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BORDER EXTERNALIZATION ON A NEW SHORE: A COMPARATIVE ANALYSIS OF AMERICAN AND EUROPEAN MIGRATION POLICIES' EFFECTS ON THE LEGITIMACY OF THE RIGHT TO ASYLUM

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ABSTRACT

Border Externalization on a New Shore:
A Comparative Analysis of American and European Migration Policies' Effects on the Legitimacy of the Right to Asylum

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Encountering the two greatest refugee crises in the twenty-first century, the European Union and the United States instituted immigration policies that externalized migration controls. Through international agreements, exportation of border controls to other countries, and other tactics that legally distance refugees and asylum seekers from the EU and US, both global powers threaten the legitimacy and access to human rights. Through a comparative legal analysis of the two destination regions, the legal implications of the kingpin of modern migration strategy – border externalization – will be examined to display the effectual legitimacy of the right to asylum. While many authors criticize the European Union for their veiled disregard for indirect violations of asylum laws by member states and neighbors, a comparison of the legal implications of American immigration policy accuses the United States of mirroring European

migration strategy. American and European representatives were primary authors of the UN Universal Declaration of Human Rights, 1951 Refugee Convention, and 1967 Protocol that collectively established the right to asylum internationally (Andreopoulos, 2020; Hurwitx, 2010). Therefore, the role of these two authorities in enforcing the right to asylum within their own borders is critical to maintaining the legitimacy of this protection. By exploring the historical causes of migration and policies of each region, the article examines the similarities and differences in geography, political arrangement, and catalytic factors that relate the EU and the US' policy decisions and treatment of human rights obligations. Next, by comparing the effects of border externalization policies, I will demonstrate the legal disconnect between international standards and the actions of the EU and US. In a final examination of the global enforcement of the right to asylum and human rights, the article demonstrates that border externalization's novel and universal application delegitimizes the right to asylum, a critical international refugee protection.

DEDICATION

To the wonderful, wise faculty of the International Studies Department and Bush School professors who inspired and guided me throughout this process. The subject matter of this paper was inspired and refined by the wisdom shared by years of professors. To all vulnerable people groups, that they might know there are students in small-town Texas who desire to help.

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NOMENCLATURE

ACA	Asylum Cooperation Agreement
EU	European Union
MPP	Migrant Protection Protocols
MP	Mobility Partnership
UN	United Nations
US	United States of America

INTRODUCTION

The twenty-first century has witnessed extraordinary refugee and migration crises, stemming not just from a traditional cause of flight, like civil war, but a myriad of circumstances prompting extraordinary flows of people across borders. The hope of refuge in a protectorate state is the catalyst for migration for vulnerable populations across the world. The European Union saw an unprecedented influx of vulnerable migrant groups in 2015. Headlines in member states and far abroad read of the traumatic journeys that people were willing to endure because of depravity and conflict at home across the Mediterranean. Similar shock met American audiences the year before in 2014 with a dramatic increase in unaccompanied minors knocking at the southern border. These regions encountered a dramatic influx of migrants in the past ten years; while extraordinary to domestic audiences, these statistics fall into the global pattern. Global totals of refugees and asylum-seekers rose from less than 17 million in 2001 to over 30 million by mid-2020, nearly doubling in 20 years (UNHCR, del Mundo). Countries fumbled to manage the influx of vulnerable populations with limited domestic funds and expectations of international humanitarian necessity, raising the question of the ability of destination countries and international refugee standards to defend human life in practice. Resolved in 1948 and 1951, respectively, the United Nations' Universal Declaration of Human Rights and Refugee Convention established foundational international standards in the preservation of human dignity and protection of life through the mechanism of asylum. American and European representatives wrote fundamental principles of the modern body of international law in the drafting of these two documents that codified universal protection of human rights and the right to asylum. In the modern terrain of migration management, however, the United States and European Union

member states are shirking international responsibilities by implementing a new strategy of migration management. These states have enacted policies that push their influence and immigration agenda beyond national territorial boundaries by extending the reach of domestic border enforcement and exporting migration control functions to third-party countries in an overarching strategy of *externalization.* Externalizing immigration policies renders legal implications on the rights of asylum seekers and refugees.

