), p. 729.
[449] Voss (2020), p. 729.

as country-specific scrutiny, commissions of inquiry, and the Universal Periodic Review, progress has been made.[450]

More specifically, the issuing of country specific reports has proven to increase country specific scrutiny by dispatching independent experts through “special procedures”, “fact-finding missions” and “commissions of inquiry” to examine potential human rights abuses.[451] Along these lines, the HRC has been establishing a growing number of commissions of inquiry to serve as independent fact-finding bodies to investigate grave violations of human rights, including crimes against humanity, and to identify perpetrators for the purpose of holding them accountable.[436] This has taken place in Libya, Eritrea, Cambodia, Iran, North Korea, Syria, Burundi, South Sudan, Sri Lanka and Myanmar.[452] In combination with other initiatives, such as the International and Regional Experts on Yemen that collect evidence and seek accountability, the Council is understood to be a "successful vehicle for international cooperation”[453] that enjoys “the respect and authority of most countries”.[454]

In an attempt to minimize concerns of politicization, ensure equal treatment for every country when their human rights situations are assessed, and ultimately to improve human rights protection globally, the UNHRC implemented the so called Universal Periodic Review Process (UPR), which has already been completed twice.[455] UPR is a state-driven process that "involves a review of the human rights records of all UN Member States [...] under the auspices of the UNHRC, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations”.[456] The process aims to universalize and depoliticize human rights, provides a basis for holding governments accountable to their promises, and serves as support for human rights defenders on the ground.[457] Systematic follow-up and implementation, along with tying human rights diplomacy and assistance to the most important recommendations, are needed to continue this progress.[458] While the mechanism is noted to be a "vast improvement”[459], working towards more consistency by minimizing politically motivated attention to, or distraction from, certain situations is nevertheless integral.

In conclusion it can be said that for all advancements made thus far in the UNHRC, and they are mostly commended, many points of tension remain. From issues of membership to the long-standing issue of politicization of such forums, incentives for improvement are manifold. However, the UNHRC “remains the only global human rights body with the legitimacy and universality to extend fundamental principles of human dignity to every corner of the world”.[460]

[450] Piccone (2017).
[451] Piccone (2017).
[452] Piccone (2017).
[453] Dekker et al. (2019), p. 25.
[454] Dekker et al. (2019), p. 25.
[455] United Nations Human Rights Council (no date), “Universal Periodic Review”, https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx.
[456] United Nations Human Rights Council (no date).
[457] United Nations Human Rights Council (no date).
[458] Piccone (2017); Davies (2010), “Rhetorical inaction? Compliance and the human rights council of the United Nations”; Ardakani and Hemat (2018), “The Impact of the Characteristics of the Procedure of Periodic Evaluation of Human Rights Council on Promotion of Respect for Human Rights by Governments”.
[459] Piccone (2017); Davies (2010); Ardakani and Hemat (2018).
[460] Piccone (2017).

# 5. Alternative Initiatives to Peace and Security

**This chapter answers the following research question:**

How are the following initiatives assessed in the literature?

a. Alternative accountability mechanisms;
b. Targeted sanction regimes.

**Main findings:**

## 5.1. Alternative accountability mechanisms:

- A significant development within the international criminal justice system in the past five years has been the establishment of alternative accountability mechanisms for Syria (IIIM), Iraq (UNITAD) and Myanmar (IIMM).
- These mechanisms are tasked with collecting, collating and analyzing evidence of atrocity crimes to an international criminal prosecution standard to ensure that criminal proceedings are realistic in the future.
- The initial reception of the initiatives has overall been very positive, largely for the mechanisms representing a new approach to international criminal justice, and for providing new avenues to hold international criminals accountable.
- General reservations to the UN investigative mechanisms have to do with efficiency and actual impact of the establishment of the mechanisms in which actual prosecutions might (not yet) be politically feasible. Main challenges further relate to (1) ensuring reliability of evidence provided by fact-finding and evidence-gathering bodies and civil society organizations, (2) to avoid duplication of work and to be rightly understood for its particular, substantive role, and (3) methodological challenges revolving around uncertainty as to which prosecutorial entity will eventually process the case-files.

## 5.2. Targeted sanction regimes

- The UN and EU are employing targeted sanctions to key individuals or groups.
- Sanctions most frequently employed are asset freezes and travel bans.
- Targeted sanctions are considered flexible, agile and visible and are therefore attractive policy instruments for governments to resort to. They fulfill political and symbolic purposes. They may also serve: strategic communication vis-à-vis targets and relevant third parties, retributive punishment, or upholding self-identifications in situations where non-intervention could be construed as complicity.
- Scholarly debates mainly revolve around targeted sanctions' effectiveness and implementation issues. Their effectiveness is difficult to measure as targeted sanctions are frequently combined with other foreign policy tools. Implementation of asset freezes or travel bans at times is found to be slow or incoherent.
- Further challenges to the practice stem from (1) cooperation with a multitude of actors around implementation, among which for-profit actors, which role is considered "indispensable" in targeted sanctions' implementation; (2) bringing the practice of listing individuals in line with human rights standards and, (3) counterproductive, unintended effects entailed by targeted sanctions.

## 5. Introduction

International institutions and states are supported by non-governmental organizations (NGOs), civil society organizations (CSOs) and other stakeholders working alongside them to advance projects of international justice such as conflict resolution and international criminal accountability. Their functioning and relevance are evidently affected by the changing geopolitical context.[461] Yet, states, NGOs, CSOs and others are also divided on overarching approaches to issues of international peace and justice. This is evidenced by the continuing "peace through justice" against "peace vs. justice" or "peace first" debates,[462] and by different takes on practices of "naming and shaming".[463] Due to the general difficulty of the UNSC to find consensus on taking measures in conflict situations, states and other actors have looked for alternative ways to act, i.e., not through the International Criminal Court (ICC), or, in some situations, by circumnavigating the UNSC's votes and resolutions. Most notably, we see that a number of alternative accountability mechanisms have been established in recent years. In addition, states took recourse to targeted sanctions, referred to as restrictive measures, that may be implemented in situations of international peace and security. Each will be discussed in turn in this chapter.

### 5.1 Alternative Accountability Mechanisms

Through the UNGA, UNSC and the UNHRC, a number of states pursue accountability for crimes under international law. To this end, the ICC has been established, as well as several other ad-hoc international tribunals. However, political constraints, slow trials, and mounting costs of UN-backed courts, hinder accountability for such crimes.[464] This in combination with the fact that evidence gathered by previously installed fact- and evidence-gathering missions is not directly admissible in criminal trials[465], has

[461] Brubaker and Dorfler (2017), "UN Sanctions and the Prevention of Conflict; A Thematic Paper for the United Nations - World Bank Study on Conflict Prevention", (United Nations University Centre for Policy Research), p. 13; United Nations Human Rights (2021), "Establishing a Mechanism on the Missing in Syria is a Priority, Commission of Inquiry on the Syrian Arab Republic Tells Human Rights Council", https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27276.

[462] In short, at heart of this so-called "peace vs justice" debate lies the following balancing act: how can the pursuit of justice and accountability for mass atrocities be pursued while bolstering, or at least not undermining, peace processes? (Williams, Dicker and Paterson (2018), "The Peace vs. Justice Puzzle And The Syrian Crisis", p. 471). The peace-first approach, as suggested by its name, prioritizes ending the conflict above all other interests; here, justice and accountability are viewed to jeopardize the peace process; only negotiation processes would bring about political change and restore peace (Rodman and Chatterjee (2011), "Peace vs Justice", p. 827). On the contrary, advocates of "peace through justice" believe that it is justice that will stop perpetrators, with the claim that there is a moral and legal duty to prosecute international perpetrators to consolidate post-conflict peace.

[463] For an elaborate analysis, see Terman (2016), *Backlash: Defiance, Human Rights and the Politics of Shame* (UC Berkeley); For a more concise account, see Terman (2021), "Why "Naming and Shaming" Is a Tactic That Often Backfires In International Relations Understanding a deeply paradoxical political process", https://publicseminar.org/essays/why-naming-and-shaming-is-a-tactic-that-often-backfires-in-international-relations/.

[464] Ferencz International Justice Initiative (2019), p. 3.

[465] Wilkinson (2017), "Finding the facts: Standards of proof and information handling in monitoring, reporting, and fact-finding missions", p. 27; See Sunga (2011), "How can UN human rights special procedures sharpen ICC fact-finding?"; In the context of Commissions of Inquiry, see Harwood (2019), *The Roles and Functions of Atrocity-Related United Nations Commissions of Inquiry in the International Legal Order* (Brill|Nijhoff), p. 119;

prompted states to look for alternative ways, i.e., not through the ICC, to ensure accountability for the most grave crimes.[466] One of the most significant developments within the international criminal justice system in the past five years has been the establishment of *investigative* accountability mechanisms in 2016 in Syria, in 2017 in Iraq, and in 2018 in Myanmar.[467] Respectively, these are called International, Impartial and Independent Mechanism for Syria (IIIM, established by the UNGA)[468], the UN Investigative Team for Accountability of Da'esh (UNITAD, established by UNSC) and Independent Investigative Mechanism for Myanmar (IIMM, established by UNHRC).[469]

The investigative mechanisms for Syria, Iraq and Myanmar have significantly changed the landscape of international criminal justice, despite being labeled as "temporary band-aid", a way to "buy time", or as blunt instrument.[470] This section addresses their functions, general assessments and challenges.

### 5.1.1 Functions

For the last two decades, accountability aspirations led to the establishment of monitoring, reporting and fact-finding missions (FFM) and commissions of inquiry (CoI) in, among other countries, Syria,

This also applies to evidence gathered by civil society organizations, see Stavrou (2021), "Civil Society and the IIMM in the Investigation and Prosecution of the Crimes Committed Against the Rohingya", p. 101.

