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Mapping EU Externalisation Devices through a Critical Eye

Ermioni Xanthopoulou | ORCID: 0000-0001-9697-3947
Senior Lecturer in Law, Brunel Law School, Brunel University London, Uxbridge, UK
ermioni.xanthopoulou@brunel.ac.uk

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Abstract

The purpose of this article is to scope, map and critique EU externalisation devices in asylum law. The article first evaluates the internal dimension of externalisation in EU asylum law, with the Dublin system being an internal device of externalisation supported by the securitisation of asylum law. The article then maps EU border externalisation manifested in border violence and critically discusses judicial responses to it. Finally, the article scrutinises EU externalisation beyond its borders, as realised by the outsourcing of asylum responsibilities or border controls to non-European countries. EU externalisation is here studied in a multi-faceted way, taking stock of devices from across the spectrum of EU asylum law. It is argued that EU externalisation is wholly underpinned by a neo-colonial narrative of emergency and repulsion that is harmful to refugees as it does not sit comfortably with principles of refugee law or EU and international human rights law.

Keywords

externalisation – EU asylum law – refugee deterrence – pushbacks – Dublin – partnerships

1 Introduction

In September 2020, the European Commission presented a pact on migration and asylum with the aim of reforming the Common European Asylum System (CEAS).[1] While evaluating reforms is necessary,[2] it is crucial that we also take a reflective step back to observe underpinning trends that drive policy and law choices. One persisting theme in the CEAS is externalisation. Externalisation is an 'umbrella concept'[3] that refers to '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'[4] and can be broadly classified into two categories in light of where activities driven by externalisation are taking place.[5] The first category refers to the outsourcing of functions either of the asylum system or border control activities to non-EU countries by means of partnership agreements. The second category of externalisation refers to practices of deflection taking place at borders. Both categories could be aimed at avoiding the engagement of international refugee law and curtailing migratory flows. In addition to this classification, externalisation can also be studied in its intra-EU form, by examining securitisation legislation and the Dublin system as the EU legal instrument of externalisation *from within*.

Externalisation policies and practices affect real opportunities of access to international protection for refugees as the opportunities for access to the EU become thin. In this respect, such policies raise serious questions of legality under various strands of international law.[6] Mitsilegas argues that externalisation relies on a preventive (in)justice paradigm, as the legal landscape aims to prevent migratory mobility.[7] Externalisation is also framed through the analogy

1 European Commission (2020). *Migration and Asylum Package: New Pact on Migration and Asylum*, Available at <https://commission.europa.eu/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en> (Accessed 15 July 2023).

2 Lang, I.G., 2022. The New Pact on Migration and Asylum: A strong external and a weak internal dimension. *European Foreign Affairs Review* 27(1), pp. 1–4.

3 Feith Tan, N., 2021. Conceptualising externalisation: Still fit for purpose?. *Forced Migration Review* 68, pp. 8–8.

4 As defined by Cantor, D., Feith Tan, N., Gkliati, M., et al, 2022. Externalisation, access to territorial asylum, and international law. *International Journal of Refugee Law* 34(1), pp. 120–120.

5 *Ibid.*

6 Ibid., pp. 120–128.

7 Mitsilegas, V., 2022. The EU external border as a site of preventive injustice. *European Law Journal* 1,1.

of the EU's frontier as a 'shifting border',[8] to describe an 'individualised moving barrier' that suffers from an accountability deficit due to the informality of an externalisation toolbox. This denotes an inconsistent and selective border that is kind and generous to some while rigid and closed to others, namely 'unwanted' migrants.[9] Borders have indeed developed as 'devices of inclusion that select and filter people', as well as exclusionary devices that repel those unwanted migrants, as expressed by Neilson and Mezzadra.[10] Davitti has also described the issue of externalisation at the EU's border vis-à-vis privatisation and the narrative of crisis, and classifies two types of structures employed with the aim of prevention and deflection.[11] The first is that of 'physical infrastructures' that confine and manage refugees, usually found in transit zones, closed ports, fences, walls and pushbacks. The second type is that of the 'borderline legal apparatus', such as the concept of a 'safe third country'.

As the externalisation of asylum responsibilities and immigration control is a fast-growing trend in EU law, there is a need to map and critically assess EU legal initiatives and practices pertaining to externalisation all together, with the aim of observing common themes from a conceptual and theoretical point of view. The article seeks to map, examine and assess with a critical eye the ways in which EU asylum law serves an externalisation objective. The article assesses the conformity of EU externalisation action with human rights and refugee law as enshrined in EU and international law.

Building on the existing literature that considers specific aspects of externalisation in EU asylum law,[12] the article wishes to offer a comprehensive

8 Shachar, A. (2020). *The Shifting Border: Legal Cartographies of Migration and Mobility: Aylet Shachar in Dialogue*. Manchester University Press, Manchester, United Kingdom; and then discussed by Tsourdi, L., Ott, A., Lenkova, Z., 2022. The EU's shifting borders reconsidered: Externalisation, constitutionalisation, and administrative integration. *European Papers* 7(1), pp. 87–89.

9 Moreno-Lax, V., and Vavoula, N., 2022. The (many) rules and roles of law in the regulation of "unwanted migration". *International Community Law Review* 24, pp. 285–286. The authors use the term of 'unwanted migration' 'to refer both to unauthorised migrants and asylum seekers as well as to the securitised approach pervading the techniques employed to govern them'.

10 Mezzadra, S., and Neilson, B. (2013). *Border as Method, or, the Multiplication of Labor*. Duke University Press, Durham, North Carolina, USA, 7.

11 Davitti, D., 2018. Biopolitical borders and the state of exception in the European migration 'crisis'. *European Journal of International Law 29(4)*, pp. 1176–1177.

12 Carrera, S., Kostakopoulou, D., & Panizzon, M. (2018). *The EU External Faces of Migration, Borders and Asylum Policies. Intersecting Policy Universes*. Brill Nijhoff Publishers, Amsterdam, Netherlands; Carrera, S., Radescu, R., & Reslow, N. (2015). *EU External Migration Policies. A Preliminary Mapping of the Instruments, the Actors and their Priorities*. Brussels: EURA-net project; Mitsilegas, 2022. *op.cit*, fn 6; Tsourdi *et al*, 2022. *op.cit*, fn 7, pp. 87–108; Als, S., Carrera, S., Feith Tan, N., and Vedsted-Hansen, J., 2022. Externalization

scoping of externalisation legal initiatives and practices taking place in the context of EU immigration and asylum law. It employs an expansive approach, investigating several instruments though the lens of externalisation. To this end, the article relies on an interdisciplinary framework of assessment consisting of the legal standards of EU and international law, and by utilising a critical, theoretical lens that borrows from sociological and post-colonial theoretical narratives on migration. The novel nature of the article, therefore, lies both in its comprehensive scope and interdisciplinary framework of assessment. The article first, in the following section, expands on the legal framework of assessment. It then moves to setting out the theoretical lens and the conceptual understanding of externalisation before mapping examples of externalisation. In particular, the fourth section of the article focuses on externalisation from within, showcasing how externalisation is already embedded in EU asylum law on allocating asylum responsibility as well in the securitisation of immigration and border control. The fifth section of the article focuses on externalisation practices observed at the border landscape by means of border violence encapsulating pushbacks as well as judicial responses to these. The sixth section focuses on externalisation devices beyond the border referring to partnerships with third countries aiming to outsource either immigration and/or border control or functions of the asylum system.

2 Legal Lens of Assessment

Measures that aim to externalise either border controls or/and aspects of the asylum system *per se* must conform with primary and secondary rules of international law.[13] Although externalisation devices could be broadly assessed through the lens of various strands of international law, the standard of assessment that the article relies on borrows from international refugee law and international human rights law, as the goal is to map and observe the EU's externalisation devices as they impact on refugees. The obligation to conform with international law is not without applicability challenges, as many of the externalisation policies and practices exist in legal grey areas that states seem

and the UN Global Compact on Refugees: Unsafety as Ripple Effect. *EUI RSC*, p. 12; Lemberg-Pedersen, M., 2019. Manufacturing displacement. Externalization and post coloniality in European migration control. *Global affairs* 5(3), pp. 247–271.; Moreno-Lax, V. (2017) *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*. Oxford University Press, Oxford, United Kingdom; Cobarrubias, S., 2020. Scale in motion? Rethinking scalar production and border externalization. *Political Geography 80*, pp. 1–10.

13 Cantor *et al*, *op.cit.*, fn 4, pp. 4–12.

to exploit. This is because states seem to shift their authority to other states leading to extraterritoriality issues and blurring questions concerning responsibility. This is why it is crucial to clearly identify the legal toolbox needed to check the lawfulness of externalisation measures.