The trend of externalization as the primary strategy of destination countries has only developed over the past twenty years, redefining the legal implications of the European Union and the United States in the twenty-first century. Questions about the externalization of immigration policies by the European Union are widespread, responded in kind by many international law scholars and asylum law experts. Violeta Moreno-Lax and X Lemberg-Pedersen, legal scholars and experts in the area of international and European refugee law, explain the use of extraterritorial controls to manage migration flows through the creation of physical or jurisdictional distance. Their argument explains the physical and ethical distance created by EU border externalization in an almost topological manner. There is a geographic component of externalization, as it is a novel, territorial phenomenon by which immigration policies are imposed beyond national boundaries; thereby, domestic policy goals are accomplished by attempting to displace international legal obligations through diluted jurisdiction. Moreno-Lax and Lemberg-Pedersen draw a critical conclusion that European states' developmental support of southern Mediterranean neighbors constitutes a shared responsibility for the maintenance of international law within *both* jurisdictions. Professor Alejandro Del Valle-Gálvez, an expert in migration and EU border law, delineates between externalization and extraterritorial migration policies by specifying which state actors are actually executing a

policy. When one state's officials enforce border controls beyond their national borders within another state, Del Valle-Gálvez calls this *extraterritorrialization*. *Externalization*, according to his delineation, is the enforcement of a policy beyond a state's borders without the presence of a state official or direct oversight by the state issuing the policy (Del Valle-Gálvez 118). Del Valle-Gálvez's definitions point to the direct and indirect complicity of states when enforcing border controls beyond their territory, directing critical attention to the implications of externalization on the accessibility of protection for asylum seekers and refugees. His ideas about the differences between direct and indirect complicity are very specific, potentially limiting the responsibility of states in the obedience of international law. While both of these authors are amongst a distinguished body of literature regarding European Union border externalization, accompanied by journalists and humanitarian advocates reporting on the grave human impact of these policies, there is a lack of study looking at the same strategy employed by the United States. Given the novelty of externalization, there is also a limited scholarship connecting the migration policies pursued by the European Union and the United States with waning global access to asylum protections for vulnerable populations. Limiting the blame for the emerging legal implications of externalization to the European Union member states ignores the universality of border externalization and its threats to asylum seekers, refugees, and other vulnerable groups.

Considering the immigration policies enacted by the European Union and the United States through a historical framework reveals an emerging pattern of legal infringement of the rights of asylum seekers, challenges to international law and human rights standards, and an increase in illegal activity that preys on already vulnerable populations. Considering the historical narrative, an analysis of migration catalysts, negotiating strength, and migration

management policies over the past twenty years contextualizes the development of externalization. Parsing the policies and international agreements that manage migrant flows for the underlying strategy and tactics of enforcement exposes the primary issue of jurisdictional responsibility that affects migrants' access to asylum protections. If the policies executed by the very states that authored the pinnacle enumerations of laws protecting asylum and human rights do not provide protection, then where are the protections legitimately available? Not only is a doctrine of international law at stake, but the foundation of democratic principles shift "[i]n the age of migration, [as] democracy has begun to operate as an instrument of exclusion, not of inclusion" (Krastev, 12). Utilizing a comparative framework, variables that differ between the US-Mexico and EU-Mediterranean borders, such as geography, political arrangement, migration flows, catalytic factors, and situational differences can be better controlled for when analyzing the development of legal implications of externalization policies. By understanding the connections between the shared and differing factors, conclusions about the causal relationships between policy implementation and the access to human and asylum rights by vulnerable populations can be drawn across geographically and politically different regions. These new policies are not just border enforcement tactics, but a kingpin of global immigration strategy with far-reaching implications that threaten the legitimacy of international doctrines.

Primary sources of historical, political, human impact, and legal information will stem from a variety of perspectives. Holding the United Nations High Commissioner for Refugees as the primary, politically-neutral authority for current trends, international law, and enforcement challenges offer foundational data and international expectations. Drawing on government documents from both the United States and European Union, I will analyze the intent of their migration agendas. I will then present the corresponding effects of aforementioned policies, as

reported by advocates and journalists in the US and EU. The work of international scholars and experts in asylum and refugee law forms foundational conclusions about the responsibilities of states, and often, their failure to uphold international responsibilities, rendering questions on the legitimacy of the right to asylum in the twenty-first century.