[466] Stavrou (2021), p. 105; Elliot (2017), "A Meaningful Step Towards Accountability? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria", p. 239; Castelos (2021), "Foreign Terrorist Fighters and the UN Investigative Team to Support Domestic Efforts to Hold ISIS Accountable for War Crimes, Crimes Against Humanity and Genocide Committed in Iraq: Building a Bridge that Should Be Used", p. 1-30.

[467] Whiting (2017), "An Investigation Mechanism for Syria The General Assembly Steps into the Breach", p. 231; Only very recently, in September 2021, a collective of thirty-five NGOs – among which Amnesty International, Save the Children and Human Rights Watch – requested the Human Rights Council to urge states to renew the mandate of the Group of Eminent Experts (GEE), an international criminally-focused investigation body located in Yemen, to support accountability for crimes under international law committed on Yemen territory. However, given twenty-one States voted against the resolution led by the Netherlands (against eighteen States in favor), there still remains a lack of political will to address the situation in Yemen; See 'Joint Civil Society Letter: States should support accountability for crimes under international law committed in Yemen at the 48th Session of the Human Rights Council' (3 September 2021). Retrieved at <https://reliefweb.int/sites/reliefweb.int/files/resources/2021-Sept-JointStatement-HRC48-Yemen-En.pdf>.

[468] Obviously, the establishment of the IIIM was not supported by all states; Russia opposed the IIIM as it stated that the creation of the IIIM was beyond the legal power of General Assembly. According to this view, the GA lacks a legal basis to establish an organ that is "prosecutorial" nature"- a task which is only strictly reserved to the Security Council. Wenaweser and Cockayne (2017), "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice", p. 213.

[469] The International, Impartial and Independent Mechanism for Syria (IIIM) created by the UN General Assembly in December 2016 pursuant to UN GA Res. 71/248; the UN Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL (UNITAD), created by the UNSC in September 2017 pursuant to UN SC Res. 2379; and the International Independent Mechanism for Myanmar (IIMM) was created by the UN HRC in December 2018 pursuant to UN HRC Res. 39/2; Given the advent of new technology combined with burgeoning political will and the support of a wide array of new actors, country-specific mechanisms for justice have proliferated. Notable other special accountability procedures include the Syria Commission of Inquiry (mandated by the HRC), the UN Mission in South Sudan (UNMISS - Peacekeeping), the UN Assistance Mission for Iraq (UNAMI), the Special Envoy for Myanmar; Special Rapporteur for Human Rights in Myanmar; Fact-Finding Mission; *See* Ferencz International Justice Initiative and Simon Skjodt Center for the Prevention of Genocide (2019), "Report for the UN; Lessons Learned from the First Generation of UN Investigative Mechanisms for Future Criminal Accountability: Considerations for CSO engagement with the United Nations Independent Investigative Mechanism for Myanmar", p. 19.

[470] Whiting (2017), p. 236.

Myanmar and Iraq.[471] Despite the variations in the formulation of their mandates, these bodies, as tool-box instruments of the UNHRC, are tasked with investigating allegations of violations of international human rights law, international humanitarian law and international criminal law – predominantly through means of documentation, images, digital records and witness testimony.[472] However, elicited limitations of these documentation initiatives (mainly revolving around the integrity of their evidence-gathering practice) further encouraged the establishment of investigative accountability mechanisms such as the IIIM, IIMM and UNITAD.[473]

The IIIM, IIMM and UNITAD are envisaged to serve as "catalysts" and "clearinghouses"[474] of broad documentation efforts in the sense that the mechanisms "consolidate disparate information" found by documentation bodies and subsequently "disperse trial ready dossiers to various jurisdictions".[475] As such, the IIIM (Syria), IIMM (Myanmar) and UNITAD (Iraq) function independently, but in close cooperation with these documentation initiatives to enhance the possibilities of justice, yet have a wider mandate.[476] That is to say, the mandates of FFM/CoI and those of the investigative mechanisms' significantly overlap in their explicit mission to establish facts and to collect and collate evidence of atrocity crimes.[477] Yet, the investigative accountability mechanisms, as independent and stand-alone organizations, are one step closer to prosecution as they *analyze* evidence of most serious international crimes (genocide, crimes against humanity, war crimes) "to an international criminal prosecution standard" to ensure that criminal proceedings are realistic in the future.[478]

Given their status of "legal bridge" between fact-finders and prosecutors,[479] and their conceptualization as "advanced fact-finding mechanism[s]"[480] or "quasi-prosecutorial body",[481] the investigative mechanisms work with higher standards of proof than other fact-finding bodies do (e.g., proof must be "beyond reasonable doubt"; ensure a chain of custody; provide evidence showing the widespread or systematic nature of a crime; and evidence showing the intent of the perpetrator).[482] Additionally, whereas FFMs and CoIs publicly report their findings for reasons of transparency, public awareness and truth-finding,[483] the mechanisms' analysis, case-work and intentions are more likely to

[471] OHCHR (2015), p. 11.
[472] Ferencz International Justice Initiative (2019), p. 4; OHCHR (2015), p. 10-11; Chorakis (2018), "International Criminal Justice in Syria: Is the New UN Mechanism a Pathway for International Criminal Justice to Achieve Peace?", p. 12.
[473] Mandel-Anthony (2019), "Hardwiring accountability for mass atrocities", p. 915; Williams and Levy (2020), "Documentation for Accountability", p. 461-462.
[474] Mandel-Anthony (2019), p. 924.
[475] Mandel-Anthony (2019), p. 924; See, for example: Nassar and Rangelov (2020), "Documentation of human rights violations and transitional justice in Syria: gaps and ways to address them" (Conflict Research Programme. London School of Economics and Political Science), p. 7.
[476] Mandel-Anthony (2019), p. 906.
[477] Ferencz International Justice Initiative (2019), p. 3; Stavrou (2021), p. 102; OHCHR (2015), p. 11.
[478] Elliot (2018), p. 240; Stavrou (2021), p. 105; Whiting (2017), p. 231.
[479] Stavrou (2021) p. 105; Wenaweser and Cockayne (2017), p. 224.
[480] Chorakis (2018), p. 10
[481] Importantly, these three investigative accountability mechanisms, as well as those international fact-finding missions, are unlike prosecutorial bodies or courts in the sense that they are not mandated to arrest, prosecute or hold trials; See the core mandates of respective mechanisms; Chorakis (2018), p. 12; Le Moli (2020), "From "Is" to "Ought": The Development of Normative Powers of UN Investigative Mechanisms", p. 653.
[482] Harwood (2019), p. 151; Le Moli (2020), p. 652-653; Creutz (2020), "International Responses to the Rohingya Crisis in Myanmar: From Politcal Inaction to Growing Legal Pressure", (Finnish Institute of International Affairs) p. 4; Ferencz International Justice Initative (2019), p. 7.
[483] Meron (2018), "Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes", p. 443; This happens obviously while respecting the confidentiality of persons who cooperate with it and of the information it gathers, OHCHR (2015), p. 34.

remain confidential – only to be shared with national, regional or international courts in order to facilitate and expedite fair and independent criminal proceedings.[484]

In addition to the differences in mandates between the FFM/CoI and the investigative accountability mechanisms, there are also significant differences in mandate, financial resources and operational realities that distinguish the investigative mechanisms from one another. Contrary to the Syria (IIIM) and Myanmar (IIMM) mechanism, UNITAD was created at the request of the Iraqi government.[485] The consent of the Iraqi government is said to be "likely politically necessary for the UNSC to create this powerful investigative mechanism, although it came with trade-offs (…)"[486], which refer to UNITAD's investigative scope that exclusively concentrates on members of ISIS, with a mandate to "collect and compile evidence and prepare files related to crimes committed *by members of ISIL*" (emphasis added).[487] By contrast, the IIIM and the IIMM (respectively established by UNGA and UNHRC) are mandated to collect and compile evidence and prepare files related to violations of international law committed in Syria and Myanmar *on all sides* (e.g., committed by governmental authorities, terrorist groups, individuals).

Accordingly, so it has been noted, due to the fact that the initiatives of the UNGA or the UNHRC cannot be vetoed by any of the permanent UNSC members, this enabled those institutions "to be viable sponsors of investigations in Syria, Myanmar (…)".[488] However, without having UNSC's additional enforcement powers at hand, it is contended that the IIIM and the IIMM may "encounter challenges in fulfilling their mandate".[489] For example, they will have to rely on voluntary cooperation of states, NGOs and individuals "to collect and provide the necessary evidence" whereas the UNSC-backed UNITAD can enforce cooperation.[490] For being authorized by the UNSC, UNITAD is said to be "inherently stronger than its counterparts" (IIIM and IIMM) created by the UNGA and UNHRC.[491]

### 5.1.2. General observations

The mechanisms are still in their early days, especially the IIMM, and all lost time over the Covid-19 pandemic.[492] The initial reception of the initiatives has overall been positive, though some contend that significant challenges for the mechanisms remain.[493]

#### *5.1.2.1. General assessment of the investigative accountability mechanisms*

Many have praised the initiatives of the UNSC, UNGA and UNHRC. They are widely heralded as "a landmark", "unprecedented", "a huge milestone", and "innovative solution" that "enhances the

[484] Wenaweser and Cockayne (2017), p. 216; Ferencz International Justice Initative (2019), p. 5.
[485] Kaufman (2018), "The Prospects, Problems, and Proliferation of Recent UN Investigations of International Law Violations", p. 102.
[486] Mandel-Anthony (2019), p. 915.
[487] Trahan (2021), "International Justice and the International Criminal Court at a Critical Juncture" In: Ankersen and Sidhu (eds) *The Future of Global Affairs (*Palgrave Macmillan), p. 131-133; Kaufman (2018), p. 104-105.
[488] Kaufman (2018), p. 102.
[489] Krapiva (2019), "The united nations mechanism on Syria: Will the syrian crimes evidence be admissible in european courts", p. 1103.
[490] Krapiva (2019), p. 1103.
[491] Trahan (2020), Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes (Cambridge University Press), p. 29; Kaufman (2018), p. 103
[492] Castelos (2021), p. 15.
[493] Castelos (2021), p. 15; Elliot (2017), p. 251; D'Alessandra and Sutherland (2021), "The Promise and Challenges of New Actors and New Technologies in International Justice", p. 11.