International refugee law,[14] which establishes state obligations towards refugees, offers a key legality check for externalisation measures and practices. Pertinently, states must respect the prohibition of *refouling* refugees, which is especially important when states consider policies of outsourcing asylum functions or when engaging in unlawful pushbacks.[15] Externalisation policies must also be considered in light of the UN Global Compact on Refugees and the Global Compact on Migration, which highlight the importance of the good faith duty of cooperation and responsibility-sharing that underpin international refugee law.[16] The latter are again especially important in the context of externalisation policies that aim to shift responsibility. The applicability of the Refugee Convention is not limited by a jurisdiction clause. So, states are obliged to respect the law when acting beyond their territory.[17] Again, this is pertinent to this context when states are engaged in externalised conduct outside their territory and in the territory of a third country with which they have potentially agreed to partner up for the purposes of asylum outsourcing or border control. The obligation to conform with the Geneva Convention is an obligation enshrined in EU primary law, Articles 18 (right to asylum and non-refoulement) and 19 (prohibition of collective expulsions) of the Charter are directly relevant. The latter further highlights the need to check the EU's externalisation devices against international refugee law as a matter of EU primary law.

International human rights law is also absolutely relevant in serving as a legality check as it offers protections to all human beings regardless of their situation. The application of obligations stemming from international human rights law depends on whether the violation in question is within jurisdiction, which is especially challenging in the context of externalisation in light of extraterritoriality.[18] Jurisdiction can indeed extend to state actions beyond bor-

14 Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 189 UNTS 137; Protocol Relating to the Status of Refugee, opened for signature, Jan 31, 1967, 606 UNTS 267 (together hereinafter 1951 Refugee Convention).

15 Article 33(1) of the Refugee Convention.

16 United Nations. (2018). *Global Compact on Refugees*, UN doc A/73/12 (Part II) (GCR).

17 Goodwin-Gill, G., McAdam, J. and Dunlop, E. (2021) *The Refugee in International Law*. Oxford University Press, Oxford, United Kingdom, 308–313.

18 Klug, A. and Howe, T. (2010) 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures' in Ryan,

ders, where a state exercises 'effective control' over a territory,[19] which asserts the extension of human rights duties of a state in an externalisation context. Indeed, according to the ECtHR the jurisdiction clause 'cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory'.[20] Although the doctrine could clearly set limits to externalisation policies, the requirement of a sufficiently close causal link between the State conduct and the violation must be established which significantly lessens the protection potential.[21]

3 Theoretical Lens of Assessment

Alongside law, the article also borrows from critical theoretical approaches to EU externalisation to offer an exegesis. Critical legal studies is useful; scholars view law as associated with and informed by power and politics. In particular, Balkin's approach to conceptualising law in an ambivalent rather than merely a pejorative manner is indicative of the law's dual role. This comes with the hope that law can be a valuable ally in the fight for justice while recognising that law often becomes a tool for injustice.[22] Law can perpetuate injustices, serving the interests of the powerful, but can also give the non-powerful a shield against injustice through recourse to the values that the law needs in order to perform legitimisation, i.e. human dignity, democracy, and human rights.[23] This is because 'powerful people and interests can sometimes be called to account because they try to legitimate what they are doing in those terms.'[24] Precisely, this paper, despite being critical about the law, still recognises its powerful beneficial potential.[25]

B. and Mitsilegas, V. (eds), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff, 98.

19 *Al-Skeini & Ors v UK* App no 55721/07 (ECHR, 7 July 2011) paras 138–139.

20 *Issa v Turkey* App no 31821/96 (ECHR, 16 November 2004).

21 *MN & Ors v Belgium* App No 3599/18 (ECHR, 5 May 2020).

22 Balkin, J.M. (2009). Critical legal theory today, in: *Philosophy in American Law*. F. Mootz (Ed.), pp. 64–72, Cambridge University Press, Cambridge, United Kingdom.

23 Balkin argues that 'Even if law is a supple tool of power, law also serves as a discourse of ideas and ideals that can limit, channel and transform the interests of the powerful, sometimes in unexpected ways that the powerful cannot fully control.'

24 *Op.cit.*, fn 22.

25 In contrast to a radically critical conception of the law focusing on law's defects and denouncing human rights' potential. See for example, Tushnet, M., 1984. An essay on rights. *Texas Law Review 62*, p. 1363; Olsen, F., 1984. Statutory rape: A feminist critique of

Specifically, FitzGerald documents how asylum policies of wealthy states are built on a logic of refugee deterrence. He describes how externalisation is constructed on an 'architecture of repulsion',[26] where usually a wealthy state deflects its asylum responsibility and outsources functions of asylum governance and legal obligations outside its territory. Even the completely regularised 'remote control'[27] of passports, visas and airline screening systems constitutes a form of externalisation, originally designed in the early twentieth century to control and manage European migration to the 'New World'.

Such policies, designed to refuse entry, were described as 'non-entrée' policies,[28] and have been conceptualised in several ways that all manifest how states repel migration using 'non-arrival measures', 'deterritorialised control', 'policing at a distance' and, of course 'externalisation'.[29] FitzGerald, documents how states have developed sophisticated methods for deterring refugees and preventing them from finding sanctuary by using an 'architecture of repulsion', in contrast to the 'architecture of protection' that asylum systems should be based on.[30]

Externalisation policies and practices are also linked to a neo-colonial narrative of emergency dictating derogations from legal obligations. Such practices of unilateral deflection are intertwined with a securitisation approach and connected with 'racism, empire, and colonialism'.[31] The persisting neo-colonial concept of emergency drives EU asylum law and policies of

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rights analysis, *Texas Law Review* 387; Gabel, P., The phenomenology of rights consciousness and the pact of the withdrawn selves. *Texas Law Review 62*, p. 1563.

26 FitzGerald, D.S. (2019). *Refugee beyond Reach: How Rich Democracies Repel Asylum Seekers*. p. 6, Oxford University Press, Oxford, United Kingdom.

27 A term coined by political scientist Zolberg in Aristide Zolberg, A., 2003. The archaeology of remote control, in: *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period*. A. Fahrmeir, et al (Eds.) pp. 195–222, Berghann Books, New York, USA.

28 Hathaway, J.C., 1997. The meaning of repatriation. *International Journal of Refugee Law* 9(4), p. 551.

29 Gibney, M. (2004). A thousand little Guantanamo's: Western states and measures to prevent the arrival of refugees, in: *Displacement, Asylum, Migration*. K. Tunstall (Ed.) Oxford University Press, Oxford, England; Munster, R., and Sterkx, S. (2006). Governing mobility: The externalization of European migration policy and the boundaries of the European Union, in: *European Research Reloaded: Cooperation and Europeanized States Integration among Europeanized States*. R. Holzhacker, M. Haverland (Eds.) Springer, New York, USA; Guild, E, and Bigo, D. (2010). The transformation of European border control, in: *Extraterritorial Immigration Control: Legal Challenges*. R. Bernard, V. Mitsilegas (Eds.) pp. 257–280, Martinus, Nijhoff, Leiden, the Netherlands.

30 FitzGerald, *op.cit.*, fn 26.

31 Tsourdi *et al*, *op.cit.*, fn 7, pp. 87–101.

externalisation. Reynolds highlights the racial character of borders and asylum law and argues that using 'a state of emergency as a threat to the life of the nation strategically motivates exclusion based on race'.[32] Externalisation is inked to emergency[33] that is a 'long-term tendency to privilege the interests of European states over those of migrants'.[34] Emergency seems to be a new norm but, interestingly, it was developed by European colonies, normalising special state powers over colonial subjects.[35] Such emergency regimes rely on 'legal techniques of subjugation of racialised and lower-class groups'.[36] Excluding foreign migrants is 'not only permissible but even righteous' as an exercise of sovereign rights to state territory and borders.[37] Such exercising of sovereign rights, when empowered by an emergency anxiety, is performed in a racialised and ruthless way that results in violent borders. Emergency has dominated the shaping of EU law responses to migration and asylum, taking different names such as 'force majeure' or 'crisis' or 'protecting our European way of life', as if this is under attack – necessitating an urgent, securitised response.[38] There are certainly racialised elements in such discourse. While critical race and post-colonial scholars frame migration as decolonisation or a form of reparation,[39] migration-phobic right-wing politicians frame migration as demographic replacement that speaks to racist anxieties opposing a post-racial society.[40] Such views are not marginalised. They have been absorbed into European politics, finding expression in policies shaping law, framing migration as a crisis that requires an emergency response of prevention. This article, by mapping externalisation devices in EU law, emphasises the neo-colonial theme of emergency as a justification of repulsion measures.