The most comprehensive enumeration of human rights and refugee protections are barely seventy years old, but yet are encountering a critical disjuncture in enforcement and international respect. The externalization of borders is not just executed by the European Union – these policies are swiftly becoming the dominant trend in migration management, crossing international standards and endangering human lives. The differences between the US-Mexico and EU-Mediterranean border do not make the legal implications of such policies into coincidental threats to the rights of asylum seekers and refugees, but rather indicate a universal threat to international protections. The novelty and universality of border externalization threaten the protection of human rights for vulnerable populations and leave a vacuum of enforcement for international law.

In the course of this argument, I will outline the terminology necessary to engage with international refugee law, explain jurisdictional complications inherent to such laws, and the process of refugee status attribution. Next, I will historically root the discussion of migration management policies regionally, comparing the catalysts that prompt migration into the EU and US across the Mediterranean and the Rio Grande, the recent history of migration policies in each region, and the primary tactics and policies of externalization by each power. Through an examination of the legal implications of an externalized migration management strategy, the differences in catalysts and policy tactics, nonetheless, render similar infringement on the rights and life of asylum seekers. Through a consideration of the consequences of policies that risk

violating international law, I will examine how the policies enforced by the EU and US threaten the legitimacy of the right of asylum, human rights, and international law.

Terminology of Asylum Law

In order to establish a shared conceptualization of externalization and further elaborate on the legal implications of such policies, an explanation of foundational terms is pertinent. I will refer to four regions through which migrants journey, from which certain jurisdictional complexities arise. *Country of origin* refers to the country where the migrant departs from, though not necessarily the state where they are a citizen. The *destination country* is the desired final location that a migrant aims for in immigration. The destination countries referred to hereinafter are the United States or the European Union for their respective migrant flow networks. A *country of first arrival* refers to potentially two nation-states – the most natural iteration would be the first country that a migrant resides in after leaving their country of origin in the journey to the destination country, but in policy implementation, a *country of first arrival* also refers to a state where a migrant must cross through before reaching the destination state. The migrant, therefore, is interacting with the geographical boundaries and jurisdiction of that intermediary state. This journey across jurisdictions in the return of migrants from the destination state to a state of first arrival for a primary application for asylum will be discussed later. The term *transit country* includes countries that migrants pass through on the way to destination states. Status as a transit nation places strain on the distribution of domestic resources, both in terms of border management and social services' care for extraterritorial persons that stay temporarily. In order to consider externalization through the legal framework, understanding the term "safe" third country is also necessary. Both European and American asylum procedures have allowed for the referral of migrants to transit nations to apply for asylum in "safe" third

countries first, pending safety attributes that protect life, freedoms, and a refugee status process (European Commission; Fratzke). With these labels in mind, a more coherent understanding of the specific policies employed by destination countries is possible, as well as an understanding of the implications for migrants and nation-states.

To differentiate refugees and asylum seekers from other migrants, one must understand the process by which a migrant is attributed "refugee status" or applied for asylum. Refugee status affords migrants international protection and assistance, and those who have applied for asylum are applying for refugee status (Preemptive Love). The determination of refugee status can be decided either by national application or by the United Nations High Commissioner for Refugees if a state is not party to the UN Refugee Convention or has an insufficient or unjust process (United Nations High Commissioner for Refugees). When applying for asylum in the United States, applicants can be placed in either an affirmative asylum processing or defensive asylum processing. Migrants who arrive in the United States legally apply affirmatively, while those who are unauthorized migrants and have been apprehended apply defensively (USCIS). To gain Refugee Status Determination from the United States, a migrant must prove that they are admissible to the US, not from the US, not resettled in any other country, and prove persecution or fear of persecution based on religion, nationality, class, race, or political affiliation (Preemptive Love). EU requirements are parallel, as applicants must prove fear of persecution based on religion, nationality, class, race, or political affiliation (Papademetriou). When applying for asylum in the European Union, a shared framework governs the administration of refugee status across the member states. An application is distributed to a member state's asylum processing system based on a cascade of factors, including family ties, visa or residential permits, followed by frequency of entry into the EU (European Commission). The experiences of

asylum seekers vary disparately based on the origin and destination countries (destination countries in discussion being the United States and the member states within the EU), articulated thoroughly in an explanation of externalization policies employed by the US and EU.

