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Europe's Externalisation of Asylum Procedures: Is a Legal and Ethical Alternative Possible?

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ABSTRACT

This article undertakes a critical interrogation of the externalisation of asylum procedures by European states, with particular emphasis on the EU-Turkey Agreement as a case study, to determine the feasibility of a juridically and ethically defensible model of externalisation. While externalisation is not inherently a violation of international human rights law (IHRL), its implementation often leads to breaches of IHRL and international refugee legislation, including the principle of non-refoulement and the rights to life and protection from torture or inhuman treatment. The article first assesses the legal accountability issues that arise from states engaging in externalisation, demonstrating how current practices frequently contravene international obligations. It then explores legal alternatives, proposing a framework for externalisation that aligns with IHRL, including robust procedural safeguards and good faith commitments. However, it contends that mere legal compliance remains an insufficient condition for the realisation of an ethically defensible approach. The article highlights how dominant migration narratives, rooted in neocolonial and security-driven discourses, perpetuate exclusionary policies that marginalise people on the move. In a modest but novel contribution, this article posits that for any form of ethical externalisation, a fundamental shift towards decolonial and intersectional narratives is necessary. By reframing migration not as a crisis to be managed but as a shared global responsibility, states may move towards legal and policy configurations that transcend reductive narratives and categorisations, embracing a praxis that upholds both legal obligations and moral imperatives.

Keywords:
Border externalisation, Extraterritorial obligations, Refugees, Human Rights

I. INTRODUCTION

In 2015 the former prime minister of the United Kingdom, David Cameron, forewarned of 'a swarm of people coming across the Mediterranean' (BBC News, 2015) [1]. Ostensibly the comment was prompted by the unprecedented rise in people on the move attempting to enter the European Union, termed the summer of migration or Europe's so-called 'refugee crisis' (Kingsley, 2016) [2]. In 2015 alone, the United Nations Refugee Agency (UNHCR) reported that over one million people on the move fled to Europe by sea (Clayton and Holland, 2015) [3] in the largest exodus to Europe in decades. The notorious practice of externalisation has emerged as Europe's favoured response to the so-called 'crisis' (Spijkerboer, 2021) [4]. The term externalisation first gained prominence in academic research in the early 2000s (Tan, 2021) [5]. However, despite its abundant use, the absence of a formal definition of externalisation in international law has resulted in the concept being ambiguously defined across border externalisation literature (Tan, 2021) [6]. Recognising the importance of conceptual clarity, the Refugee Law Initiative has provided a salient contribution to this end (Cantor et al., 2022) [7]. Consequently, this paper will adopt the following definition of externalisation: 'the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory' (Cantor et al., 2022) [8]. Exemplary of this practice is the EU-Turkey Agreement, adopted in March 2016, enduring until today, albeit amongst political and legal turmoil (European Parliament, 2016; Gkliati, 2017) [9]. Yet numbers fleeing to the continent continue to rise, which demands an adequate and ethical response. The prevailing literature perceives the EU-Turkey Agreement as characteristic of externalisation of the asylum procedure. That being detrimental to those on the move, attempting to keep them at the margins of Europe (Heyer, 2022) [10] and in tension with international human rights law (IHRL) (Peers and Roman, 2016; Rodrigues, 2016; Refugee Law Initiative, 2022) [11]. Nonetheless, the practice of externalisation is not prima facie a violation of IHRL (Cantor et al., 2022) [12]. Although, extensive legal discourse addresses issues of accountability and responsibility for human rights violations that flow from externalisation agreements,(Ovacık, Ineli-Ciger, and Ulusoy, 2024) [13] and has begun to bridge legal and ethical concerns, (Moreno-Lax and Lemberg-Pedersen, 2019) [14] a deficit remains in the wider literature considering the inverse. That being, what externalisation laws, policies and practices ought to look like to comply with international law; perhaps out of fear that it would encourage practices that emulate existing procedure. This article will seek to fill this gap in the literature with a socio-legal approach, contending that a legal and ethical alternative is possible under limited circumstances that radically address neocolonial narratives underlying externalisation through a decolonial and intersection lens. Therefore, the aims of this article are threefold, seeking to establish through a socio-legal analysis and case study of the EU-Turkey Agreement:

(i) that although not prima facie a violation of IHRL the form and process of externalisation of asylum procedures is frequently a violation of IHRL;

(ii) proposing requirements for a procedure in compliance with standards of international law;

(iii) that due to the current narrative underpinnings, it is characteristic of these measures to be unethical and therefore a reframing of the political and legal narratives offers the potential for an ethical alternative.