32 Reynolds, J. (2021). *Empire, Emergency and International Law*. Cambridge University Press, Cambridge, England; Reynolds, J., 2021. Emergency and migration, race and the nation. *UCLA Law Review* 67, p. 1768.

33 Oliveiro, K., 2013. The Immigration state of emergency: racializing and gendering national vulnerability in twenty-first-century citizenship and deportation regimes. *Feminist Formations* 25(2), 1.

34 Spijkerboer, T.P. (2022). Coloniality and recent European migration case law, in: *Migrants' Rights, Populism and Legal Resilience in Europe*. V. Stoyanova and S. Smets (Eds) pp. 118–138, Cambridge University Press, Cambridge, England.

35 Reynolds, *op.cit.*, fn 32.

36 Ibid; Nasser, H. (1965). *The Jurisprudence of Emergency. Colonialism and the Rule of Law*. University of Michigan Press, Michigan, USA.

37 Achiume, E.T. 2019. Migration as decolonization. *Stanford Law Review* 71, pp. 1509–1515.

38 Reynolds, *op.cit.*, fn 32.

39 Achiume, *op.cit.*, fn 37.

40 Kaufmann, E. (2017). *Racial Self-Interest is not Racism: Ethno-Demographic Interests and the Immigration Debate*. London Policy Exchange; Murray., D. (2017). *The Strange Death of Europe: Immigration, Identity, Islam*. Bloomsbury Publishing, London, England.

4 EU Externalisation from Within

4.1 *The Device of Peripheralisation*

Externalisation, in principle, refers to agreements or practices that take place at the border of the EU. We should, though, take a broader perspective and examine the EU Dublin system of allocating responsibility as an internal device of externalisation, due to its 'country of first entrance' rule. This is because under the Dublin III Regulation responsibility is outsourced from the core to the periphery of the EU.[41] In this way, Member States deflect their asylum law responsibilities and expect Member States of the periphery to shoulder them instead, placing irregular migrants, including refugees, out of sight of most EU Member States.[42] This is otherwise referred to as 'solidarity deficit',[43] as it fails the principles of responsibility-sharing and international cooperation. The solidarity deficit and externalisation effect are also exacerbated by the lack of mutual recognition of asylum decisions and the free movement of recognised refugees. The first country of arrival[44] effectively amounts to a safe third-country concept.[45] Equivalent to the concept of 'safe third country', which is the usual basis for third-country asylum processing, the 'first entrance country' rule serves as a device for Member States to justify the externalisation of their responsibility. Despite plans to reform the CEAS, the Dublin system is not expected to change as far as its externalisation effect is concerned.[46]

Dublin transfer should pass the legality check as long as Member States adhere to 'similar basic legal standards on asylum'.[47] Despite the presumption that all Member States respect fundamental rights, there is a glaring implementation gap, as recognised by European courts.[48] The principle of mutual

41 Dublin Regulation (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin).

42 On Dublin system, see Xanthopoulou, E. (2020). *Mutual Trust and Fundamental Rights in the Area of Freedom, Security and Justice: A Role for Proportionality?.* Hart Publishing, pp. 149–184.

43 Tsourdi, E., 2021. Solidarity deficit, refugee protection backsliding, and EU's shifting borders: The future of asylum in the EU?. *Revue Européenne du Droit* 2(3), pp. 157–161.

44 Hathaway, J. (2021). The *Rights of Refugees under International Law.* Cambridge University Press, Cambridge, England, p. 330.

45 Cantor *et al*, *op.cit*, fn 4, p. 23.

46 Lang, *op.cit*, fn 2, pp. 1–4.

47 Cantor *et al*, *op.cit*, fn 4.

48 For the rulings of the European Court of Human Rights on the Dublin returns, see M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011); Tarakhel v

trust, that Dublin relies on, has similar underpinnings to the 'safe third country' concept.[49] They both involve a risk-based assessment that relies on a presumption of trustworthiness, which in turn allows for an expectation of honest cooperation.[50] If reversed, this model incentivises the overwhelmed first entrance countries to fail the trustworthiness test by means of disrespecting fundamental human rights.

Moreover, by applying the 'first country of entrance' rule only to asylum seekers who irregularly arrive to the EU,[51] EU law discriminates against them in comparison to those who arrive in a documented fashion. By treating them differently, often by involving detention, the law penalises them in breach of Article 18 of the EU Charter, which requires that the right to asylum 'shall be guaranteed with due respect for the rules of the Geneva Convention'. The latter prescribes in Article 31 that states 'shall not impose penalties [on refugees], on account of their illegal entry or presence'.[52] Transferring or holding asylum seekers at the periphery of the EU, often in detention or under perilous conditions, could likely amount to penalisation.

It is important to recognise that externalisation is at the heart of EU asylum law. This is of course not in line with the general principles of EU law, such as solidarity, equality and the duty of sincere cooperation. The principle of equality between Member States is enshrined in Article 4(2)TEU. Member States are equally expected to fulfil in concert common EU objectives. To this end, they may also expect to rely on the EU as the principle of sincere cooperation includes a mutual legal obligation between the EU and its Member States 'to assist each other in carrying out the tasks which flow from the Treaties'.[53] Another pertinent dimension of sincere cooperation is associated with the obligation of Member States to offer each other mutual assistance. Member States are expected to take appropriate measures to fulfil their obligations and refrain from taking any measures that could negatively impact this task. The first entrance country rule, as enshrined in Dublin, arguably endangers the EU objective of creating a CEAS.[54]

In September 2020, the European Commission released the new Pact on Migration and Asylum, launching a set of legislative proposals for the reform of

Switzerland, App no 29217/12 (ECtHR, 4 November 2014); Regarding CJEU rulings, see Joined Cases C-411/10 and C-493/10 N.S. and M.E. ECLI:EU:C:2011:865; C-578/16 PPU – C.K. and Others ECLI:EU:C:2017:127; Case C-163/17 Jawo ECLI:EU:C:2019:218.

49 Xanthopoulou, *op.cit.*, fn 42.

50 *Ibid.*, pp. 26–46.

51 Dublin, Art 13(1).

52 1951 Refugee Convention, Art 31 (1).

53 Article 3(4) TEU.

54 Article 78 TFEU.

the CEAS. The Pact aspires to put a 'flexible yet mandatory' approach forward to responsibility-sharing.[55] The plans to repeal Dublin involve its replacement with the Regulation on Asylum and Migration Management (RAMM) that aspires to be based on solidarity and fair sharing of responsibility.[56] However, the proposed Regulation is criticised for not making deep and comprehensive changes.[57] It still relies on the existing rules on allocating responsibility, while introducing corrective measures that are compensatory for the countries at the external border by means of relocation, financial or operational support and return sponsorship. Under the proposed measure, solidarity mechanisms are introduced on an exceptional basis, such as for situations of search and rescue and migratory pressure. This is welcome although return sponsorship that is offered as a solidarity option is not a meaningful solidarity measure.[58] Overall, the proposed reform is seen as a 'repackaging of old tricks rather than a fresh start'.[59] Compensating for the obvious solidarity deficit by relocating refugees in times of alleged crisis does not alter the injustice rooted in law. FitzGerald uses an accurate medieval metaphor, describing places of externalisation as cages.[60] Indeed, the Dublin system effectively creates 'cages' into which refugees are forcibly moved and from which they cannot escape.

4.2 *The Device of Securitisation*

Externalisation goes hand in hand with securitisation, which is another trend endemic in EU asylum law. Securitisation is taking place in different ways, such as by means of controlling immigration via using criminal law,[61] e.g., criminalising acts of solidarity.[62] Securitisation is also taking place by reinforcing the

55 European Commission (2020). *Migration and Asylum Package: New Pact on Migration and Asylum*, Available at <https://commission.europa.eu/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en> (Accessed 15 July 2023).

56 European Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management, COM(2020) 610.

57 Editorial: Catherine Woollard, Director of the European Council on Refugees and Exiles (ECRE).

58 European Council on Refugees and Exiles (ECRE) (2021), The Regulation on Asylum and Migration Management: Giving with the One Hand, Taking Back with the Other, Available at https://ecre.org/wp-content/uploads/2021/02/Policy-Note-33-Ramm-February-2021.pdf (Accessed 27 November 2023).

59 Karageorgiou, E., Noll, G., (2022) *What Is Wrong with Solidarity in EU Asylum and Migration Law? Jus Cogens* 4, 131–154.