A final foundational term needs to be defined, as its connotative differences affect the responsibilities understood to be obligated by a state. "Jurisdiction" refers not only to the legal terrain of responsibility that a state holds within its territorial state but also to those responsibilities that are conferred by greater legal bodies by virtue of a state's extended activities. The United Nations Human Rights Committee argued that the financial, military, and diplomatic activity of a state extends its jurisdictional responsibility to uphold human rights for "all persons over whose enjoyment of the right[s] [concerned] it exercises power" (Moreno-Lax and Lemberg-Pedersen). The EU and US, as demonstrated in the following discussion, use externalizing policies to shift jurisdiction to origin or transit states. This prompts legal ambiguities of international responsibility and lessens access to true asylum protections.

Addressing the specific policies implemented by the European Union requires a discussion of country-specific bilateral agreements and greater regional efforts. While the tools used to externalize borders with governmental policies are comparably parallel between the US-Mexico and EU-Mediterranean borders, there exists a compositional discrepancy in the geopolitical arrangement – the EU is a unified *collective* of independent nation-states bordering a *collection* of independent African states on the other side of the Mediterranean Sea, while the US-Mexico border is shared by the US and Mexico across a comparably narrower river, as well as crossing more rugged landscapes and urban areas. Both borders encounter flows of migration not only originating from the states that share the border, making the southern partners into both origin and transit states. Rather than hindering analysis, the differences in geopolitical

composition allow for a greater understanding of the diverse implications of externalization, especially as it relates to the way states manage jurisdictional responsibility.

1. HISTORY OF MIGRATION CATALYSTS AND POLICY

1.1 European Union - Mediterranean Border

The historical context of modern policies that govern migration across the Mediterranean is greatly rooted in the past twenty years of relations amongst Mediterranean neighbors. I will show that as the political dynamic changes, the negotiation symmetry changes, therefore altering the type of policies pursued by the European Union and their southern neighbors, with externalization emerging as the novel strategy. In 1999, the EU began a policy-making adventure to explore the “external dimension of migration” at the directive of EU member states, initiating the negotiations with North African countries that would continue for the next 10 years (Abderrahim), supplemented by other migrant control policies that externalize the control of migration flows into the EU for the duration of the twenty-first century. The narrative of EU-Mediterranean migration agreements is one of shifting power dynamics and negotiating positions – as one side of the Mediterranean moves into a position of advantage, the terms of migration agreement shifts. Factors unrelated to migration have also changed the negotiation climate between southern Mediterranean states and the EU. A party's bargaining position in migration agreements is invariably affected by aspects *beyond* migration, such as trade directionality, foreign aid, tourism revenue, political balances, and security (Kausch). For example, an agriculture and fishing agreement went sour at the hands of the European Court of Justice, in turn poisoning a burgeoning conversation between the EU and Morocco regarding migration in 2016 (Abderrahim). The Arab Spring of the early 2010s greatly changed the governments, regime relations with citizens, and diplomatic affairs within and between the Southern Mediterranean states. The changes to the south of the Mediterranean, therefore, altered the flow

of migrants across to Europe, in addition to the regimes with which the EU negotiated (Kausch). Chaos and upheaval in the southern Mediterranean region continue to be a major catalyst for migration towards Europe, shaping the narrative and negotiations of migration policies.