prospect of future accountability".[494] The establishment of the mechanisms, which started with the IIIM, is noted to represent "a crystallization of a new approach to international criminal justice (...)", one that "moves away from the creation of new supranational jurisdictions, towards an approach involving the creation of platforms for assistance and cooperation to established jurisdictions".[495] What is commented on the IIIM in particular – but can be taken for the creation of investigative mechanisms in general[496] – is that it reflects the international community not to be "doing nothing to address the worldwide atrocities" as they constitute "markers that remind future political actors and diplomats that the crimes […] will not easily be forgotten or brushed aside".[497] Moreover, it is commented that if the (IIIM) mechanisms work would lead to achieving criminal prosecution of e.g., senior leaders, "it would represent the greatest expansion to the system of international criminal law since the indictment of Augusto Pinochet".[498] In this context, the mechanisms are a "bridge"[499] to a future moment "when the conditions and political will exist to provide for accountability".[500] Similarly, the creation of mechanisms is understood as "yet another testament to the human determination and creativity" that has kept the international criminal justice project moving forward[501] – and gives diplomats an "opportunity to demonstrate that law, indeed international criminal law, can trump power".[502]

What is more, due to a better use and implementation of technological advancements,[503] the mechanisms are considered to be of complementary nature to national, regional or international justice institutions as evidence becomes secured and investigations are initiated at a much earlier point than courts are able to.[504] Despite obstacles to direct accountability in the short term, the mechanisms are found to serve the interests of efficiency and judicial economy[505] not only by easing the investigative burden on regional, national or international prosecutors when it comes to case preparation, but also by "taking on the bulk of the work of the ICC in sifting through material to identify credible sources" and "in contributing to case selection through identifying where a critical mass of evidence leads".[506] In particular, research points towards the IIIM's proactive engagement with states, with one senior prosecutor commending on "the proactive supplementation of information without request".[507] It is noted that the IIIM "currently stands out for gaining a reputation for its cooperative, 'solution-oriented' approach, marking a shift from the disobliging, bureaucratic reputations of some other UN bodies".[508]

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[494] Kaufman (2018), p. 94-95; Chorakis (2018), p. 13; Stavrou (2021), p. 105; Castelos (2021), p. 21; Wenaweser (2017), p. 229; Mandel-Anthony (2019), p. 906, 914; Cockayne and Wenaweser (2017), p.; Krapiva (2019), p. 1102.
[495] Wenaweser and Cockayne (2017), p. 229.
[496] See for such comment on IIMM: Stavrou (2021), p. 102.
[497] Whiting (2017), p. 236.
[498] Rankin (2017), "Investigating Crimes against Humanity in Syria and Iraq: The Commission for International Justice and Accountability", p. 421.
[499] Whiting (2017), p. 237, Castelos (2021), p. 15; Stavrou (2021), p. 101.
[500] Whiting (2017), p. 236.
[501] Whiting (2017), p. 236.
[502] Ranking (2017), p. 419.
[503] Castelos (2021), p. 14; D'Alessandra and Sutherland (2021), p. 13-14.
[504] De Vos (2020), Complementarity, Catalysts, Compliance: The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo (Cambridge University Press), p. 288; Castelos (2021), p. 16; OHCHR (2015) p. 55.
[505] Bekou (2020). "State of play of existing instruments for combating impunity for international crimes" (Policy Department, Directorate-General for External Policies), p. 62.
[506] Mahnad (2018), "An Independent Mechanism for Myanmar: A Turning Point in the Pursuit of Accountability for International Crimes" (EJIL Talk!), https://www.ejiltalk.org/a-turning-point-in-the-pursuit-of-accountability-for-international-crimes/; Stavrou (2021), p. 103.
[507] D'Alessandra, Rapp and Ashraph (2020), "Anchoring Accountability for Mass Atrocities: Providing the Support Necessary to Fulfil International Investigative Mandates" (The Oxford Programme of International Peace and Security), p. 4.
[508] D'Alessandra, Rapp and Ashraph (2020), p. 4.

While seeking accountability for international law violations is lauded, reservations have certainly been made. At the macro level, questions have been raised as to whether, to what extent, and how the investigative accountability mechanisms' merits correct former accountability deficits. Critical observers note that the mechanisms' further step in the process of accountability – where the actual prosecutions will occur – is "not yet fully resolved", and "may even not be politically feasible".[509]

Adama Dieng, Special Adviser to the Secretary-General on the Prevention of Genocide, stipulates the nature of the mechanisms by saying that "these mechanisms are not "accountability mechanisms", considering they preserve and collect evidence for prosecutions *elsewhere*, and to only bring under the attention of the international community, while, meanwhile, "atrocity crimes and the need for tribunals continue unabated".[510] In this regard, questions are raised as to whether the proliferation of investigative bodies reflect a sign of "weakness and superficiality" rather than "strength and creativity" in the pursuit of accountability".[511]

In a similar vein, in absence of available international justice options via existing international or hybrid courts, some have critiqued the UN for establishing "an inefficient welter of mechanisms", which operate "successively or concurrently, to address the same atrocity crimes situations or countries".[512] In this regard, the model of the IIIM is said to be both "a symptom" of these inefficiencies as well as an "aspirational remedy".[513]

Additionally, in the face of the limited competences of the UNGA in the field of international peace and security, the view of the UNGA as "taking the reins of questions of justice in the face of the UNSC deadlock"[514] is deemed as "far from a complete answer to Security Council deadlock due to veto use".[515] Though the UNGA successfully created the IIMM, it is noted that such investigative mechanism "(...) is never an adequate alternative to measures aimed at preventing the crimes in the first place".[516] As well as that, given UNITAD is backed by UNSC's enforcement power, it is questioned whether the inquiries done by the IIIM and IIMM – not backed by the UNSC – "still hold value for the genuine pursuit of justice" or rather must be considered "feeble fallbacks in the absence of international consensus through the UNSC".[517]

Second, the scope of the investigative mechanism of Iraq (UNITAD) has been critiqued for addressing "one side of the conflict" as it only involves investigations against ISIS members. In this way, investigations might overlook crimes committed by other armed groups involved in the conflict.[518] Particularly for having such a "singular focus", the UNITAD has been said to represent "a step backward for the field of international justice" or a "throwback to the Nuremberg approach" with a mandate that "harbingers back to the selectivity concerns of "victor's justice," that, for example, haunted the legacy of the Nuremberg Tribunal".[519]

Additional concerns are raised about the Iraqi judiciary being the intended primary recipient of UNITAD materials – considering the Iraqi judicial system is said to lack fair process standards and employs the death penalty.[520] In this way, UNITAD, as UN-institution, may provide evidence into a

[509] Trahan (2021), p. 112.
[510] Dieng (2020),"Remarks by Adama Dieng", p. 340.
[511] Kaufman (2018), p. 106.
[512] Mandel-Anthony (2018), p. 924.
[513] Mandel-Anthony (2018), p. 923-924.
[514] Human Rights Watch, "UN General Assembly Adopts Resolution on War Crimes Investigations", www.hrw.org/news/2016/12/21/syria-un-general-assembly-adopts-resolution- war-crimes-investigations.
[515] Trahan (2020), p 28-30.
[516] Trahan (2020), p 28-30.
[517] Kaufman (2018), p. 106
[518] Mandel-Anthony (2019), p. 917; See Van Schaack (2018), "The Iraq investigative team and prospects for justice for the Yazidi genocide".
[519] Trahan (2020), p. 132; See Van Schaack (2018); Dieng (2020), p. 340.
[520] Mandel-Anthony (2019), p. 917.

system that is not in conformity with international human rights protections.[521] Noteworthy, contrary to UNITAD, the IIIM's and the IIMM's terms of reference provide explicit clauses saying that it shares its information only with jurisdictions "where the application of the death penalty would not apply for the offences under consideration".[522]

#### *5.1.2.2. Evaluation of third-party cooperation*

Looking at the investigative accountability mechanisms in the wider context of the international legal order, the role of non-state actors is particularly interesting. At first the creation, and now the functioning of the mechanisms, furthers the debate on how non-state, state and interstate actors play a role in the development and governance of a system of international criminal law. That is to say, in furtherance of a common goal of ensuring justice, accountability, and redress for victims of crimes, not only national and international prosecutorial and judicial authorities cooperate with the accountability mechanisms, but also various other stakeholders including NGOs and CSOs.[523]

In this respect, and at the more specific level, the prosecutorial and judicial authorities (the so-called "end-users" of the evidence generated by the UN mechanisms' operations)[524] expressed increasing satisfaction with the focus on and establishment of novel investigative mechanisms.[525] Notably, the level of integrity of (disparate) evidence consolidated or collected by the newer mechanisms has significantly improved.[526] This is predominantly with respect to previously established evidence-gathering bodies with "convoluted processes, heavy redactions that undermine utility (even when witnesses have consented to material being shared), low quality of information, poor interview techniques (including leading questions), disorganised archiving leading to difficulties in locating material, and failures to implement basic chain of custody procedures".[527] Noting that "the IIIM marks a sharp improvement" in this context, it is anticipated that the currently installed investigative accountability mechanisms will remedy these concerns.[528]

Along with the above, the mechanisms' interaction with a growing milieu of NGOs and CSOs bring benefits for both sides. For the part of the mechanisms, cooperation with local civil society and NGOs is considered "vital" and "key in its success" (with suggestions that without it "the IIIM will fail").[529] This is because they offer materials from a broader range of sources, involve valuable data and knowledge of socio-political, geographic or thematic areas in which conflicts occur. This input is especially valuable in case crime scenes that cannot be accessed by prosecutorial authorities themselves.[530] Additionally, CSOs and NGOs act unburdened by political deadlocks or UN