60 FitzGerald, *op.cit.*, fn 26.

61 Gatta, G.-L., Mitsilegas, V., Zirulia, S. (2021). *Controlling Immigration Through Criminal Law*. Bloomsbury Publishing, London, England.

62 Carrera, S., et al. (2019). *Policing Humanitarianism – EU Policies Against Human Smuggling and their Impact on Civil Society*. Hart Publishing, Oxford, England.

deterrent effect of the border by means of physical infrastructure and digital surveillance.[63] Border security functions as a free-standing objective that often trumps humanitarian needs.

In particular, policing humanitarianism is an example of the securitisation trend[64] that is directly associated with the externalisation agenda. The EU Facilitation Directive, was introduced to combat migrant smuggling, i.e., facilitation of unauthorised entry, transit and residence in exchange for financial or material gain. Together with the Framework Decision on the strengthening of the penal legal framework for smuggling constitute the 'Facilitators Package'.[65] Its scope is ambiguous, leading to national implementation laws criminalising humanitarian acts of rescue, in deviation from international law. According to international commitments, international and regional instruments designed to counter the smuggling of human beings should exempt the facilitation of entry and stay for non-profit purposes from criminalisation, including, therefore, humanitarian assistance.[66] EU law deviates from the UN definition of migrant smuggling as it does not include a mandatory exception that would be in line with international law but only includes an optional humanitarian exemption. The EU Facilitators Package left it optional for EU Member States to apply such an exemption in their criminalising attempts. In addition, the Facilitation Directive does not require the existence of the motivation of financial or material benefit for an act of facilitating entry to count as smuggling,[67] leading to a broad scope and significant variations in how Member States implement EU law in their domestic laws.[68] The discrepancy between EU and

63 Mitsilegas, V., Moreno-Lax, V., and Vavoula, N., (2020). *Securitising Asylum Flows: Deflection, Criminalisation and Challenges for Human Rights*. Brill, Leiden/Boston, Netherlands/USA.

64 European Union Agency for Fundamental Rights, (2014). Fundamental rights: challenges and achievements in 2014 – Annual report <EU Fundamental Rights Agency starting from its first thematic report in 2014> (Accessed 15 July 2023); Carrera and others, *op. cit.* fn 48, p. 8.

65 Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, [2002] OJ L 328.

66 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (entered into force on 28 January 2004), Article 6.

67 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, Article 1(1)(a).

68 Study Requested by the European Parliament, (2018). Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf> (Accessed 27 November 2023).

international law was acknowledged by the European Commission,[69] which, however, decided against reforming the law.

In July 2020 the EU Fundamental Rights Agency reported several criminal proceedings against NGO activists operating search and rescue missions.[70] While the law is supposed to tackle migrant smugglers facilitating unauthorised entry, it has systematically been used to police civil society, which is a dangerous trend as far as respect to the rule of law is concerned.[71] Investigations and charges against civil society members have increased since 2015.[72] Criminalising acts of humanitarian support, such as search and rescue missions at sea conducted by NGOs due to states failing to protect human life, is another expression of the neo-colonial rationale of externalisation at any cost and the practice of refugee deterrence. This is because civil society is not only disempowered from performing its role in protecting human rights and human life but is also marginalised and incriminated for doing so. The choice to weaken civil society is directly connected to externalisation actions from within as civil society is this internal actor that would pose a check to power. Civil society assisting humanitarian rescue would ensure that those people in search of sanctuary would be able to find it. Allowing them to act towards this purpose would simply be against the spirit of migrant repulsion that the law is ingrained with. It is therefore clear that the employment of securitisation in the field of immigration control serves externalisation aims and is utilised with migration prevention rather than simply with harm prevention at heart.

The landscape of externalisation has been further intensified by the physical infrastructure of barriers to mobility, such as border walls and barbwire fences that block access to refuge while they increase control of mobility. Walls have

69 European Commission, (2015). EU Action Plan Against Smuggling (2015–2020) <https://ec.europa.eu/anti-trafficking/eu-policy/eu-action-plan-against-migrant-smuggling-2015---2020_en> (Accessed 15 July 2023).

70 EU Agency for Fundamental Rights, (2020). June 2020 update – NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them. (Accessed 15 July 2023); Thsi Schack, L. (2020). Humanitarian Smugglers? The EU Facilitation Directive and the Criminalisation of Civil Society. Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/07/humanitarian (Accessed 15 July 2023).

71 Minetti, M., 2020. The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy. *New Journal of European Criminal Law* 11(3), pp. 335–350.

72 ReSoma, (2020) The criminalisation of solidarity in Europe <https://www.migpolgroup.com/wp-content/uploads/2020/03/ReSoma-criminalisation-.pdf> (Accessed 15 July 2023).

dramatically increased from 6 in 1989 to 74 in 2023.[73] Walls, being inevitably visible, have both a real and symbolic anti-migration effect on migratory flows. Although they might decrease flows at the places of installation, they do not address the drivers of migration and only 'divert' migratory flows to different entry points, which are frequently fatal.[74] Mobility control is also supported by the use technology with the aim of curtailing migration, bearing serious risks to the protection of human rights.[75]

Securitisation techniques have the impact of deterring mobility, reflecting the repulsion architecture of the EU law. As FitzGerald has put it, these techniques create virtual 'barbicans' similar to the outer defences of medieval castles.[76] The trend of over-criminalising in the field of migration sits uncomfortably with refugee law principles, such as the prohibition of penalisation and the right to asylum.[77] Criminalising both mobility and acts that support refugees is a manifestation of the neo-colonial migration politics affecting refugees: neo-colonial as they resemble techniques of past colonial rule that resorted to oppressive legislation often derogating from the law.[78] Pedersen observes that the externalised policies essentially reproduce colonial devices of racialised control, similar to practices used during the transatlantic slave trade.[79] Criminalisation might actually be useful in saving lives if used to target failure to rescue at sea to send a strong message that migrant lives are valued.[80] Externalisation and securitisation are both expressions of the same rationale of repulsion and refugee deterrence and have ties with a racist and neo-colonial approach towards deflecting asylum responsibilities when it comes to non-European refugees.

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73 Costica Dumbrava, European Parliamentary Research Service, (2022). Walls and fences at EU borders <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI(2022)733692_EN.pdf> (Accessed 15 July 2023).

74 Jones, R., 2016. Borders and Walls: Do Barriers Deter Unauthorized Migration?. *Migration Policy Institute* <https://www.migrationpolicy.org/article/borders-and-walls-do-barriers-deter-unauthorized-migration> (Accessed 15 July 2023).

75 Vavoula, N. (2021). Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism. *European Journal of Migration and Law* 23 (4), pp. 457–484.

76 FitzGerald, *op.cit.*, fn 26, p. 9.

77 Article 31 of the 1951 Refugee Convention; Article 18 EU Charter.

78 Reynolds, *op. cit*., fn 32.

79 Lemberg-Pedersen, M., 2019. Manufacturing displacement. Externalization and Post Coloniality in European Migration Control. *Global Affairs* 5, p. 247.

80 Guild, E., and Mitsilegas, V., 2023. Taking the normative foundations of EU criminal law seriously: The legal duty of the EU to criminalise failure to rescue at sea. *European Law Journal* 27(4–6), p. 349.

4.3 *The (Proposed) Device of Pre-screening*

Although still proposed legislation, the Pact includes a proposal on pre-entry screening of third-country nationals at EU external borders. Pre-entry screening involves subjecting all third-country nationals who attempt an irregular entry to a procedure where identification as well as security and health checks are involved. The outcome of this procedure will be a referral either to an asylum procedure or to a return procedure, or to a decision regarding refusal of entry.[81] The proposed procedure is an indication of what the future will most likely hold, which is another way of fortifying Fortress Europe and will pose serious challenges regarding respect for the right to asylum.[82] It is worth noting that such an amendment will feed externalisation from within as it will create a practice of 'semi-inclusion'.[83] Asylum-seekers will be bound by national law that imposes restrictions and obligations on them, including detention and limited access to legal aid and effective remedies. However, pre-screening relies on a fictional transit zone that is likely to allow for derogations and exceptional treatment for those attempting to cross on an irregular fashion.[84] The legal fiction of 'non-entry' is yet another example of externalisation ingrained in EU law which is shaped by the narrative of emergency.

5 EU Externalisation at the Border

5.1 *The Device of Border Violence*

Border violence at the frontiers of the EU has led to an incalculable loss of life. Pushbacks, an infamous example of border violence, are 'defined as refusals of entry and expulsions without any individual assessment of protection needs.'[85] This is a practice seen in various migratory routes of the world.[86] Pushbacks include the so-called 'hot returns' (involving 'direct deportations

81 Communication COM (2020) 612 final recital 40 Screening Regulation Proposal.

82 Dräger, S., 2022. The EU screening regulation proposal and the right to asylum – cementing fortress europe? *Refugee Law Initiative Working Paper No. 64* (Accessed 15 July 2023).