In achieving this, the article will form three sections. First, a summary of the status of externalisation of the asylum procedure under IHRL will be provided. Thereafter, the EU-Turkey Agreement will be examined, analysing how the agreement violates IHRL under the principles of non-refoulement, the right to life and the right to not be subject to torture or cruel and inhuman treatment. Finally, as a novel contribution, a legal alternative to the EU-Turkey deal will be proposed, advocating that whether this legal alternative is ethical remains contingent upon a reframing of the dominant narratives on externalisation. These are subsequently crystallised into law, ultimately restricting the circumstances under which such procedures can be deployed drastically.

II. STATE RESPONSIBILITY FOR EXTERNALISATION IN INTERNATIONAL HUMAN RIGHTS LAW

In order to propose a legal and ethical alternative, it is first necessary to broadly establish state responsibility for violations of IHRL rights that arise from externalisation laws, policies and practices. As established, measures of externalisation are not prima facie a violation of IHRL (Cantor et al, 2022) [15]. Nonetheless, primary and secondary rules of international law [16] govern the legality of the form and process of measures that seek to externalise the asylum system from one state's territory to another (Refugee Law Intiative, 2022) [17]. That being, the way in which a state chooses or is compelled to abide by such measures. Usually,

a state cannot be discharged of obligations under international law solely due to the fact that externalisation measures are wholly or partly implemented extra-territorially of a state (Refugee Law Intiative, 2022) [18]. Consequently, states that externalise their asylum procedure to a third-party state can breach international obligations jointly with that state to which the process has been transferred (Refugee Law Intiative, 2022) [19]. Thus, states participating in externalisation practices are legally accountable for their actions as dictated by IHRL standards, before international, regional and domestic judicial mechanisms (Refugee Law Intiative, 2022) [20]. On this basis, we may examine the case study of the EU-Turkey Agreement in further detail.

III. THE EU-TURKEY AGREEMENT

A) Defining the Agreement

On 18 March 2016, the Turkish government and European Union Member states reached an agreement termed the 'statement of cooperation'. The agreement followed a series of meetings with Türkiye beginning in November 2015 (European Parliament, 2016) [21]. The EU proclaimed motivations of breaking 'the business model of smugglers... [offering] migrants an alternative to putting their lives at risk,' ultimately seeking to halt the flow of 'irregular migration' via Türkiye to Europe (European Parliament, 2016) [22]. As such, the following was principally agreed to:

All new irregular migrants crossing from Türkiye to the Greek islands as of 20th March 2016 would be returned to Türkiye;

Türkiye would take any necessary measures to prevent new sea or land routes for irregular migration opening from Türkiye to the EU;

For every Syrian being returned to Türkiye from the Greek islands, another Syrian would be resettled to the EU (European Parliament, 2016) [23].

As to whether the EU-Turkey Statement amounts to a treaty, which can then itself be subject of legal scrutiny, is a matter of contention (Idriz, 2017) [24]. In a case brought against the European Council in the Court of Justice of the EU (CJEU), it was claimed that the Statement was 'not intended to produce legally binding effects,' nor constitute 'an agreement or a treaty,' (NF v. European Council, 2017) [25] merely constituting a 'political arrangement.' (*NF v. European Council*, 2017) [26]. Nevertheless, as previously contended, where the form and process of measures under the EU-Turkey agreement violate instruments of IHRL, states are subject to legal obligations. Hence, it seems prudent to examine the form and process of the EU-Turkey Agreement against instruments of IHRL and states' obligations thereof enabling suggestions for a legal alternative.