[521] Trahan (2021), p. 133-134; Dieng (2020), p. 340; See Van Schaack (2018).
[522] Trahan (2021), p. 134.
[523] See, for example, Doumit (2020), "Accountability in a Time of War: Universal Jurisdiction and the Strive for Justice in Syria"; See the website of the IIIM for more information on engagement with stakeholders: <https://iiim.un.org/engagement-with-stakeholders/>.
[524] D'Alessandra, Rapp and Ashraph (2020), p. 3.
[525] D'Alessandra, Rapp and Ashraph (2020), Annex 1; D'Alessandra and Sutherland (2021), p. 11
[526] D'Alessandra and Sutherland (2021), p. 11; Stavrou (2021), p. 105.
[527] D'Alessandra, Rapp and Ashraph (2020), "Anchoring Accountability for Mass Atrocities: Providing the Support Necessary to Fulfil International Investigative Mandates" (Opinio Iuris) http://opiniojuris.org/2020/09/19/anchoring-accountability-for-mass-atrocities-providing-the-permanent-support-necessary-to-fulfil-international-investigative-mandates-part-iii/>.
[528] D'Alessandra and Sutherland (2021), p. 11; See also D'Alessandra, Rapp and Ashraph (2020).
[529] Castelos (2021), p. 17; Ferencz International Justice Initiative (2019), p. 7; Elliot (2017), p. 252; D'Alessandra and Sutherland (2021), p. 11.
[530] Castelos (2021), p. 17; Ferencz International Justice Initiative (2019), p. 7; Elliot (2017), p. 252; D'Alessandra and Sutherland (2021), p. 11; Williams and Levy (2020), p. 462; See Rankin (2018), "The Future of International

bureaucracy[531], and can find creative ways to foster diplomatic and public pressure.[532] Lack of outreach to, and engagement with, CSOs is hence seen as a challenge to the mechanisms (*see* "challenges" section).[533]

### 5.1.3. Challenges

Challenges nonetheless remain for the investigative accountability mechanisms, most importantly related to (1) cooperation with CSOs; (2) ensuring the reliability of CSO documentation; (3) the proliferation of documentation initiatives and (4) methodological challenges.[534]

As stipulated, the cooperation between CSOs and NGOs remains highly important for the mechanisms' functioning.[535] On the other hand, it confronts the practice with a number of challenges. For example, in light of the quality requirements for evidence, questions are raised as to whether it is possible to use information collected "through citizens' journalism" and through other bodies[536] for the purpose of judicial proceedings.[537] Considering e.g., CSOs promoting particular ideals and interests (which are e.g., less focused on fair process standards of potential defendants), or given the risk of partiality of information, questions are raised as to what weight the information they collect should carry.[538] It is stipulated that the mechanisms' role in assessing the reliability and probative value of the evidence is key in ensuring the admissibility of CSOs' documentation to criminal proceedings,[539] although for some commentators it is not clearly understood how the mechanisms are currently managing this important task.[540] A partial solution suggested in this context is the adoption of clear guidelines concerning criminal inquiries by NGOs and CSOs willing to undertake documentation for the purposes of future submission to criminal procedures.[541]

A further noted challenge for the international community is to guarantee each of the investigative mechanisms to be able to contribute its evidence consistent with international criminal justice practice and values, i.e., "toward fair and systematic prosecutions" that, particularly in the context of UNITAD, "do not implement the death penalty".[542] Related to the differences in mandate of the mechanisms, literature reports an additional challenge for both the ICC and the international community *regarding the mechanisms* "to ensure that the rule of law can apply equally to all, so that not even *state* actors remain above the law" (emphasis added).[543]

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Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)"; Stock (2020), p. 54; Vukusic (2019), "Accountability in Syria", p. 213.

[531] Vukusic (2019), p. 213

[532] Rankin (2018), p. 411.

[533] Elliot (2017), p. 251

[534] Mandel-Anthony (2018), p. 926.

[535] D'Alessandra (2016), *Handbook on Civil Society Documentation of Serious Human Rights Violations* (PILPG), p. 12; Williams and Levy (2020), p. 462; Stavrou, p. 102.

[536] Jacobs (2020), "Limitations of Using Fact-Finding Reports in Criminal Proceedings: The Case of Myanmar", (TOAEP Policy Brief Series), p. 4; Ferencz International Justice Initative (2019), p. 7.

[537] Williams and Levy (2020), p. 462; D'Alessandra (2016), p. 12, 60; Baylis (2009), "Outsourcing investigations", p. 144; Stavrou (2021), p. 101; Krapiva (2019), p. 1104.

[538] D'Alessandra (2016), p. 12; Williams and Levy (2020), p. 462.

[539] Stavrou (2021) p. 103-105.

[540] Kaufman (2018), p. 107.

[541] Stavrou (2021), p. 101.

[542] Trahan (2020), p. 24, 42.

[543] Trahan (2020), p. 42.

Another overall concern denotes the question whether the proliferation of documentation initiatives does not have an added value, but rather sustains the fragility of the system.[544] For the part of the mechanisms, they must avoid the duplication of work in order to supplement and support existing efforts. For that, the mechanisms must understand and consider what already has been done.[545] In similar vein, the challenge of processing the extensive amount of documentation provided by fact-finding bodies by the mechanisms was among the main concerns raised by the IIIM, and equally noted in the context of IIMM.[546]

A similar challenge exists for CSOs in distinguishing the mechanisms and other special procedures from one another.[547] In case of the Syrian mechanism (IIIM), scholars stress that it took more than a year for some CSOs and victim groups to fully understand the specific role of the IIIM.[548] In case of the Myanmar mechanism (IIMM), CSOs stressed difficulty with understanding the substantive differences between the IIMM, FFM, CoI and/or e.g., Special Rapporteur, and the Special Envoy.[549] With more information, CSOs are in better position to carry out their work (i.e., raise awareness and moderate expectations among grassroots communities).[550]

There have been more risks and challenges reported as stemming from the proliferation of documentation initiatives, including the "re-traumatization of the victims, contradictory information provided by witnesses and a lack of coordination".[551]

Finally, due to uncertainty as to which prosecutorial entity will eventually use the case-files submitted by the mechanisms, methodological questions arise. Such questions are for example, "how will they [the mechanisms] gather information and evidence in a way that allows it to be justiciable?"[552] More specifically, "will the evidence be used in an adversarial common law system, an inquisitorial civil law system, or a novel jurisdictional blend?"[553]

Such uncertainty similarly causes challenges for the mechanisms to obtain informed consent of e.g., witnesses/victims with "sufficient specificity", as well as reluctance with engaging parties to provide information or sensitive data in the first place, when it is unclear "who might receive that information in the future".[554]

[544] Elliot (2017), p. 251; Stavrou (2021), p. 101.
[545] Elliot (2017), p. 250; Stavrou (2021), p. 102.
[546] Stavrou (2021), p. 103.
[547] Ferencz International Justice Initiative (2019), p. 8; Stavrou (2021), p. 102; Elliot (2017), p. 251.
[548] Ferencz International Justice Initiative (2019), p. 7.
[549] Bekou (2020), "State of play of existing instruments for combating impunity for international crimes", p. 54; Ferencz International Justice Initiative (2019), p. 7; Syria Justice and Accountability Centre (2017), "Responding to misconceptions regarding the IIIM", https://syriaaccountability.org/updates/2017/08/02/responding-to-misconceptions-regarding-the-iiim/.
[550] Bekou (2020), p. 54; Ferencz International Justice Initiative (2019), p. 7; Syria Justice and Accountability Centre (2017).
[551] Mandel-Anthony (2018), p. 924.
[552] Mandel-Anthony (2018), p. 926.
[553] Mandel-Anthony (2018), p. 926.
[554] Mandel-Anthony (2018), p. 926-928.

## 5.2. Targeted Sanctions

The employment of sanctions is considered a central instrument in upholding international peace and security.[555] The EU and the UN are among the actors that most frequently adopt sanctions. Sanctions are considered as restrictive measures which apply political or economic pressure on targets that maintain harmful policies, threaten peace or do not cooperate with international law.[556] As such, and to date, a wide range of sanction regimes are employed to the end of deterring violations of human rights[557], frustrating the acquisition of weapons of mass destruction and nuclear proliferation, promoting conflict resolution, preventing the undermining of democracy/rule of law[558], blocking sponsorship of, or engagement, in terrorism.[559]

Comprehensive sanction regimes became a point of contention after their devastating adverse humanitarian impacts in e.g., Yugoslavia, Haiti and Iraq.[560] Since, the UN Security Council has been refining and redesigning the sanctions concept.[561] With the aim of minimizing the suffering of innocent civilians, whilst upholding the efficacy and legitimacy of sanction regimes[562], the international community started to shift away from all-encompassing comprehensive sanction regimes applied to entire countries towards *targeting* sanctions to key individuals or groups.[563] At times, the UN or the EU apply both a comprehensive sanction regime to a whole country, while at the same time issuing targeted sanctions to designated persons. For example, in the case of Libya, where next to an imposed open-ended arms embargo on the government was imposed next to targeted sanctions (such as travel bans and the freezing of assets are used against human traffickers, smugglers and human rights violators against migrants).[564] In other situations, sanction regimes are employed to focus on particular