83 Apatzidou, V., 2023. The Normalization of denial of legal safeguards in the proposed asylum and migration legislation. *ELB Blogpost* (Accessed 15 July 2023).

84 *Ibid.*

85 Council of Europe Parliamentary Assembly, Pushbacks Practice and Policy in Council of Europe Member States Resolution 2299 (2019), available on; (last accessed on 15 July 2023).

86 UNHRC, Report on Pushbacks, para 100. Land pushbacks in Europe in Balkan route (Amnesty International, Pushed to the Edge: Violence and Abuse against Refugees and Migrants along the Balkans Route (Amnesty International 2019); US-Mexico Amnesty International, America: Pushback Practices and their Impact on the Human Rights of Migrants and Refugees (February 2021), <https://www.amnesty.org/en/wp-content/uploads/2021/05/AMR0136582021ENGLISH.pdf> (Accessed, 27 November 2023); Africa

without individual examination directly at the border'),[87] usually facilitated by the construction of fences or walls blocking access to safe border crossing points.[88] Pushbacks may also involve interception of vessels at sea and their deflection away from a state's own territory, such as naval pushbacks.[89]

If pushbacks do not allow access to adequate individual determination of claims for asylum or international protection, then they raise serious questions of legality.[90] Pushbacks are then indeed 'antithetical to the rule of law'.[91] In particular, the prohibition of collective expulsions of aliens is enshrined in Article 4 of Protocol 4 to the European Convention on Human Rights.[92] Pushbacks also run contrary to the principle of non-refoulement.[93] Another key legal provision that renders such practices unlawful is Article 98 of the UN Convention on the Law of the Sea (UNCLOS), ratified by the EU law,[94] which means that the EU is also bound by all the rights and obligations under UNCLOS. The provision creates the duty to assist persons in distress and applies to all ships. In terms of primary EU law, both the Charter and the TFEU are of great relevance.[95] Regarding secondary EU law, the Asylum Procedures Directive (APD) also applies at the borders as specified in Article 3(1) which

(for example, between Algeria and Niger or Libya and Morocco); UNHRC, Report on Pushbacks, para 57 (Accessed 15 July 2023).

87 Hruschka, C., 2020. Hot Returns Remain Contrary to the ECHR: ND & NT before the ECHR (*EU Immigration and Asylum Law and Policy*, 28 February 2020) (Accessed 15 July 2023).

88 See, for example, 'Poland seals Belarus Border Crossing in Migrant Standoff' (*DW*, 9 November 2021) https://www.dw.com/en/poland-seals-belarus-border-crossing-in-migrant-standoff/a-59763332 (Accessed 15 July 2023).

89 Human Rights Watch (HRW), (2021). 'Submission to the Special Rapporteur's Report on Pushback Practices and their Impact on the Human Rights of Migrants' (Accessed 15 July 2023); European Parliament LIBE Committee, (2021). Report on the Fact-finding Investigation on Frontex concerning alleged fundamental rights violations: referring to systematic practice of pushbacks at present in the Mediterranean sea; Hirsch, A.-L., 2017. The borders beyond the border: Australia's extraterritorial migration controls get access arrow. *Refugee Survey Quarterly* 36 (3), pp. 48–80: referring to the pushbacks by Australia from the high seas to Malaysia, Indonesia and Vietnam.

90 Cantor *et al*, *op.cit.*, fn 4, p. 13.

91 Carrera, A., Feith Tan, N., and Vedsted-Hansen, J., *op.cit*, fn 12, pp. 12–13.

92 Hakiki, H., 2022. The ECtHR's jurisprudence on the prohibition of collective expulsions in cases of pushbacks at European borders: A critical perspective. *Theory and Practice of the European Convention of Human Rights* 24, p. 133.

93 Goodwin-Gil, G., 2011. The right to seek asylum: interception at sea and the principle of non- refoulement. *International Journal of Refugee Law 23*, p. 443.

94 Council Decision 98/392.

95 Articles 19 [prohibition of collective expulsions] and 18 [right to asylum and non-refoulement] and Article 78 of the Treaty on the Functioning of the EU (TFEU) [asylum policy ensuring compliance with the principle of non-refoulement]. See also, Strik, T., (2020). Mechanisms to prevent pushbacks, in: *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint*

activates all legal safeguards provided for by the law. In particular, at border crossing points, Article 8(1) APD requires that the Member States inform asylum applicants of their rights to international protection. In addition, when an application is made, Article 6 APD requires access to a procedure and an effective remedy.[96] An application is entitled to remain in the territory of a Member State during the time that their application is pending.[97] A return is only possible when an application is not submitted and provided that the individual in question had a real opportunity to submit an application. Therefore, 'hot returns' or collective expulsions are incompatible with EU law, meaning that if ECtHR judgments appear to tolerate pushbacks, they have no bearing on independent EU legal obligations.

5.2 *CJEU Litigation*

The Court of Justice of the EU (CJEU) has already ruled against state efforts to exclude access to the law regarding the use of transit zones by Hungary. While Member States are sovereign and can ensure that external borders are crossed legally, compliance with such an obligation cannot justify Member States' infringement of Article 6 of Directive 2013/32.[98] The CJEU held that the Hungarian authorities' systemic practice of aiming to limit access to the transit zones of Röszke and Tompa made it almost impossible for third-country nationals arriving from Serbia to access the asylum process in Hungary. In a similar vein, the CJEU held that Lithuania's suspension of the asylum process in the event of a declaration of emergency was illegal under the Procedures Directive.[99] The same reasoning of illegality could also apply to cases of naval pushbacks, which effectively have the same result as the Lithuanian or Hungarian legislation denying third-country nationals effective access to asylum applications.[100]

The involvement of FRONTEX in pushbacks is another piece of the externalisation puzzle.[101] FRONTEX has recently been scrutinised by a number of

Mechanisms and Access to Justice. S. Carrera, and M. Stefan (Eds.) Routledge, Oxfordshire, United Kingdom, pp. 234, 239.

96 Art 46 APD.

97 Art 9(1) and Art 46(5) APD.

98 Case C-808/18, *Commission* v *Hungary*, ECLI:EU:C:2020:1029, para. 127.

99 Case C-72/22 PPU, *Valstybės sienos apsaugos tarnyba*, ECLI:EU:C:2022:505, para.

100 Mitsilegas, *op. cit.*, fn 6.

101 Strik, T., (2022). European oversight on Frontex: how to strengthen democratic accountability. *Verfassungsblog* https://verfassungsblog.de/european-oversight-on-frontex/ (Last accessed 25 July 2023); Gkliati, M. 2022. The next phase of the European border and coast guard: Responsibility for returns and push-backs in Hungary and Greece. *European Papers 7*, 171, p. 192.

EU bodies and institutions, including the European Parliament, the European Court of Auditors[102] and OLAF.[103] Indeed, its knowledge of pushbacks conducted by the Greek authorities, and its failure to act to prevent them has seriously affected the legitimacy of the agency.[104] Gkliati rightly notes that FRONTEX sets the bar for Member States' operations,[105] explaining how this low standard setting affects tolerance to border violence.

Finding FRONTEX accountable for actions or omissions that constitute breaches under EU law is, in principle, possible.[106] However, determining accountability is very challenging due to blame-shifting between Member States and Frontex.[107] The CJEU jurisdiction on actions to annul FRONTEX' acts has been criticised as being too narrow, with actions for damages being put forward as a more credible redress avenue.[108] Overall, EU liability, under its current strict procedural causality conditions, does not provide a suitable tool to remedy breaches of fundamental human rights in the externalisation process.[109] Still, it is worth noting that existing litigation,[110] suing FRONTEX in relation to pushbacks, forms a tool for pressure.[111]

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102 European Court of Auditors (ECA), (2021) *Frontex's support to external border management: not sufficiently effective to date,* https://www.eca.europa.eu/Lists/ECADocuments/SR21_08/SR_Frontex_EN.pdf (Accessed 27 November 2023).

103 EP Pushbacks Report https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698816/EPRS_BRI(2021)698816_EN.pdf (Accessed 15 July 2023).; OLAF Report https://cdn.prod.www.spiegel.de/media/00847a5e-8604-45dc-a0fe-37d920056673/Directorate_A_redacted-2.pdf (Accessed 15 July 2023).

104 Fink M., 2020. Why It Is So Hard to Hold Frontex Accountable: On Blame-Shifting and an Outdated Remedies System, (Accessed 15 July 2023).