B) How the Agreement Violates International Human Rights Law

i) Non-refoulement

Both states to which the EU-Turkey Agreement pertains to, Greece and Türkiye, are bound by the principle of non-refoulement. The Refugee Convention, which has been ratified by 151 states including Türkiye and all EU states, enshrines the principle of non-refoulement. That being, the guarantee against return to a country where a refugee faces a well-founded fear of persecution [27]. The principle is considered to have acquired the status of customary international law (Costello and Foster, 2016) [28]. Violations of the principle can occur either directly or indirectly. For example, direct refoulement occurs when a state sends an asylum claimant or refugee back to face persecution. Indirect refoulement occurs when a state sends a refugee to a country where the refugee will not be properly processed or face onward removal to a country where they face persecution (*T.I. v United Kingdom*, 2009) [29]. In application of the principle, UNHCR (2007) has asserted that 'states are required to grant individuals seeking asylum access to their territory and to fair and efficient asylum procedures,' [30]. Furthermore, in Europe the principle has been enshrined into regional law through various instruments. For example, the Charter of Fundamental Rights of the EU (2009), to which Greece is bound [31]. Although the EU is not a state party to the Refugee Convention, the Treaty of the Functioning of the European Union (TFEU) demands that EU member states must abide by the Refugee Convention. Thus, ensuring its laws are consistent with the principle of non-refoulement [32]. Finally, Article 13 European Convention on Human Rights (ECHR), to which both Greece and Türkiye are bound, guarantees the right to an effective remedy and requires the state to offer asylum seekers the opportunity to make a claim for asylum and

have that claim considered (*M.S.S. v. Belgium and Greece*, 2011) [33]. Hence, both Greece and Türkiye are subject to comply with the principle of non-refoulement under various instruments of IHRL.

In considering how the EU-Turkey Agreement violates the principle of non-refoulement, elements of both direct and indirect refoulement have been reported. For example, it may be contended that asylum seekers and refugees are subject to indirect refoulement as they are unable to adequately make an application for international protection under the Agreement. The Turkish asylum system remains in its infancy. In 2013, Türkiye implemented its first asylum law, the Law on Foreigners and International Protection (LFIP) (2014) [34]. The law incorporates many EU asylum law models and procedures and was perceived as a key achievement of the 'Europeanisation' process of the Turkish asylum system (Biehl, 2016) [35]. However, significant concerns persist of a rift between de jure legislation and de facto implementation. This has been corroborated by a case brought before the Greek Asylum Appeals Committee where it was noted that the principle of non-refoulement was systematically violated in Türkiye, evoking violent incidents of rejection at the borders and mass deportations to Syria (Gkliati, 2017) [36]. Moreover, Amnesty International have further substantiated these concerns citing an 'absence of comprehensive, publicly available data available,' (Amnesty International, 2016) [37] on the implementation of Türkiye's asylum system. This 'information gap' is further compounded by the authorities' refusal to provide information upon request (Amnesty International, 2016) [38]. Furthermore, numerous concerns have emerged regarding the quality of decision making by the Turkish authorities. LFIP demands that any refusal of international protection must include 'material reasons and legal ground,' for the refusal [39]. However, the 30,000 decisions made in April 2016 raise questions over their quality (Amnesty International, 2016) [40]. Concerningly, Refugee Rights Türkiye stated that as of 2021, no negative decisions received by international protection applicants and seen by the NGO elucidated on the grounds for their rejection (Refugee Rights Turkey, 2015) [41]. Hence, significant evidence indicates that Greece's return of individuals to Türkiye undertaken to fulfil the EU-Turkey Agreement, along with measures taken by Türkiye at their borders, are a violation of the principle of non-refoulement. This is due to inadequate or non-access or to the asylum procedure, leading to deportation to a place where people are subject to actual or a well-founded fear of persecution.

Furthermore, there is reason to believe that the Agreement poses a threat of direct refoulement due to its false equivalency of Türkiye as a 'safe third country'. In the past two decades, the European Court of Human Rights (ECtHR) has established grave human rights violations pertaining to the situation of migrants and asylum seekers in Türkiye (*Jabari v Turkey*, 2000) [42]. The ECtHR stressed the severe condition of asylum seekers in detention and determined in the landmark decision, Abdolkhani and Karimnia v Turkey, finding no meaningful domestic juridical instruments or safeguards for asylum seekers and other migrants in Türkiye (*Abdolkhani and Karimnia v. Turkey*, 2009) [43]. The concerns that plague the EU-Turkey Agreement in relation to refoulement are not unique and have been observed in the jurisprudence of other jurisdictions. The UK Supreme Court in its judgement concerning the Safety of Rwanda Bill provided further insight into the concept of a 'safe third country' against standards of IHRL. The policy was ruled unlawful and in contravention with the ECHR as there were substantial grounds for believing that people would be at risk of refoulement, in being returned to a country where they would face persecution or inhuman or degrading treatment. Moreover, the Supreme Court noted that refoulement is prohibited by the Refugee Convention, the UN Convention Against Torture (UNCAT), and Article 3 [44] ECHR. Parallels can be drawn with the EU-Turkey Agreement in their mutual false equivalency of what constitutes a 'safe third country'. Therefore, the EU-Turkey Agreement, through its implementation commits direct and indirect refoulment, and is exemplary of how externalisation of the asylum procedure violates IHRL.