[555] Cockayne, Brubaker and Jayakody (2020), "Fairly Clear Risks: Protecting UN sanctions' legitimacy and effectiveness through fair and clear procedures" p. 4; Eckert (2017), "The evolution and effectiveness of UN targeted sanctions", p. 4.
[556] Biersteker, Eckert and Tourinho (2016), " Sanctions: The Impacts and Effectiveness of United Nations Action", p. 11; Giumelli (2017), "Winning Without Killing: The Case for Targeted Sanctions", p. 91.
[557] Biersteker et al. (2016), p. 38; See the European Parliament resolution of 8 July 2021 on the EU Global Human Rights Sanctions Regime (EU Magnitsky Act) at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0349_EN.html.
[558] See European Council, "Lebanon: EU adopts a framework for targeted sanctions" (30 Juli 2021), https://www.consilium.europa.eu/en/press/press-releases/2021/07/30/lebanon-eu-adopts-a-framework-for-targeted-sanctions/.
[559] Brubaker and Huvé (2021), "UN Sanctions and Humanitarian Action", p. 3.
[560] Taking place in the 00's.
[561] Giumelli and Onderco (2021), "States, firms, and security: How private actors implement sanctions, lessons learned from the Netherlands", p. 190; Biersteker et al. (2016), p. 11.
[562] Giumelli and Onderco (2021), p. 190; United Nations University (2017), "Strengthening Sanction Regimes: Dr Rebecca Brubaker outlines five general recommendations for strengthening UN sanctions", https://cpr.unu.edu/publications/articles/strengthening-un-sanctions.html.
[563] Ruys (2021), "The European Union Global Human Rights Sanctions Regime (EUGHRSR)", p. 299; Biersteker et al. (2016), p. 10-12; Giumelli and Onderco (2021), p. 190-192; See Boon (2016), "U.N. Sanctions as Regulation". On the individualization of sanctions, see Herik (2014), "Peripheral Hegemony in the Quest to Ensure Security Council Accountability for Its Individualized UN Sanctions Regimes"; On the design of smart sanctions generally, see Targeted Sanctions Consortium, "Designing United Nations Targeted Sanctions" (August 2012), http://www.watsoninstitute.org/pub/Designing_UN_Targeted_Sanctions_FINAL.pdf. [hereinafter Designing UN Targeted Sanctions].
[564] See, for example, Human Rights Watch (2020), "Libya: Events of 2020", https://www.hrw.org/world-report/2021/country-chapters/libya.

themes, such as the cyber-security sanction regime at the EU level,[565] or the recently issued EU global human rights sanctions regime (Magnitzky Act).[566]

This section discusses the sanctioning policies of both the UN and the EU, with a particular focus on targeted – or individual – sanctions imposed in relation to human rights abuses. The functions of sanctions will be briefly addressed, as well as their general assessment and challenges.

### 5.2.1. Functions

The EU and the UN sanction regimes have a wide scope, including a range of comprehensive country-specific sanction regimes, such as bans on arms export or telecommunication equipment, as well as a broad set of individual or targeted sanctions. In the latter category, most often used measures are asset freezes, travel bans, prohibitions to make funds available to those listed and to satisfy their claims (with regard to e.g., contracts and transactions).[567]

In contrast to comprehensive 'all or nothing' sanction regimes,[568] targeted sanctions are valued for being flexible and agile policy instruments, ones that can be attuned in response to target behavior.[569] Targeted sanctions are understood to have three different purposes: (1) to coerce change in a target's behavior, (2) to constrain a target from engaging in a proscribed activity, or (3) to signal and/or stigmatize a target about the violation of an international norm.[570] In a world of diplomatic statements and posturing, targeted sanctions offer a high degree of visibility and concreteness which makes them an attractive policy instrument for governments to resort to. The use of this tool is additionally popular as it resonates with the wider public, and can thus perform a reputational and symbolic function.[571] In addition to their symbolic value, specific advantages ascribed to targeted sanctions are that they offer the possibility to target individuals in situations where they may act independently from a state, such as in the case of cybercrime, and that they can be resorted to in cases where comprehensive sanctions may be deemed too politically sensitive and risk escalating a conflict.[572] Besides these particular purposes, senders of targeted sanctions may have other objectives. These include strategic communication vis-à-vis targets and relevant third parties, retributive punishment, or upholding self-identifications (such as being a defender of human rights) in situations where non-intervention could be construed as complicity.[573]

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[565] See, for example, Moret and Pawlak (2017), "The EU Cyber Diplomacy Toolbox: towards a cyber sanctions regime?".

[566] See Ruys (2021); van der Have (2020), "The Proposed EU Human Rights Sanctions Regime"; Brubaker and Dorfler (2017); Miadzvetskaya, "Habemus a European Magnitsky Act", (12 January 2021) (European Law Blog), https://europeanlawblog.eu/2021/01/13/habemus-a-european-magnitsky-act/.

[567] Giumelli, Hoffmann and Książczaková (2021), "The when, what, where and why of European Union sanctions", p. 1; For an overview of currently applied set of (individual) sanctions, see the EU sanctions map at https://www.sanctionsmap.eu/#/main/details/23,43/?search=%7B%22value%22:%22%22,%22searchType%22:%7B%7D%7D .

[568] Biersteker et al (2016), p. 14.

[569] Ruys (2021), p. 299; Biersteker et al. (2016), p. 15; Portela (2014), "The EU's Use of 'Targeted' Sanctions: Evaluating Effectiveness" (CEPS), p. 4.

[570] Biersteker et al (2016), p. 21.

[571] Anglin (2017), "United Nations Economic Sanctions Against South Africa and Rhodesia", p. 25; Ilgit and Prakash (2019), "Making Human Rights Emotional: A Research Agenda to Recover Shame in "Naming and Shaming", p. 1300.

[572] Ruys (2021), p. 291.

[573] Lohmann and Vorrath (2021), "International Sanctions: Improving Implementation through Better Interface Management", (Research Division International Security and the Americas Division), p. 4.

In terms of punitive or preventative employment, the varying dimensions of sanctions make them of versatile use depending on the situation and stage of a conflict.[574] Situations in which sanctions are imposed include both conflict and post-conflict management, as well as peace enforcement activities – e.g., sanctions conducted in defense of a peace agreement.[575] In this respect, the range of crises in which sanctions are applied reflect the different objectives that targeted sanctions are intended to achieve.

### 5.2.2. General observations

While UN and EU targeted sanctions are generally viewed to be "smart" in the sense of "hitting the intended targets with relatively minimal collateral damage"[576], and "more forceful than words while less invasive and costly than war",[577] and "seductive because it seems easy to employ and relatively risk-free",[578] in spite of gradual refinements and an increased use, the use of targeted sanctions remains controversial.[579] Scholarly debates in this context mainly revolve around targeted sanctions' contested effectiveness and implementation issues.[580]

Notwithstanding a relatively positive view on targeted sanctions in terms of their limited effects on wider communities compared to comprehensive regimes, it is however noted that even targeted sanctions may entail unintended collateral socioeconomic effects beyond the individuals addressed, for example reflected in the expansion of illicit markets and criminal networks.[581]

Moreover, and yet, the effectiveness of targeted sanctions is much-debated.[582] When evaluating their effectiveness, an issue relates to the question of how to measure this.[583] For one, a general complication comprises a lack of consensus on, or even definition of the 'intended results', as well as the uncompromised meaning of its 'overall success' – as the purposes served by the sanctions are interpretable by different senders that are pursuing the different objectives as noted above.[584]
In addition, as targeted sanctions are rather frequently combined with other instruments – for example negotiation processes, incentives or diplomatic pressure[585] – they "do not operate, succeed or fail in a vacuum".[586] Rather, the confluence of several foreign policy initiatives leads to a partial understanding of the specific role targeted sanctions play in shaping policy outcomes - which makes their rate of effectivity challenging to measure as distinct from other interventions.[587]

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[574] Cockayne, Brubaker and Jayakody (2020), p. 2.
[575] Brubaker and Dorfler (2017), p. 3.
[576] Ahn and Ludema (2016), "Measuring smartness: Understanding the economic impact of targeted sanctions", (United States Department of State), https://www.state.gov/wp-content/uploads/2018/12/Measuring-Smartness-Understanding-the-Economic-Impact-of-Targeted-Sanctions-1.pdf.
[577] Lohmann and Vorrath (2021), p. 3.
[578] Giumelli (2017), p. 91.
[579] Biersteker et al. (2016), p. 31.
[580] Lohmann and Vorrath (2021), p.3.
[581] Brubaker and Dorfler (2017), p. 3
[582] Biersteker et al. (2016), p. 4; Hofer (2019), "The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law", p. 133; Giumelli (2017), p. 91.
[583] Biersteker et al. (2016), p. 4; Hofer (2019), "The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law", p. 133; Giumelli (2017), p. 91.
[584] Giumelli, Hoffmann and Książczaková (2021), p. 4.
[585] For a complete evaluative scheme on combinations of targeted sanctions, see Biersteker et al. (2016), p. 30.
[586] Biersteker et al. (2016), p. 30.
[587] Biersteker et al (2016), p. 30; Lohmann and Vorrath (2021), p.4; Peksen, D. (2019), "When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature, Defence and Peace Economics", p. 635.

Yet, research by the Geneva-based Targeted Sanctions Consortium together with panels of experts have measured the effectivity of sanctions as a function of (1) policy outcome, and (2) UN-contribution to that outcome.[588] Based on these variables, this analysis indicates that sanctions are effective in coercing, constraining, or signaling a target on average of about 22% of the time.[589] By differentiating per objective, it is reported that sanctions are most likely to be effective in the area of signaling (27%), with constraining and coercing achieving lower respective success rates.[590] Both at UN and EU level, the question whether sanctions indeed are effective in changing behaviour remains thus largely unanswered.[591] In addition, it is crucial to note that this efficacy assessment did not consider the unintended consequences, economic costs or harmful effects that may have accompanied each 'effective' episode.[592]

The question as to whether targeted sanctions work is inextricably linked to questions around their implementation.[593] In this context, scholars raise varying opinions as to the complexity of sanctions' implementing activities. By some it is stated that targeted sanctions, by virtue of their limited nature, "are easier to implement than comprehensive sanctions and political support for targeted sanctions is easier to mobilize since these sanctions target only those directly responsible for dangerous behaviour".[594] Others note that targeted sanctions are more complex to implement than comprehensive sanctions as they require greater technical skills and expertise.[595]

In particular, it is reported that the effectiveness of targeted sanctions such as travel bans – often employed in joint with other targeted sanctions such as e.g., asset freezes (which is in 2020 for the EU the most commonly occurring combination of sanctions)[596] – can become compromised by a slow or incoherent implementation.[597] As such, in case of asset freezes, listed individuals are given time to move their resources to different accounts. Similarly, if travel bans are implemented incoherently, this sanction can easily be circumvented.[598] These examples highlight that the potential of travel bans and asset freezes again might lie in *stigmatizing* targets – in the context of "naming and shaming" – which in turn could deter others.