105 Gkliati, M., 2022, The next phase of the European border and coast guard: responsibility for returns and push-backs in Hungary and Greece, *European Papers*, 7 (1), p. 187.

106 Mitsilegas, 2022. *op.cit.*, fn 6.

107 Fink, *op.cit.*, fn 104.

108 Mitsilegas, 2022. *op.cit.*, fn 6, p. 16.

109 Ziebritzki, C., (2020). Refugee Camps at EU External Borders, the Question of the Union's Responsibility, and the Potential of EU Public Liability Law. *Verfassungsblog*, https://verfassungsblog.de/refugee-camps-at-eu-external-borders-the-question-of-the-unions-responsibility-and-the-potential-of-eu-public-liability-law/ (Last accessed 25 July 2023); Goldner-Lang, I. (2022). Towards 'judicial passivism' in EU migration and asylum law?, in: *The Changing European Union: A Critical View on the Role of Law and Courts.* t. Ćapeta et al (Eds.) Hart, Bloomsbury Publishing, London, England.

110 Although this is not a pushback but a deportation case, it is worth mentioning it. T-600/21 T-600/21, *ws and Others v Frontex*, ECLI:EU:T:2023:492; Case T-282/21, *ss and st v European Border and Coast Guard Agency*, NYR; Case T-205/22, *Naass and Sea Watch v Frontex*, NYR; Case T-136/22, *Hamoudi v Frontex*, NYR.

111 Front-LEX, 'For the First Time, a "Pushback" Victim Sues Frontex for Half a Million Euro' https://www.front-lex.eu/alaa-hamoudi (Last accessed 25 July 2023); Front-LEX, 'Taking Frontex's New Director Aija Kalnaja to Court over Greece' (Last accessed

5.3 *ECtHR Litigation*

Judicial responses to pushbacks on behalf of the ECtHR must also be considered. A state-friendly approach has generally been observed in relation to pushbacks,[112] although the ECtHR in *Hirsi*[113] had warned against lawless zones or legal black holes that could lead to rightlessness.[114] It is important to note that the irregular migrant is framed by case law as culpable and opportunistic,[115] which is indicative of the well-rooted neo-colonial and racialised rationale of repulsion. In several important cases, the migrant is no longer seen as the vulnerable figure that they are.[116] With a definite turn in case law that was noted in *N.D. and N.T.* v. *Spain*, the ECtHR delivered quite a controversial ruling and found that in certain circumstances, a collective expulsion will not be in violation of Article 4 Protocol 4 ECHR, where the expulsion is due to the person's 'own culpable conduct'.[117] The ECtHR, found that there had been no violation of Article 4 Protocol 4 and that the lack of individual removal decisions was a result of the applicants' own conduct, who had placed themselves 'in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force'. The court, by holding that the applicants' own conduct essentially contributed to their rightlessness, framed the migrant as 'culpable' actors who brought the expulsion on themselves. What appears to be increasingly recognised as the new vulnerable in the context of migration is not the migrant or the refugee but the border itself. The security of the border, a legal fiction, emerges as the new vulnerability that appears to be threatened by the migrant, the actual being. It views the state border as a precarious value to be appreciated and protected as compared to the rights, personhood and actual vulnerability of the asylum seeker,

25 July 2023); Front-LEX, 'First Ever Case vs. Frontex: Terminate Operation in Greece' https://www.front-lex.eu/court-case-frontex (Last accessed 25 July 2023)

112 Spijkerboer, *op.cit.*, fn 34, p. 117.

113 *Jamaa and others* v *Italy* App no 27765/09 (ECHR, 23 February 2012).

114 Mann, I., 2018. Maritime legal black holes: migration and rightlessness in international law. *European Journal of International Law*, 29 (2) p. 347.

115 Carrera, S., 2021. The Strasbourg court judgement N.D. and N.T. v. Spain: A carte blanche to push backs at EU external borders?. *European University Institute, Robert Shuman Centre of Advanced Studies*.

116 *N.D. and N.T.* v *Spain* [GC] App no 8675/15 and 8697/15 (ECtHR, 13 February 2020).

117 In para. 200, the Court claimed to ground this new exception on 'well-established case-law' (*Berisha and Haljiti* v *the former Yugoslav Republic of Macedonia* App No. 18670/03 (ECtHR, 16 June 2005); and *Dritsas and Others* v *Italy*, App no. 2344/02 (ECHR, 1 February 2011) but this is highly contested by legal scholars. See, for example, Ciliberto, G., 2021. A brand-new exclusionary clause to the prohibition of collective expulsion of aliens: The applicant's own conduct in *N.D. and N.T.* v *Spain. Human Rights Law Review* 21, pp. 203–210.

who becomes invisible and simply a member of a group constituting a threat to the wealthy state and its border, reproducing a neo-colonial rationale.

The judgment appears to offer a carte blanche for governments to forcefully push back refugees and migrants.[118] Although Greece has not ratified Protocol 4, the ruling might have legitimised state actions of border violence.[119] Indeed, it was only a few weeks after the publication of the judgement that Greek authorities were shooting migrants, including refugees, with rubber bullets and gas canisters at the Evros border, trying to push them back to Turkey.[120] The European Commission President, von der Leyen, has praised Greece as a shield at 'extraordinary circumstances'.[121] It is difficult not to notice the neo-colonial, racialised undertone of emergency under which Europe needs to be 'shielded' from non-Europeans on the move, while at the same time Europe is acting fast, as it should, to accept asylum seekers from Ukraine.[122]

Although in subsequent case-law[123] the Strasbourg Court appeared less state-friendly, it still maintained the 'own culpable conduct' exception. For example, in *M.K. and Others* v. *Poland*, the ECtHR found that pushbacks by Poland and Hungary were in breach of the prohibition of collective expulsion as they did not result from the migrants' 'own conduct'. Similar to *M.K. and Others* v. *Poland*, in *Shahzad* v. *Hungary* the Strasbourg Court found for the applicant and distanced its assessment from *N.D. and N.T.* v. *Spain*, while still explaining how this case was different from the Melila 'fence storming', thus legitimising that assessment. However, in *A.A. and Others* v. *North Macedonia* the ECtHR again found for the state, returning to *N.D. and N.T.* v. *Spain*. The Court held that it was in fact the applicants who had placed themselves in

118 Hakiki, *op.cit*., fn 92; Goldner, I.L., 2020. Which connection between the Greek Turkish border, the Western Balkans route and the ECtHR's judgment in ND and NT?. *EU Migration Law Blog* https://eumigrationlawblog.eu/2750-2/#:~:text=This%20Grand%20Chamber%20judgment%20from%2013%20February%202020,similar%20to%20the%20one%20at%20the%20Greek-Turkish%20border. (Accessed 15 July 2023).

119 Christides, G. et al., The Killing of a Migrant at the Greek-Turkish Border. *Spiegel* <https://www.spiegel.de/international/europe/greek-turkish-border-the-killing-of-muhammad-gulzar-a-7652ff68-8959-4e0d-9101-a1841a944161 (Accessed 15 July 2023).

120 Ibid.

121 Ursula von der Leyen, 2020. Remarks at the Joint Press Conference with Kyriakos Mitsotakis, Prime Minister of Greece, Andrej Plenković, Prime Minister of Croatia, President Sassoli and President Michel <https://ec.europa.eu/commission/presscorner/detail/en/statement_20_380> (Accessed 15 July 2023).

122 European Commission, 2023. Factsheet: EU solidarity with Ukraine https://ec.europa.eu/commission/presscorner/detail/en/FS_22_3862> (Accessed 15 July 2023).