ii) The Right to Life and the Right to not be subject to Torture or Inhuman and Degrading Treatment

There are various instruments of IHRL binding Greece and Türkiye, which provide the right to life and to not be subject to torture or inhuman and degrading treatment. The right is closely related to the principle of refoulement. The ECHR protects these rights under Articles 2 and 3 respectively. Moreover, the ECtHR has asserted that the protection of individuals removed from a country to face violations of these rights, is neither 'practical nor effective' (*Airey v. Ireland*, 1979) [45]. Furthermore, UNCAT provides that a person cannot be removed to a state where there are substantial grounds for believing they would be in danger of being subjected to torture (United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984) [46]. This obligation further entails that the person at risk should never be deported to somewhere from which they may subsequently face deportation to a third state where they would

be in danger of being subject to torture, meaning onward refoulement (Committee Against Torture, 2016) [47]. The International Covenant on Civil and Political Rights (ICCPR), also contains protections equivalent to Articles 2 and 3 of the ECHR. These have been interpreted to include 'an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm.' (United Nations Human Rights Committee, 2004) [48]. Therefore, both Greece and Türkiye are bound to respect the right to life and to not subject people to torture, inhuman or degrading treatment either in their own territory or through onward refoulement.

The application of the EU-Turkey Agreement, by Greece and Türkiye arguably contravenes these rights. For example, during the procedure of removing asylum seekers and refugees to Türkiye, both Greek and Turkish authorities have been widely documented to engage in illegal pushbacks (Amnesty International, 2022) [49]. The practice has been documented inter alia by UNHCR, IOM, the UN Special Rapporteur on the human rights of migrants and the Council of Europe Commissioner (Human Rights Watch, 2023) [50]. The Pylos shipwreck, which resulted in the deaths of over 600 people attempting to seek asylum in Greece, was attributed in part to the actions and omissions of the Hellenic Coast Guard by multiple civil society organisations including Human Rights Watch (Human Rights Watch, 2023) [51]. Furthermore, the practice has been corroborated by IHRL jurisprudence. In the judgement of *Safi and Others v. Greece*, the ECtHR found violations of Articles 2 and 3 of the ECHR by Greece in the case of a shipwreck which occurred during an alleged pushback to Türkiye, resulting in the death of 11 people [52]. The UN Special Rapporteur on the human rights of migrants has further substantiated 'recurrent and consistent reports coming from Greece's land and sea borders with Türkiye,' (UNHCR, 2022) [53] asserting that 'violence, ill-treatment and pushbacks continue to be regularly reported…despite repeated calls…to end such practices.' (UNHCR, 2022) [54]. Comparably, concerns have been raised over Italy's plans to externalise their asylum procedure to Albania for those rescued at sea (Amnesty International, 2024) [55]. This portrays a correlation between externalisation of the asylum procedure and the state practice of illegal pushbacks. Therefore, there is substantial evidence that Greece and Türkiye's transfer process under the EU-Turkey Agreement violates the rights to life and freedom from torture or inhuman treatment.