Non-state actors can play a decisive role in the implementation phase of sanctions.[599] Especially, and not gone unnoticed by scholarly debates, the evolution of sanctions from comprehensive to targeted has favored the inclusion of 'for-profit actors' (i.e., financial institutions and banks) in ensuring implementation,[600] predominantly through means of identifying, freezing and facilitating the

[588] Biersteker et al (2016) p. 30; Biersteker, Eckert, Tourinho, and Hudáková (2018), "UN targeted sanctions datasets (1991–2013)" p. 404.
[589] Biersteker et al (2016), p. 30.
[590] Biersteker et al (2016), p. 30; Moret and Pawlak (2017).
[591] Ruys (2021), p. 231; Hofer (2019), p. 164; Biersteker et al. (2016), p. 30; *See* Ashford (2016), "Not-so-smart sanctions: the failure of western restrictions against Russia", p. 15.
[592] Biersteker et al (2016), p. 31.
[593] Cockayne, Brubaker and Jayakody (2020); Jones and Portela (2020), "Evaluating the success of international sanctions: a new research agenda", p. 46.
[594] Honda (2017), "UN Targeted Sanctions and Human Rights", p. 27.
[595] Biersteker et al (2016), p. 8.
[596] Giumelli, Hoffmann and Książczaková (2021), p. 12.
[597] Brubaker and Dorfler (2017), p. 3.
[598] Brubaker and Dorfler (2017), p. 3; Portela (2014), p. 17.
[599] Giumelli and Onderco (2021), p. 191. See, for example, Grabosky (2013), "Beyond responsive regulation: The expanding role of non-state actors in the regulatory process".
[600] Giumelli (2018), "The Role of For-Profit Actors in Implementing Targeted Sanctions: The Case of the European Union", p. 123; Liechtenstein Initiative (2019), "Unlocking Potential: A Blueprint for Mobilizing Finance Against Slavery and Trafficking", p. 4.; Carisch and Rickard-Martin (2016), "Implementation of United Nations targeted sanctions", p. 150; Giumelli (2018), p. 141.

confiscation of assets.[601] A recent example of a public-private partnership in the context of international peace and security involves the "Liechtenstein Initiative" – denoting a collective of Governments of Liechtenstein, Australia and the Netherlands, as well as Liechtenstein private sector actors and foundations which aim to take action against modern slavery and human trafficking. This includes sanctions imposed in 2018 by the United Nations Security Council on six suspected human traffickers in Libya.[602]

### 5.2.3. Challenges

Reservations nonetheless remain for the practice of targeted sanctions. This has not only to do with (1) cooperation among actors around implementation, but also with (2) the practice of listing individuals according to human rights standards and, on a broader account, (3) the counterproductive effects produced by targeted sanctions in the context of 'naming and shaming'-debates.

Both in the context of the EU and UN, targeted sanctions cannot effectively be implemented without intense collaboration between a wide range of actors.[603] At the same time, herein lies much of the difficulty, as it is for example in the context of the UN that 'misperceptions based on misplaced emphasis on Member States' implementation duties have allowed the UN Secretariat and UN agencies to eschew implementation responsibilities.'[604]

While reported that cooperation and information-sharing between governments and financial institutions strengthens sanctions implementation[605] – the role of for-profit actors is even called "indispensable for the contemporary politics of sanctions"-[606], this practice involves challenges too. Most prominently, and noted in EU context, challenges that come with public-private cooperation in the area of international security include the "inability to monitor and enforce the behavior of for-profit actors" which can create a situation in which "either the location or the type of companies/firms produces an uneven implementation of the regulation".[607] Given the currently non-existent monitoring structure of sanctions implementation by for-profit actors, which is found to be "alarming", scholars suggest that the EU should consider this, as well as develop mechanisms "to involve, train and prepare private actors to implement targeted sanctions".[608] In this way, the expectation/reality gap between the spirit of the law of regulations and their policy outcomes will be reduced,[609] and the resilience of the sanctions system strengthened against threats", that is, risks that come with incoherent implementation.[610]

What is more, the listing practice surrounding targeted sanctions at times bring legal challenges on 'fair process' grounds and other procedural human rights standards.[611] In particular given the limited opportunities of those targeted by UN sanctions to have restrictive measures independently reviewed, this has been defined as a point of attention.[612] Additionally, it is found that "targeted individuals can

[601] Liechtenstein Initiative (2019), p. 4.
[630] Liechtenstein Initiative (2019), p. 4.
[603] These actors include for example sanctions' committees, expert panels EU member states and institutions, UN agencies, regulatory institutions of member states, international organizations and, hence, private actors; Carisch, and Rickard-Martin (2016), p. 150.
[604] Carisch, and Rickard-Martin (2016), p. 150.
[605] Giumelli and Onderco (2021), p. 200.
[606] Giumelli (2018), p. 138.
[607] Giumelli (2018), p. 139.
[608] Giumelli (2018), p. 141.
[609] Giumelli (2018), p. 141.
[610] Giumelli (2018), p. 141.
[639] Cockayne, Brubaker and Jayakody (2020), p. 18; Goede and Sullivan (2016), "The politics of security lists"; Giumelli (2015), "Understanding United Nations targeted sanctions: an empirical analysis", p. 1354.
[612] Cockayne, Brubaker and Jayakody (2018), p. 3.

be listed before being afforded a chance to respond and there are limited opportunities for review of a listing decision at the UN level" – which evidently affects the rights to due process and an effective remedy.[613] Those affected should be ensured the right to be informed, the right to be heard and the right to an effective review of their case, and therefore experts encouraged the Security Council to undertake regular reviews of sanctions lists.[614]

Finally, as has been mentioned, targeted sanctions can be used to publicly assert a deviation of an international norm to the end of forcing states to comply with their international legal obligations (stigmatization and condemnation, or, "naming and shaming").[615] States employing this tactic argue that it is helping, for example, to improve human rights conditions.[616] Recent scholarship, however, has reported that naming and shaming is a "fundamentally risky strategy" in the context of human rights promotion, one that produces contrary effects by provoking defiance.[617] While intended as a nonviolent foreign policy alternative to military intervention, targeted sanctions may entail unintended effects, as they may increase the level of political instability in states,[618] "leading [governments] to augment their level of repression in an effort to stabilize the regime, protect core supporters, minimize the threat posed by potential challengers, and suppress popular dissent".[619] From this angle, studies suggest that targeted sanctions "have often worsened rather than improved human rights conditions in the target state", as they for example lead to decreases in that particularly targeted violation, but rather increases in other human rights violations.[620] The same strand of research finds that targeted sanctions may induce compliance, incite a backlash and prove resistance, particularly when the shaming emanates from "an actor to which their country has few positive social ties" or "when shame is mired in bias or inaccuracy, damaging the credibility of the shamer and provoking a defensive response".[621] Also, shame that is stigmatizing may produce an "outsider" identity for targeted states, driving them "towards further deviance".[622] Hence, the unintended "backlash" effects of targeted sanctions pose a challenge to the practice and must be taken into account when applied.

[613] Jayakody (2018), "Refining United Nations Security Council Targeted Sanctions 'Proportionality' as a Way Forward for Human Rights Protection", p. 93.
[614] Cockayne, Brubaker and Jayakody (2018), p. 4.
[615] Cockayne, Brubaker and Jayakody (2018), p. 4; See Terman (2016) and (2021).
[616] Hofer (2019), p. 166
[617] Terman (2016), p. 149. Studies with similar findings: Grossman, Manekin and Margalit (2018), "How Sanctions Affect Public Opinion in Target Countries: Experimental Evidence from Israel".
[618] Fortier (2021), "Naming and Shaming and Its Consequences on Civil Conflicts", p. 2.
[619] See Wood (2008), "A Hand upon the Throat of the Nation: Economic Sanctions and State Repression 1976–2001".
[620] See DeMeritt and Courtenay (2019), "Repression Substitution: Shifting Human Rights Violations in Response to UN Naming and Shaming".
[621] Terman (2016), p. 147-148.
[622] Terman (2016), p. 148.

# 6. Future Prospects

This chapter answers the research question:
According to the literature, what international developments relevant to the five policy priorities are expected to take place *in the next five to ten years*?

Main findings:

- Renegotiation or "collapse" of multilateralism**.** The current weakening of the multilateral order continues, resulting in the collapse of multilateral institutions and the formation of a "renegotiated" international legal order.
- Nuclear proliferation. With US hegemony eroding, the former barriers to proliferation will continue to decrease. In addition, there is a growing divergence between the approach to nuclear non-proliferation by nuclear and non-nuclear states that will need to be bridged. Moreover, new technological developments come with a great risk of destabilizing the current nuclear order.
- The development of new weapons. Chemical, biological, radiological and nuclear weapons (CBRN-weapons) significantly increase a global "risk of escalation". In the long term, new weapons of mass destruction are forecasted as top critical threat. Especially so in case of uncontrolled proliferation of these weapons amongst non-state actors.
- The multiplication of adverse effects of technology**.** In the short term, this introduces insecurities in terms of a risk of cybersecurity failure. In the medium term, reports indicate a "technology governance failure", understood as a lack of a global regulatory framework for the use of digital infrastructures. In the longer term, this introduces threats of digital power concentration with related dangers for private sector accountability and oversight, access to public resources, privacy and freedom of speech.
- Climate action "failure" is identified as *the* long-term risk. Current projections reveal a most probable "collapse" of the global economy, a breakdown of global trade, resource scarcities, resulting in the engagement of major powers resorting to military means to secure food, water and energy supplies for their populations. The darkest scenarios even precipitate a significant danger of escalation if new weapons, including nuclear weapons, are resorted to.