123 *M.K. and Others* v. *Poland* App Nos. 40503/17, 42902/17 and 43643/17 (ECHR 23 July 2020; *Shahzad* v. *Hungary* App No. 12625/17 (ECHR, 8 July 2021) *J.A. and Others* v. *Italy*, No. 21329/18 (ECHR, 30 March 2023).

jeopardy by participating in the illegal entry onto North Macedonian territory on 14 March 2016, taking advantage of the group's large numbers. They did not make use of the existing legal procedures for gaining lawful entry. Consequently, the Court found that the lack of individual removal decisions could be attributed to the fact that the applicants did not make use of the official entry procedures, and that expulsion was thus a consequence of their own conduct. In addition, the court was convinced that the state had offered effective and genuine access to its territory, 'in spite of some shortcomings in the asylum procedure and reported pushbacks' (para 122), maintaining *N.D. and N.T.* v. *Spain*.[124]

National legislation as well as practices of pushbacks rely on a regime of emergency which is well-observed in literature as a not-so-infrequently used legal technique with the purpose of exerting dominance over certain disadvantaged groups.[125] Pushbacks reflect the 'architecture of repulsion',[126] where a wealthy state or an organisation of states reject their responsibilities by deflecting legal obligations outside their territory. Although the CJEU has generally deferred to political institutions or Member States and abstained from interfering with substantive issues of EU external migration law,[127] it has been rather active as far as the erosion of the rule of law is concerned.[128]

5.4 *The Device of Migration Instrumentalisation*

A proposed instrument that aims to further fortify external EU borders with the effect of legitimising practices of externalisation that would normally fail the legality test is the proposed Regulation on the Instrumentalisation of Migration, proposed in December 2021, addressing situations of instrumentalisation in the field of migration and asylum, coupled with a proposal amending the Schengen Borders Code (SBC).[129] According to the proposal, in cases of 'exceptional situations of mass influx' of such a scale and nature that would

124 Mitsilegas, 2022. *op.cit.*, fn 7.

125 Hussain, N. (2003). *The Jurisprudence of Emergency. Colonialism and the Rule of Law*. University of Michigan Press, Michigan, USA; Oliviero, K.E., 2013. The Immigration state of emergency: Racializing and gendering national vulnerability in twenty-first-century citizenship and deportation regimes. *Feminist Formations* 25(2), pp. 1–29. Spijkerboer, *op.cit.*, fn 34, p. 118.

126 FitzGerald, *op.cit.*, fn 26, p. 6.

127 García Andrade, P., 2022. The External Dimension of the EU Immigration and asylum policies before the court of justice. *European Papers*, 7(1), pp. 109, 122.

128 See, for example, Case C-821 2019 *European Commission* v. *Hungary*, ECLI:EU:C:2021:930 regarding the criminalisation of assistance to asylum seekers.

129 Proposal for a Regulation of the European Parliament and of the Council addressing situations of instrumentalisation in the field of migration and asylum COM(2021) 890 final.

render a Member State's asylum system non-functional, or where there is simply a 'risk' of a crisis, the state will have the ability to derogate from some of its obligations, and thus EU law may be either suspended or continue to apply with less safeguards for asylum-seekers.[130] The law will allow Member States to deviate from the standards related to the whole spectrum of asylum functions in any situation they consider to be an incident of instrumentalisation, which is quite ambiguous. The proposal is another example of emergency legislation in the field of migration that misdirects the focus of vulnerability from the migrant to the border. Furthermore, the proposed Regulation addresses situations of crisis and force majeure, further normalising exceptions based on emergency. If the proposal becomes law, denial of safeguards at borders will be legitimised, normalising lawless zones in the name of a neo-colonial and racialised rationale of emergency.

6 EU Externalisation beyond the Border

6.1 *The Device of Partnerships*

Increasingly, externalisation is constructed by transferring obligations to neighbouring and other countries, by means of agreements that aim to outsource border control or certain functions of the asylum process to less wealthy countries in exchange for financial gain. This is usually conducted by the conclusion of agreements that specify what exactly is outsourced and what kind of compensation is envisaged for the third country. In this respect, the safe third country concept is applied, as a first legality check.[131] These partnerships are essentially a form of 'contactless' and remote immigration control[132] that represent an escalation of the deterrence paradigm by means of pre-emptive and early action that is exercised by key transit countries. These agree to contain migrants, including refugees, in exchange for different types of gains ranging from political or financial aid to funding or beneficial visa regimes. The EU has concluded such agreements with Turkey, with African countries and with Western Balkan countries for several purposes.

130 *Ibid.*

131 Karageorgiou, E., Feline Freier, L. and Ogg, K. (2021). The evolution of safe third country law and practice, in: *The Oxford Handbook of International Refugee Law.* C. Costello et al (Eds.), OUP, Oxford, United Kingdom.

132 Moreno-Lax, V., 2020. The architecture of functional jurisdiction: Unpacking contactless control – on public powers, *S.S. and Others v. Italy*, and the "operational model". *German Law Journal* 21, pp. 385–416.

6.2 *EU-Turkey Statement*

An example of externalisation beyond the border attempted by means of political partnership is the EU-Turkey Statement that was signed on 18 March 2016 and aimed at stopping irregular migration to Europe in what appeared to be a temporary and exceptional measure. It provided that all new irregular migrants and asylum seekers crossing from Turkey to the Greek islands should be returned to Turkey.[133] Moreover, the parties agreed that for every Syrian returned from the Greek islands, EU Member States would accept a Syrian refugee from Turkey. The return was agreed in exchange for financial assistance and support for humanitarian capacity building, as well as Turkish visa liberalisation and accession talks.[134]

Legal issues pertaining to the statement stem from its hybridity and informality which are more broadly endemic in the EU's cooperation with non-EU countries. This is because non-binding, informal, soft law is prioritised at the expense of 'institutional balance, judicial control, and transparency'.[135] Informality results in serious accountability deficit.[136] The statement was published as a press release and neither its author nor its legal nature are clear.[137] The instrument is an example of the 'ongoing informalisation' of the process to externalise EU border control.[138] In addition, concerns about the protection of the right to asylum, non-refoulment, right to liberty and non-discrimination have been rightly voiced and further escalated by Greek Joint Ministerial Decision (JMD) in June 2021, which designated Turkey as a 'safe third country' for people from Afghanistan, Bangladesh, Pakistan, Somalia, as well as Syria, expanding the impact of the deal to include the whole Greek jurisdiction.[139]

133 This deal followed the EU-Turkey Joint Action Plan, activated on 29 November 2015 and the 7 March 2016 EU-Turkey statement.

134 *Ibid.*

135 Fernando-Gonzalo, E., 2023. The EU's informal readmission agreements with third countries on migration: effectiveness over principles?. *European Journal of Migration* and Law 25(1), pp. 83–108.

136 Tsourdi et al. *op. cit.* fn 8, pp. 88, 93.

137 Kassoti, E., and Carrozzini, A. (2022). One instrument in search of an author: revisiting the authorship and legal nature of the EU-Turkey statement, in: *The Informalization of the EU's External Action In the Field of Migration and Asylum*. E. Kassoti, N. Idriz (Eds.) p. 433, TMC Asser Press, Hauge, Netherlands.

138 Tsourdi et al. *op. cit.* fn 8, pp. 93.

139 International Rescue Committee, 2021. Joint NGO statement on Greek government's decision to deem Turkey a "safe" country. <https://eu.rescue.org/press-release/joint-ngo-statement-greek-governments-decision-deem-turkey-safe-country.> (Accessed 15 July 2023).

The deal has been assessed by national parliaments, the European Parliament[140] and the Court of Auditors in a critical way.[141] However, it could not be legally challenged before the CJEU.[142] This is because the statement cannot be considered an action or act attributable to the EU institutions, since the Court found that it was merely a 'political arrangement' concluded by Member States.[143] Although the CJEU avoided ruling on the legality of the statement, it has not been passive in relation to agreements concerning regular migration from partner countries.[144] Indeed, although the Court has been quite active both in EU external relations and in the AFSJ, it appears to be rather passive as far as the external aspects of asylum law and irregular migration are concerned[145]

National courts and the ECtHR have not proven to be fruitful alternative avenues for reviewing the legality of the statement either. In this respect, *JR and Others* addressed in 2018 the human rights implications of the statement but did not find a violation of rights.[146] As far as judicial scrutiny at a national level is concerned, a lower Greek court in Lesbos interestingly found that Turkey is an unsafe third country, but the Greek Council of State ruled that the return of Syrian refugees was actually in line with EU law.[147]

The statement pertains both to outsourcing of border and migration control as well as shifting certain functions of the asylum process. As the EU Member States will receive one Syrian refugee waiting in Turkey for every Syrian refugee returned from Greek island, the Statement clearly touches asylum law. The Statement is probably a unique initiative on behalf of all Member States, acting jointly yet independently from the EU, by moving asylum seekers who have already been in the territory of the EU to a third country. The statement

140 Although the EP has avoided challenging these informal instruments in court for political reasons.

141 See for the German Bundestag of 15 March 2017 18/11568 Drucksache; German Bundestag of 27 February 2019 19/8028 Drucksache; German Bundestag of 27 March 2020 19/19340 Drucksache; For example: European Court of Auditors,2019. Special report 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results European Court of Auditors, 2018. Special report No 27/2018: The Facility for refugees in Turkey: helpful support, but improvement needed to deliver more value for money.

142 Case T-192/16 *NF* v *European Council,* ECLI:EU:T:2017:128; Case T-193/16 *NG* v *European Council,* ECLI:EU:T:2017:129; Case T-257/16 *NM* v *European Council* ECLI:EU:T:2017:130; Joined Cases C-208/17 P to C-210/17 *P NF and others* v *European Council,* ECLI:EU:C:2018:705.