Furthermore, conditions in Türkiye for refugees and asylum seekers may amount to torture or cruel, inhuman and degrading treatment. The European Council on Refugees and Exiles (ECRE) has reported migrants being tortured by law enforcement offices (ECRE, 2023) [56]. Additionally, Human Rights Watch reported the torture of a group of eight Syrians who sought to cross into Türkiye of which, one man and boy died with six others seriously injured (Human Rights Watch, 2023) [57]. Greek jurisprudence has upheld evidence of this practice. In a case brought to the Greek Appeals Committee, recent NGO reports provided adequate proof of torture and inhuman treatment (and even deaths) of asylum seekers in Türkiye. These reports were given credence [58]. Therefore, whilst Türkiye independently violates UNCAT and the ICCPR, Greece likewise violates Articles 2 and 3 of the ECHR by removing people to Türkiye, where protection of these rights are neither 'practical' nor 'effective,' [59] correspondingly deviating from the principle of non-refoulement. It ought to be qualified that the way in which the EU-Turkey produces tension with international law is not unique, but comparable to most measures of externalisation. Beyond the EU-Turkey Agreement, the ECtHR have stated that 'too often, externalisation is a thinly disguised attempt to ensure that the human rights violations… deemed necessary for effective deterrence and prevention of migration movements happen on another country's territory, thus avoiding the scrutiny of European human rights guardians.' (Raimondi et. al., 2017) [60]. As will be explored, this can be attributed to neocolonial narratives underpinning measures which ought to be reframed for any prospect of an ethical alternative to the current reality.

IV. LOOKING FORWARD: LEGAL AND ETHICAL ALTERNATIVES

A) Legal Alternatives

The above analysis identifies, through the lens of the EU-Turkey Agreement, that externalisation of the asylum procedure repeatedly falls foul of IHRL. In light of this, this paper seeks to make a novel contribution by ascertaining the characteristics of both a legally compliant and ethical form of externalisation. The notion of a solely legally compliant form of externalisation has been considered in existing literature. First, international agreements regarding third country processing must adequately protect transferee's rights. These must be binding under international law to permit appropriate scrutiny of provisions by relevant democratic and judicial mechanisms. Their content should detail applicable substantive and procedural standards and

include effective monitoring mechanisms ensuring legal rights derived from IHRL are respected and provide recourse to remedies if not (Raimondi et. al., 2017) [61]. This avoids the initial pitfalls of the EU-Turkey Agreement, which seeks to evade state responsibility and obligations through its ambiguous presentation as a non-binding 'political arrangement.' (*NF v European Council Case*, 2017) [62]. As such, any agreement made must explicitly acknowledge that arrangements to externalise asylum functions remain regulated by applicable rules of IHRL (Refugee Law Initiative, 2022) [63]. Moreover, the first state of reception ought to have a national asylum system to decide asylum claims in their territory, giving proper effect to their obligations to refugees under the Refugee Convention; similarly to avoid any transferral of responsibility (Refugee Law Initiative Declaration on Externalisation and Asylum, 2022) [64]. Any agreement must be contingent upon thorough examination of the human rights record of states party to it. Therefore, resolving some tension with both the principle of refoulement and IHRL obligations which are routinely violated under the EU-Turkey Agreement.

Furthermore (as advocated by Refugee Law Initiative), to ensure compliance with IHRL obligations, there ought to be an explicit procedure pursuant to any such agreement: for individual assessment in the first state of reception, for every asylum seeker, prior to any transfer to another territory. First, an individual assessment of legality of the individual transfer should be completed considering peripheral international law obligations (Refugee Law Initiative Declaration on Externalisation and Asylum, 2022) [65]. This ought to occur in the transferring state to avoid the potential for illegal pushbacks where someone's life or freedom would be in danger against the principle of non-refoulement (Refugee Law Initiative Declaration on Externalisation and Asylum, 2022) [66]. In compliance with IHRL, this individual pre-transfer procedure must assess the s ubsequent elements:

i) That there is no danger of direct or indirect refoulement ensuing the transfer;

ii) That the receiving state will not breach international human rights or refugee law standards in either the transfer, reception or other arrangements (Refugee Law Initiative Declaration on Externalisation and Asylum, 2022) [67];

iii) That there is a functioning and adequate asylum system in the territory to which they are being transferred;

iv) That there is no legal basis preventing their transfer out of the territory (Refugee Law Initiative Declaration on Externalisation and Asylum, 2022) [68];

v) Examination of the social, political and economic conditions of the receiving territory (Refugee Law Initiative Declaration on Externalisation and Asylum, 2022) [69].