# 6. Introduction

The current developments covered in this report will to a large extent continue to challenge the international legal order in the future. Close to all reports on future assessments put large focus on the COVID-19 pandemic, for example observed as, "feeding a growing sense of a looming era of global turbulence".[623] They point out how the pandemic has affected and shaped societal, economic and political structures in the past two years, assess its aftermath, and anticipate long-term effects of this global crisis. The fact that the pandemic "has revealed the weak nodes and tenuous ties threading through the international system" will potentially cause a ripple effect of developments and sheds light on the general trends in global affairs.[624] Next to impacting global health, COVID-19 has affected and will affect not only the "global economy, but the relationship between countries and the way people look at international cooperation […]". [625] Nevertheless, although the contours of new global structures and challenges are becoming increasingly clear, uncertainty about what will ultimately become reality remains.

The following section describes five major challenges that the international order is projected to face over the next five to ten years. These are: the renegotiation of multilateralism, nuclear proliferation and new weapons, adverse effects of technological developments including cyberattacks and issues pertaining to cyber security, and finally climate "failure".[626]

## 6.1 Renegotiation of multilateralism

The renegotiation of multilateralism, or even "collapse" of multilateral institutions is indicated as future "megatrend" and/or "threat" that dominates the international order in the next five to ten years.[627] As elaborated in chapter 3 of this report, the crisis of multilateralism is already ongoing. However, these challenges will prevail as further tensions arise.[628] In the long term, this trend will develop into the "[d]issolution of global multilateral institutions established to resolve economic, environmental, geopolitical and/or humanitarian crises with regional or global implications: border disputes, environmental commitments, migration crises, health emergencies, trade disputes (…)".[629] The long-term consequences of this will be felt in the international order, not least in the economic realm.

In the best-case scenario, the world will be characterized by multipolarity with limited multilateralism: there would still be cooperation where there is strong interest among the great powers or across

[623] Albert (2020), "Beyond continuationism: Climate change, economic growth, and the future of world (dis)order", p. 1; See also World Economic Forum (2021), "Global Risks Report 2021", p. 7; Center for Global Development (2020), "Will the COVID-19 pandemic reshape the future of international development cooperation?", https://www.cgdev.org/event/will-covid-19-pandemic-reshape-future-international-development-cooperation; Thompson et al (2021) argued that COVID-19 has "accelerated, exacerbated, or catalyzed" each of the megatrends covered in the report (p. 131).
[624] World Economic Forum (2021), p. 53.
[625] Center for Global Development (2020), "Will the COVID-19 pandemic reshape the future of international development cooperation?", https://www.cgdev.org/event/will-covid-19-pandemic-reshape-future-international-development-cooperation; Barthe-Dejean (2021), "Shifting paradigms: Regionalisation and the post-COVID-19 risk matrix".
[626] See Ministerie van Defensie (2020), "Defensievisie 2035: Vechten voor een Veilige Toekomst", Trendanalyse.
[627] Thompson et al (2021), "Geopolitical Genesis. Strategic Monitor 2020-2021", p. 21.
[628] World Economic Forum (2021), p. 7.
[629] World Economic Forum (2021), p. 88.

regions.[630] "Minilateralism" poses here as both the reason for and reinforced consequence of this trend.[631]

In a less optimistic if more realistic scenario, competition for hegemony between China and the US prevails. "As China's economic, technological, military and political rise continues there will likely be a "seesaw game in the intensification of the Sino–US competition", for example carried out through trade wars.[632]

More specifically, it has been noted that increasing "messy multilateralism" will produce new cooperative struggles with "two realms of interaction between states, markets, and rules governing the global economy: (1) a [statist or nationalist] 'take control' sphere, and (2) a 'multilateral cooperation as we know it' sphere".[633]

However, structural developments do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures will intersect with structure to define the future.[634] As stated above, assessments do not stipulate an absence of multilateralism to come, but rather a negotiated form of multilateralism "that rolls back previous dictates of the global economy".[635]

## 6.2 Nuclear Proliferation

Assessments of future international challenges state that the trend of an end to US domination will affect the general status quo of nuclear proliferation. As such, with a potentially crumbling American hegemony, barriers to proliferation will increasingly erode.[636] In combination with a "concurrent rise of a more competitive security environment, particularly among great powers" there will be increased "pressures on countries to seek nuclear weapons or related capabilities as a hedge" while the US will likely lose its "ability to effectively wield the traditional 'carrots and sticks' of nonproliferation and counter proliferation policy".[637]

At the end of January 2021, the Science and Security Board of the Bulletin of the Atomic Scientists deemed that the current nuclear threat "was the highest it has ever been since the start of the atomic age".[638] Next to this, the fact that former US President Donald Trump (and others) "conducted foreign

[630] Kempe and Mirtchev (2021), "Global Risks 2035: The Search for New Normal", p. iv.
[631] Malamud and Viola (2020), "Multipolarity is in, multilateralism out: Rising minilateralism and the downgrading of regionalism", In: *Regionalism Under Stress* (Routledge).
Dai (2020), "Challenges to the International Institutional Order`'.
[632] Kim (2019), "A real driver of US–China trade conflict: The Sino–US competition for global hegemony and its implications for the future", p. 37.
[633] Conley (2021), "The Future of the International System. Messy Multilateralism, Networked Technology, and Pioneering Innovation", (Center for Strategic and International Studies), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/210826_Conley_Future_InternationalSystem_0.pdf?mCXs15QmxZARfviNyMmLTWyrqvhrjffy, p. 4.
[634] Ankersen and Sidhu (2021), The Future of Global Affairs (Palgrave Macmillan), p. 23.
[635] Conley (2021), p. 4
[636] Brewer (2020), "Toward a More Proliferated World? The Geopolitical Forces that Will Shape the Spread of Nuclear Weapons", (Center for Strategic and International Studies), https://www.armscontrol.org/act/2019-04/features/future-nuclear-order.
[637] Brewer (2020); Mehta and Whitlark (2021), "Nuclear Proliferation: The Next Wave in 2020", In *Oxford Research Encyclopedia of Politics*.
[638] Pelopidas and Therme (2021), "The Nuclear Weapons Challenges of 2021", (Sciences Po Center for International Studies), https://www.sciencespo.fr/ceri/en/content/nuclear-weapons-challenges-2021.

policy and even issued nuclear threats through Twitter"[639] reflects a changing nuclear environment. Thus, nuclear proliferation and vulnerability are integral challenges in the years to come, bringing the issue back "to the heart of diplomacy and very long-term defense".[640] More specifically, in the context of increasing tensions between major powers and the collapse of the Intermediate-Range Nuclear Forces Treaty as well as the failure to reach other nuclear reductions agreements, have made observers "skeptical regarding the prospects, or indeed wisdom, of nuclear disarmament".[641]

Tensions have risen and will likely continue to rise between states purporting non-proliferation and nuclear powers. For example, many states consider the Russian and US' plans to modernize their nuclear arsenals, to go against the Nuclear Nonproliferation Treaty (NPT), which entails an obligation to negotiate towards disarmament.[642] The Arms Control Association states that "[w]ith one side [non-proliferation] viewing nuclear weapons as inherently immoral and the other [nuclear powers] seeing nuclear deterrence as a way to maintain security for itself and its allies there appears to be little space to bridge this divide until the nuclear possessor states move toward nuclear reductions and disarmament".[643]

This "growing divergence of preferences" is striking.[644] In January 2021, the Treaty on the Prohibition of Nuclear Weapons (TPNW) came into force, with currently 84 signatories.[645] Its supporters, mainly from Africa, Central and South America, Asia, and Oceania, "push for the abolition of nuclear weapons and an unconditional rejection of nuclear deterrence".[646] At the same time, China, India, and Russia with an unprecedented joint total of around 6760 nuclear warheads, currently make up slightly more than half of the estimated global arsenals.[647] In addition, India, Israel, and Pakistan, which own 156, 90 and 165 nuclear warheads respectively, never joined the NPT.[648] It is therefore evident that these states will need to be included in the negotiation and establishment of a renewed nonproliferation order.[649]

### 6.3 New Weapons

In the context of shifting global power dynamics, together with fast scientific and technological advances, the proliferation of tactical, ("small-scale") chemical, biological, radiological and nuclear (CBRN-)weapons increase a global "risk of escalation".[650] In the long term, new weapons of mass

[639] Futter (2021), "Future Nuclear Challenges", In: *The Politics of Nuclear Weapons* (Springer International Publishing), p. 259

[640] Pelopidas and Therme, C. (2021); Koch (2020), "Extended deterrence and the future of the nuclear nonproliferation treaty".

[641] Kulesa (2021), "Reinventing Nuclear Disarmament and Nonproliferation as Cooperative Endeavors', (Council of Foreign Relations), https://www.cfr.org/report/reinventing-nuclear-disarmament-and-nonproliferation-cooperative-endeavors.

[642] Davis Gibbons (2019), "The Future of the Nuclear Order", (Arms Control Association), https://www.armscontrol.org/act/2019-04/features/future-nuclear-order.

[643] Davis Gibbons (2019); Kulesa (2021).

[644] Barnum and Lo (2020), "Is the NPT unraveling? Evidence from text analysis of review conference statements", p. 740.

[645] Kulesa (2021).

[646] Kulesa (2021).