143 *NF*, para. 29.

144 Garcia Andrade, *op.cit.,* fn 127, p. 109.

145 *Ibid.*, pp. 109–121.

146 *JR and Others* v *Greece* App no 22696/16 (ECHR, 25 January 2018).

147 Greece Council of State of 22 September 2017 decision n. 2347/2017.

was the result of what was perceived as migration crisis and for this reason is clearly linked to the emergency rationale present in other devices.

6.3 *EU Partnerships with African States*

Other cooperation agreements include those signed with African states, focusing on border patrolling, interceptions and pull-backs.[148] These include indirect forms of EU support to a state through financial and operational assistance and training, targeting sea border patrolling and control, prioritising interceptions and pull-backs at sea and land, and conducting 'capacity building' on migration management.[149] Such measures aim to stop arrivals of migrants including refugees to the EU. FRONTEX is heavily involved in joint operations with African states' authorities, especially as regards the West African route through the Sahel transit region.[150] For example, FRONTEX cooperates with Niger with the main purpose of migration management, ensuring information sharing while providing training and capacity building.[151] Due to this partnership,[152] national legislation implementing the agreement has led to intensified criminalisation of smuggling and the adoption of repressive measures of containing people in transit. These changes have increased the risk of detention, torture, deportation and smugglers' fees, leading to extremely dangerous journeys.[153] The cooperation agreements with Niger have temporarily been suspended since a recent coup in July 2023.[154]

148 Practices of preventing people from crossing the border conducted in cooperation with bordering states that drags people back to its own territory and/or intercept them at sea and forcibly return them to its territory are known as 'pullbacks'.

149 EU Commission, 2017. EU Trust Fund for Africa Adopts €46 Million Programme to Support Integrated Migration and Border Management in Libya.

150 Frontex' involvement was strengthened since 2010 after the signing of the Africa-Frontex Intelligence Community (AFIC), a framework for cooperation with 31 African States in the context of border-management.

151 Zandonini, G., 2020. Biometrics: The new frontier of EU migration policy in Niger', Proceedings of the Conference, Externalisation of borders; detention practices and denial of the right to asylum, Lagos.

152 Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger); Working Arrangement between Frontex and the European Union Capacity Building Mission in Niger (15 July 2022) <https://prd.frontex.europa.eu/document/working-arrangement-between-the-european-border-and-coast-guard-agency-frontex-and-the-european-union-capacity-building-mission-in-niger-eucap-sahel-niger/> (accessed on 27 November 2023).

153 ARCI, 2018. The dangerous link between migration, development and security for the externalisation of borders in Africa. Case studies on Sudan, Niger and Tunisia <www.statewatch.org/news/2018/jul/report-frontiere-2018-english-.pdf> (Accessed 15 July 2023).

154 Statewatch (2023), *EU: Commission halts migration cooperation with Niger, but for how long?* <https://www.statewatch.org/news/2023/september/eu-commission-halts-migration-cooperation-with-niger-but-for-how-long/> (Accessed 27 November 2023).

Having ensured that people are stopped on their way to the EU, the EU avoids engaging its own legal obligations, as asylum seekers never manage to lodge asylum applications that an EU state would have the legal obligation to process.[155] Another example of land and sea border pullbacks is illustrated by Morocco, which stops people crossing into the Spanish enclaves of Melilla and Ceuta based on agreements with Spain and the EU,[156] and recently, the EU signed a Memorandum of Understanding with Tunisia.[157] Such partnerships reproduce the neo-colonial and racialised spirit of repulsion and deterrence and aim to control migration. According to racist views, absorbed in European politics under the guise of 'protecting the European way of life', migration is viewed as a demographic replacement and perceived as a threat.[158] It is in light of such views that those partnership agreements seeking to stop movement before even engaging asylum law attract most support.

6.4 *EU Partnerships with Western Balkan States*

The EU has also concluded Status Agreements with Albania, Bosnia-Herzegovina, Montenegro, North Macedonia and Serbia.[159] These allow FRONTEX to carry out joint surveillance operations or rapid border interventions to manage migratory flows, counter irregular immigration and tackle cross-border crime. Frontex has become an important vehicle of externalisation to neighbouring countries of transit. And, while FRONTEX is seriously

155 Cantor *et al*, *op.cit.*, fn 4, p. 15.

156 Hathaway, *op.cit.*, fn 28, pp. 1–390.

157 Memorandum of Understanding (MoU) on a strategic and comprehensive partnership between the EU and Tunisia (Tunis, 16 July 2023) <https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3887> (Accessed 27 November 2023).

158 Framing Ethnic Diversity as a "Threat" Will Normalise Far-Right Hate, Say Academics, OPEN DEMOCRACY (Oct. 23, 2018); Angela Giuffrida, 2019. Europe' s Far Right Leaders Unite with a Vow to 'Change History', GUARDIAN, https://www.theguardian.com/politics/2019/may/18/europe-far-rightleaders-unite-milan-vow-to-change-history (Accessed 15 July 2023).

159 Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania ST/10290/2018/INIT OJ L 46, 18.2.2019; Proposal for a COUNCIL DECISION on the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina COM/2019/110 final; Council of the EU. (8 May 2023), Agreement between the European Union and Montenegro on operational activities carried out by the European Border and Coast Guard Agency in Montenegro 8354/23; COUNCIL DECISION on the conclusion of the Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia 12895/22; Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia ST/15579/2018/REV/1 OJ L 202.

criticised for its operations within EU territory, its operations beyond EU borders are under-scrutinised.[160] Gkliati and Kilpatrick specifically criticised the deal with Albania for not containing the necessary human rights safeguards.[161]

Partnership agreements are likely to raise serious issues of compatibility with the international refugee and human rights law. As they usually target asylum seekers from crossing the border in an irregular fashion, they effectively penalise them. This is in violation of Article 31(1) of the Refugee Convention, which exempts refugees from penalisation for irregular entry, recognising that most refugees often have no choice on this matter.[162] Moreover, such agreements are very likely to be in breach of the right to asylum. By relocating asylum seekers to a third country, a state effectively denies them the opportunity to exercise their right to asylum in its territory.

Another relevant principle whose protection is at stake is the absolute prohibition on collective expulsions set out in Article 4 Protocol 4 to the ECHR, as whole groups of people are threatened for a transfer to a third country without having their applications for international protection individually assessed by authorities of the country in whose territory they are. Particular concerns exist about specific groups of asylum seekers, such as women and LGBTQ asylum seekers. Such agreements usually fail to respond to the intersectional vulnerabilities of women and LGBTQ asylum seekers, who might end up being further discriminated against, persecuted and potentially refouled back to their country of origin.[163] States remain bound to observe the 1951 Refugee Convention when engaged in conduct outside their own territory, since the applicability of the Refugee Convention is not limited by a 'jurisdiction' clause.[164] This is even more important when considering the transformation of borders that have become elastic yet omnipresent far beyond the actual frontier with exclusionary and violent effects.

160 Gkliati, M., and Kilpatrick, J., 2021. Losing sight of an agency in the spotlight: Frontex cooperation with third countries and their human rights implications. *Forced Migration Review* 68, p. 18.

161 *Ibid.*

162 As was recently highlighted by Cantor, D., 2023. About the similar example of the UK' illegal migration bill, does the UK's illegal migration bill breach the refugee convention? – Refugee Law Initiative Blog on Refugee Law and Forced Migration.

163 Rainbow Migration, (2022). Rwanda is not safe for LGBTQI + people <https://www.rainbowmigration.org.uk/news/rwanda-is-not-safe-for-lgbtqi-people/> (Accessed 15 July 2023).

164 Goodwin-Gill et al, *op. cit.*, fn 18, 308–313.

7 Conclusion

The objective of this article is to map and assess the EU's externalisation devices, which is conducted at a tri-dimensional level, considering externalisation from within, at the border and beyond the border. The lens of assessment has been both legal drawing from international refugee and human rights law but also theoretical. It is found that externalisation is embedded within EU law and policy at all examined levels and it appears highly likely that this underlying element will be reinforced by current reform plans, if they go ahead. Serious questions of legality are raised in light of several devices of externalisation assessed here through the lens of international refugee, human rights as well as EU law. Externalisation, pertaining both to immigration and border control and outsourcing of asylum functions, goes hand by hand and is indeed driven by migration prevention leading to refugee deterrence. Emergency and crisis rationale dictate such tendencies whose neocolonial spirit cannot go unnoticed.

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