Finally, it is vital for compliance with IHRL that any externalisation of the asylum procedure shall be done in good faith. The principle of good faith, as articulated in Articles 26 and 31 of the VCLT, demands that states respect not only the letter of the law but the spirits of the commitment (Vienna Convention on the Law of Treaties,1969) [70]. Hence, a violation of good faith should not just be considered a direct violation of international law, but continuous acts or omissions that cumulatively diverge from, or nullify, treaty obligations from the wider intentions of the treaty (Kargaran, 2023) [71]. These violations fundamentally undermine the state's capabilities of honouring treaties. The assessment of good faith is an objective one, which focuses on the practical effects of state actions rather than on intentions and motivation (Crawford, 2019) [72]. The Refugee Convention, as established, does not explicitly require states to process asylum seekers within their borders. However, in line with the spirit of the Convention, states should only pursue externalisation when it is a reasonable and proportionate alternative to processing claims within their territory, in accordance with the principles of international human rights law (IHRL) (Crawford, 2019) [73]. Reasons that may come under good faith could be to relieve an excessive burden on a country of first asylum in the context of a mass arrivals (Refugee Law Initiative, 2022) [74]. Therefore, we can see that principles of IHRL suggest that states may legally externalise elements of their asylum procedure to an external state so long as they are conducted under the above requirements and practised in good faith.

B) Ethical Alternatives

While this article does not purport to exhaustively account for the conditions of an 'ethical' model of externalisation, it aims to offer a modest yet novel intervention to existing literature by foregrounding narrative reformulation as a necessary prerequisite for such a pursuit. I will draw upon insights from critical legal and decolonial studies, which argue that externalisation, as practiced by the EU, is both a vestige of colonial legacies and an active mechanism sustaining an ongoing neocolonial project (Reynolds, 2021) [75], seminally

explored by scholars such as Fanon and Mbembe (Fanon, 1963) [76]. Resultingly, externalisation laws, policies and praxis are imbued with neocolonial narratives, stories conveyed through neocolonial discourse, that serve to perpetuate colonial relations of domination and subordination. This section will draw upon new theoretical perspectives to outline that this narrative basis of externalisation leads to incongruence with the principles of IHRL (Xanthopoulou, 2024) [77]. In light of this, the article contends that any attempt to conceptualise an 'ethical' form of externalisation must, at its core, engage with narrative reformulation through a decolonial and intersectional lens (Cappiali and Pacciardi, 2025) [78]. For the purposes of this article, decoloniality can be considered to be an examination of the enduring legacies of colonial and imperial actions on the contemporary geopolitical and sociocultural order (Hooks, 2014) [79]. Intersectionality elucidates the intersections of hegemonic structures and oppression, such as race, gender, sexual orientation and class, demonstrating their co-constitutive role in systems of subordination (Hooks, 2014) [80].

Although the EU-Turkey Agreement claims to 'sav[e] lives' (Reynolds, 2021) [81], critical legal studies discourse has identified that as a measure of externalisation, it is both rooted in, and a continuation of, European imperialism and neocolonial narratives [82]. This is evident in both the text of the EU-Turkey Statement (Casaglia and Pacciardi, 2022) [83] which utilises such language when it claims to 'strengthen cooperation on the migrant crisis' (European Parliament, 2016) [84] and the practice of racialised and gendered border violence that arise in pursuit of the agreement (Sachseder et. al., 2024) [85]. Indeed, the narrative of migration as crisis and emergency intrinsically yields security-oriented bordering practices (Benam, 2011) [86]. Discursive relationships between migration and security support hierarchical categorisation of migrants (Casaglia and Pacciardi, 2022) [87]. This entails the distinction between the vulnerable migrant, forced to flee and exploited by smugglers in need of rescue, against the economic migrant, who is portrayed as ill-intentioned and a danger to Europe (Casaglia and Pacciardi, 2022) [88]. Not only does this premise the acceptability of people on the move as rooted in their deservingness in relation to their degree of vulnerability, but it justifies violence against those who do not fall into the favourable side of such categorisation (Casaglia, 2021) [89]. Reynolds has proposed that such practices are rooted in the neocolonial narrative of emergency, whereby certain types of migration, particularly non-white migrants from ex-colonised groups or nations, are perceived as an existential threat to sovereign nations, a threat which needs to be 'shielded' against (Reynolds, 2021) [90]. Reynolds contends that this narrative is neocolonial in nature as it reinforces ideas of 'them' and 'us', predicated upon the perpetuation of 'white demographic domination in Europe and the exclusionary maintenance of the accumulated wealth which sustains it' (Reynolds, 2021) [91], thus intentionally rousing race-based exclusion of mostly ex-colonised people. Hence, the narrative of emergency present in the agreement inherently evokes legal techniques of subjugation of ex-colonised, racialised and lower-class groups.