[647] Davis Gibbons (2019); Arms Control Association (2021), "Nuclear Weapons: Who Has What at a Glance", https://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat.

[648] Arms Control Association (2021).

[649] Davis Gibbons (2019); Kane and Mayhew (2020), "Global Trends Analysis: The Future of Nuclear Arms Control: Time for an Update"; Futter, A. (2021), "Explaining the Nuclear Challenges Posed By Emerging and Disruptive Technology: A Primer for European Policymakers and Professionals", p. 258.

[650] Ministerie van Defensie (2020), "Groeiende technologische mogelijkheden", (no page number).

destruction are forecasted as “top critical threat”[651] that results in “loss of life, destruction and/or international crises”.[652] This threat exists especially in case of uncontrolled proliferation of these weapons amongst non-state actors.[653]

The easier these weapons become of use (or misuse), the more individuals and small groups will be capable of causing mass harm.[654] It is especially this vulnerability that "leads to new fears”.[655] Faster, more precise weapons shorten reaction times. These weapons can moreover put "pressure on the concept of meaningful human control”.[656] Further, the proliferation of (autonomous) aerial weapons “may be conducive to an expansion of targeted killings”.[657] This weakens “long-standing norms regulating the use of force, including in interstate scenarios”.[658] At the same time, they create tension and a need for new legal frameworks and limitations.

In the context of the proliferation of unmanned vehicles, the technological advantage of the US will contribute to an unwillingness or even blockage of articulating a new set of usage rules that may undercut US tactical advantages.[659] For example, there are currently no special international rules in place for the use of unmanned drones. Moreover, a large number of drones are used and sold by private industry rather than government.[660] Thus, there will be a growing need for government and military experts to understand these developments and to negotiate not only at state level, but also with private sectors.[661]

Overall, drone regulation is currently headed by the US, if at all. The absence of strong institutions and clear rules on drones is assumed to accelerate the spread of armed drone capability, which will forever change modern war – especially given its usage of state and non-state militias.[662] Yet, rather than regulating the use of these weapons and controlling their proliferation, "there is now a global race to match the US’ drone capability”.[663] This development is further enabled through the argument that drone technologies simultaneously offer peaceful and beneficial uses, further supporting the continuation of their development.[664]

Additionally, it has been noted that over 100 states now have capabilities to launch cyber-attacks.[665] The risks of miscalculations, as well as “an absence of predictability and transparency” will increase.[666]

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[651] World Economic Forum (2021), p. 57.
[652] World Economic Forum (2021), p. 88.
[653] Haugstvedt and Jacobsen (2020), “Taking Fourth-Generation Warfare to the Skies? An Empirical Exploration of Non-State Actors’ Use of Weaponized Unmanned Aerial Vehicles (UAVs—‘Drones’)”; World Economic Forum (2021); Koblentz (2020), “Emerging Technologies and the Future of CBRN Terrorism”, p. 178, 190.
[654] World Economic Forum (2021), p. 5.
[655] World Economic Forum (2021); Koblentz (2020), p. 178; Ministerie van Defensie (2020).
[656] Ministerie van Defensie (2020), p. 48. See also: Ekelhof (2019), “Moving beyond semantics on autonomous weapons: Meaningful human control in operation”.
[657] Haas and Fischer (2017), “The evolution of targeted killing practices: Autonomous weapons, future conflict, and the international order”. See Saurer (2021), “Autonomy in weapons systems: playing catch up with technology”, https://blogs.icrc.org/law-and-policy/2021/09/29/autonomous-weapons-systems-technology/.
[658] Haas and Fischer (2017).
[659] Ayton-Shenker (2018). *A New Global Agenda: Priorities, Practices, and Pathways of the International Community* (Rowman and Littlefield), p. 36.
[660] Kane and Mayhew (2020), p. 21.
[661] Kane and Mayhew (2020), p. 21.
[662] Haugstvedt and Jacobsen (2020); World Economic Forum (2021).
[663] Ayton-Shenker (2018), p. 36.
[664] Ayton-Shenker (2018), p. 36
[665] Levine (2017), “Russia Tops List of 100 Countries”.
[666] Kane and Mayhew (2020), p. 16.

This will be further exacerbated by non-state actors gaining more dangerous cyberattack capabilities, with methods becoming more sophisticated.[667]

While most hacks so far have failed their objective in targets such as hospitals, firms, and electricity providers, it is asserted that "it is only a matter of time until they succeed".[668] Thus far, attempts to establish regulation in the cyber field have been unsuccessful. Nevertheless, it can be assumed that over the coming years, the restrictions of cyberattacks that currently only have a basis in soft law, will be included in the domestic criminal law systems of states, at the very least.[669]

### 6.4 Adverse Technological Effects

Technological breakthroughs have transformed almost every aspect of today's society. Among the most well-known are: Artificial Intelligence (AI), and associated group of digital technologies like the Internet of Things (IoT) and Big Data, blockchain, quantum computing, advanced robotics (etc.). Yet, reviewing the impact of digital technologies on International Relations and Security still deals with "*potential futures*, rather than actual scenarios" [emphasis in text].[670]

With great advances in smart and interconnected systems also comes "critical superiority" and "projection of power".[671] This increases dependency on technology, and with that there comes a heightened risk for individuals and institutions of losing their digital autonomy.[672] In the short term (0-2 years), this introduces insecurities in terms of a risk of cybersecurity failure (by the World Economic Forum defined as "[b]usiness, government and household cybersecurity infrastructure and/or measures are outstripped or rendered obsolete by increasingly sophisticated and frequent cybercrimes, resulting in economic disruption, financial loss, geopolitical tensions and/ or social instability", and indicating a "clear present danger").[673] In the medium term, reports indicate a "technology governance failure", understood as a "lack of globally accepted frameworks, institutions or regulations for the use of critical digital networks and technology, as a result of different states or groups of states adopting incompatible digital infrastructure, protocols and/or standards".[674] In the longer term, this introduces threats of digital power concentration, which suggests the "concentration of critical digital assets, capabilities and/or knowledge by a reduced number of individuals, businesses or states, resulting in discretionary pricing mechanisms, lack of impartial oversight, unequal private and/or public access".[675]

Over the next five years, it is noted that digital power concentration could translate into the confinement of "political and societal discourse to a limited number of platforms that have the capability of filtering information and further reducing the already limited agency of individuals and organizations over how their data are used".[676] In more authoritarian contexts, "a distinct threat remains that governments will attempt to take over major platforms and service providers—thus consolidating their power to restrict internet access, censor information and cut communications".[677]

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[667] World Economic Forum, "Middle Power Morass: Navigating Global Divides", https://reports.weforum.org/global-risks-report-2021/middle-power-morass-navigating-global-divides/.
[668] World Economic Forum, "Middle Power Morass: Navigating Global Divides",
[669] Alter (2018), p. 33.
[670] Danilin (2018), "Emerging Technologies And Their Impact On International Relations And Global Security" (Hoover Institute) https://www.hoover.org/research/emerging-technologies-and-their-impact-international-relations-and-global-security.
[671] Danilin (2018).
[672] World Economic Forum (2021), p. 33.
[673] World Economic Forum (2021), p. 87.
[674] World Economic Forum (2021), p. 33.
[675] World Economic Forum (2021), p. 33, 87.
[676] World Economic Forum (2021), p. 33.
[677] World Economic Forum (2021), p. 35.

As a result, it is observed that "[p]athways to future economic and societal gains under these conditions would be severely imperiled". As such, privacy concerns and the security of our data and digital identities will remain paramount by 2030.[678]

### 6.5 Climate Action Failure

All reports on future assessments state climate failure as *the* long-term risk.[679] This mid to long-term development reaches far beyond the current effects of climate change on the international legal order as discussed in chapter 3.

Current projections by climate change scientists reveal a most probable "collapse" of the "global economic and financial architecture" that is based on assumptions of continuous growth.[680] This precipitates "a breakdown of global trade and exacerbating resource scarcities in import-dependent states".[681] In this context, "great powers (especially the US and China) may engage in 'predatory militarism' to secure food, water and energy supplies for their populations, and there is a significant danger that inter-state conflict over dwindling resources could escalate into a nuclear exchange".[682] Predictions on a total amount of climate refugees reach from 40 million to 1 billion by 2050.[683] Massive programs of resettlements will have to be put in place to relocate entire states to habitable regions (e.g., Maldives, parts of Bangladesh).[684]

Transformation and development of efficient response and adaptation mechanisms currently dominantly take place at local levels. At times, leading cities and state legislatures adopt "the policies that heads of state may, for political reasons, shun".[685] In the context of continuing limited and fragmented global cooperation, yet, climate change requires global action. The implications of a three- or four-degree temperature rise (instead of the aimed at 1.5 degrees) for the international order will prompt an "unprecedented food insecurity"[686], "intra-state conflict" and amplifying "geopolitical tension across the international system".[687] This makes climate action failure *the* challenge to address in the multipolar international legal order.

[678] Criekemans et al (2021), "Security environment 2021-2030"; World Economic Forum (2021), p. 66.
[679] World Economic Forum (2021), p. 7; Bradshaw et al. (2021), "Underestimating the challenges of avoiding a ghastly future"; Ministerie van Defensie (2020). The Club of Rome (2021), "Anchoring Transformation: Policy Anchors for Ensuring A New European Social-Economic Paradigm", p. 4.
[680] Albert (2020), "Beyond continuationism: climate change, economic growth, and the future of world (dis)order", p. 16; Club of Rome (2021), p. 3.
[681] Albert (2020), p. 15-16.
[682] Albert (2020), p. 16.
[683] Albert (2020), p. 16.
[684] Albert (2020), p. 16.
[685] Alter (2018), p. 34.
[686] Albert (2020), p. 16.
[687] Ministerie van Defensie (2020), "Dreigingsanalysie" (no page number).

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## 5. Initiatives Related to Peace and Security

### 5.1 Alternative Accountability Mechanisms

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