This insecurity extends to other vulnerable groups. The notion that the migration-violence nexus has gendered aspects has also been well-explored (Belloni et. al., 2018) [92]. For women, empirical evidence has shown that the unstable environments created by externalisation cause higher levels of sexual violence (Freedman, 2016) [93]. Furthermore, queer people on the move face 'exponentially' higher risks of abuse when they are prevented from leaving transit countries with high levels of homophobia or transphobia or are pushed back to their countries of origin (Liguori, 2019) [94]. Arguably, the effects of coloniality are intrinsically intersectional due to the symbiotic relationships of systems of oppression (Reynolds, 2021; Xanthopoulou, 2024) [95, 96]. Under the emergency rationale, excluding foreigners becomes a righteous exercise over territorial sovereignty, producing mobility inequalities (Mbembe, 2001) [97] and justifying deadly violence at the border that has gendered, racialised and colonial aspects. This necessitates both a decolonial and an intersectional approach as a grounding for 'ethical' externalisation (Cappiali and Pacciardi, 2025) [98].

The violence and accountability deficit that manifest from the EU-Turkey Agreement, as established in the preceding section, lie inescapably at odds with principles of IHRL and international refugee law. Scholars such as Xanthopoulou have drawn on critical legal arguments, such as Reynolds', to argue that the narrative underpinnings of externalisation laws, policies and praxis guarantee persistent incongruence with and derogations from IHRL obligations (Xanthopoulou, 2024) [99]. From this perspective, externalisation of the asylum procedure is 'framed through the analogy of the EU's frontier as a 'shifting border'' and, in doing so, leads to an accountability deficit that is an inevitable corollary of the ideological foundations of externalisation (Xanthopoulou, 2024) [100]. It must be acknowledged, as TWAIL scholars have long done before, that international law itself has colonial underpinnings (Mutua, 2001) [101]. However, as contended by both Balkin, although the law is informed by power, it has a dual role, it can both uphold structures of power and be a recourse to justice and tool for emancipation for marginalised groups (Balkin, 2009) [102]. Although much of the prevailing literature presents any measure of externalisation as intrinsically bound to these narrative origins, I propose that

narrative reformulation of externalisation offers the potential for an 'ethical' model. This imperative demands a paradigmatic shift towards decolonial and intersectional narratives, rooted in the intellectual traditions of decolonial thought, that endeavour not merely to rectify historical injustices but to reconfigure the global legal and political order in a manner that redistributes responsibility equitably among affluent states (Okafor, 2019) [103].

In envisioning a narrative reformulation that can be crystallised into legal frameworks, we can draw upon established decolonial and intersectional approaches. As foregrounded by critical feminist and decolonial theorists, modalities of oppression, are not only historically contingent upon colonial matrices of power but also function in concert to perpetuate asymmetrical hierarchies of control (Hooks, 2014) [104]. These perspectives offer critical tools for dismantling entrenched neocolonial structures and reimagining legal architectures that foreground justice, equity, and historical redress Achiume's conceptualisation of decolonisation 'not as independence but as more equitable interconnection' (Achiume, 2019) [105] offers a foundational premise for this reformulation, one that necessitates a radical interrogation of prevailing power asymmetries and an advocacy for the empowerment and liberation of marginalised groups. Within this framework, Achiume posits, that migration from the Third World itself, can be understood as a form of 'distributive justice' that seeks to remediate the 'failures of formal decolonisation,' (Achiume, 2019) [106].

However, it is important to acknowledge that hegemonic neocolonial narratives that currently permeate externalisation function not to facilitate this corrective notion, but rather to obscure it. These narratives serve to construct and foreground the so-called 'migrant crisis,' obfuscating the deeper structural realities at play. In reality, as Okafor elucidates, what persists is not a crisis of migration but rather a profound 'crisis of solidarity' (Okafor, 2019) [107]. Okafor conceptualises 'de-solidarity' not merely as an absence of solidarity in discourse and praxis, but as a broader epistemic and structural shift wherein solidarity itself is rendered increasingly precarious (Okafor, 2019) [108]. This manifests in the active interrogation, deconstruction, and delegitimisation of solidarity as a normative framework, alongside the systematic dismantling of its institutional and infrastructural embodiments. As Reynolds put this, 'in the European context this has a fundamentally racial contour' (Reynolds, 2021) [109]. The EU-Turkey Agreement is indicative not only of how the externalisation of European borders fails to operate in a fully collaborative way with third states, but also that it seeks to outsource the responsibilities of IHRL from wealthy European states to less wealthy non-European states (Linekar and Achilli, 2022) [110]. As such, this discourse has suggested we should seek to reframe narratives of how western countries are connected to the issue of global displacement and resulting responsibility for the problem in recognition of the dynamics of global poverty, global order and causal responsibility (Parekh, 2017) [111]. Thus, this compels a reframing of how Western states are implicated in global displacement and, consequently, how responsibility ought to be understood, not as an act of benevolence, but as an obligation derived from the historical and material realities of global poverty, geopolitical hierarchies, and causal responsibility.

Further research is necessary to refine this vision, but an 'ethical' alternative would likely entail policies that grant people on the move agency over transfer agreements, that equitably distribute responsibility among wealthy nations and facilitate a decisive shift away from asymmetrical partnerships with third states. In this reimagined model, the allocation of responsibility for migration should be guided by two fundamental principles: the agency of migrants to exercise meaningful choice in determining their destination and the capacity of receiving states, who assume obligations commensurate with their economic resources and historical responsibilities. It is true, that enduring colonial and neocolonial logics that have exacerbated forced migration to unprecedented levels. As such, this reimagining aligns with Okafor's conceptualisation of global solidarity, urging a paradigm shift in which of migration flows are understood as a 'stable phenomenon' rather than a 'series of crises' (Okafor, 2019) [112] and perhaps even as an extension of the decolonial project itself. In its current form, externalisation remains irreconcilable with ethical imperatives. However, the possibility of a mutually beneficial framework for both asylum seekers and states remains within reach. While there have been valid questions raised over Greece's economic capacity to deal with its involuntary role as the 'gatekeeper' or 'frontline' state in Europe (Grasso and Giugni, 2016) [113] compounded by the dysfunctional nature of the Dublin Regulation (European Parliament and Council, 2013) [114]. The EU possesses both the economic and logistical capacity to manage migration flows effectively (Baumeister et. al., 2017) [115]. The true impediment lies not in capability but in political will (Baumeister et. al., 2017) [116]. This suggests that externalisation may offer an apt means on this basis. As articulated in socio-legal studies, it is the law itself that yields the illegality, which diminishes the human rights of migrants and underscores their vulnerable position in society (De Genova, 2004) [117]. Migration can be seen as decolonisation – and externalisation could be a part of global

solidarity. Only in this way could the foundations be laid for any 'ethical' form of externalisation.

V. CONCLUSION

The EU-Turkey Agreement is the epitome of Europe's approach to externalising asylum procedures. An examination of the deal underscores the urgent need for legal and ethical alternatives. It is evident that the Agreement in its form and procedure repeatedly violates IHRL, particularly the principle of non-refoulement and the rights to life and protection from torture or inhuman treatment. The way in which it violates IHRL shares a strong correlation with measures in other European jurisdictions. Proposing legal alternatives, such as international agreements with robust individual assessment procedures and adherence to the principle of good faith, provides a framework for compliance with IHRL. However, it is the ethical dimension that demands a paradigm shift. The framing of migration as a crisis perpetuates racist and neo-colonial narratives justifying the marginalisation of vulnerable people. Narrative reformulation, rooted in post-colonial and human rights perspectives, offers the potential for a reconciliation of this tension with IHRL. As Europe will continue to face challenges, it is imperative to prioritise the protection of human rights and dignity. By reframing the discourse and pursuing legal and ethical alternatives, Europe can move towards a system that upholds its commitments under international law and depart from cruel neocolonial narratives that can only lead to exclusion.

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