The external component of EU migration management has developed from the Global Approach to Migration (GAMM) to the contemporary Migration Partnerships Framework throughout the twenty-first century. The GAMM, established in 2005 by the EU, was executed with mobility partnership agreements which managed migration into the EU through bilateral partnerships with nations throughout Eastern Europe, the Middle East, and North Africa by building capacity in their national migration processes, limiting illegal migration, and enforcing border management (Ahad and Collett; Abderrahim, 2019). Following the Arab Spring, the EU expanded the mobility partnership agreements formerly arranged with Eastern European states to North African countries following their political upheaval (Abderrahim, 2019). The mobility partnership system distanced migrants from EU shores through a focus on third countries' domestic affairs – strengthening third countries' immigration systems, enforcing border control, and investing in socio-economic development (Abderrahim, 2019). The EU's incentives for such agreements included visa facilitation programs of a third country's nationals in return for readmission of third-country nationals as well as migrants who passed through the third country on the way to the EU (Abderrahim, 2019). The EU successfully negotiated MPs with Morocco and Tunisia in 2013 and 2014, but Algeria refused (Abderrahim, 2019). The Khartoum Process, a similar framework more so aimed at controlling migration from the Horn of Africa, was established in 2014 and included Egypt and Libya (ICMPD). EU-Mediterranean policies thereby controlled the entirety of North Africa with the exception of Algeria's aloof avoidance. Following the dramatic increase of refugee migration towards the EU in 2015, the EU reassessed

its migration management in light of the dramatic loss of life in the Mediterranean and the sudden augmentation of domestic pressure to combat illegal migration (Díaz de Mera García Consuegra and Valenciano, 2021). The EU's reassessment resulted in the Migration Partnership Framework.

The Migration Partnership Framework did not end the strategy of externalization but expanded it. The shift in 2016 to the Migration Partnership Framework increased the external force of EU migration management and focused EU policy attention primarily on the Mediterranean neighbors (Ahad and Collett, 2017). The goal of the Framework is to stem migration catalysts in origin states, increase the proportion of illegal migrants readmitted to origin and transit states, build capacity in third countries' immigration systems, and keep migrants closer to origin countries to prevent loss of life in migration (Díaz de Mera García Consuegra and Valenciano, 2021). Addressing bordering states along the Mediterranean, as well as some origin states in central Africa and the Middle East, the Migration Partnership Framework represents a further honed focus on external policy making to decrease migration into the EU (Ahad and Collett, 2017). The combination of the Migration Partnership Framework and Khartoum Process distances migrants from access to European jurisdiction and places responsibility for caring for vulnerable international migrants on the EU's southern neighbors.

Two of the primary tactics that are utilized by the EU in the migration management strategy include economic investment and readmission agreements. Both the Migration Partnership Framework and Khartoum Process include terms that facilitate the return of illegal migrants to the EU to origin and transit states in the southern Mediterranean neighborhood. Economic investment targets the catalysts of migration to slow the flow of legal and irregular migration. The International Crisis Group's Report No. 179, while in reference to European

border arrangements with Libya, applies to all of the origin and transit countries that Europe reaches down to negotiate with to the south of the Mediterranean – "Any effort by European policymakers to stabilize [a Mediterranean neighbor] must be part of a national-level strategy aimed at developing [a Mediterranean neighbor's] licit economy and reaching political normalization." As Europe seeks to develop the southern region of Libya to stem migration from sub-Saharan Africa, the European Union's southern border of power extends across the Mediterranean and into continental Africa. What was originally proposed to be conditional on human rights assurances, governance, and legal protections within a country, development dollars are a primary tactic of the EU in external border management (Ahad and Collett, 2017). The use of economic investment in origin and transit countries entrenches European power in the domestic activities of a third country to distance migrants from EU jurisdictional territory.

Readmission agreements, another primary tactic of EU migration policy and highly disdained term of migration agreements, constitute returning foreign nationals that live in the EU without authorization to their country of origin. Agreements centering on readmission create speedy processes of identification of an origin country's nationals living without authorization in the EU, consular approval to return, and deportation (Abderrahim, 2019). However, the return of migrants to countries they only passed through highlights the jurisdictional snafu created by a migration management strategy of border externalization – an agreement can create an apparent loophole allowing destination states to deflect their international responsibilities to refugees and asylum seekers by sending them to a nation through which they passed. Furthermore, the return of third-country nationals to a southern Mediterranean partner becomes a domestic issue created by the EU. This snafu primarily involves Morocco, as a large contingent of sub-Saharan migrants pass through Morocco before crossing the sea to Europe; asking Morocco to receive migrants

that are not “theirs” in nationality places a domestic burden that Morocco is not currently capable of bearing, and much less so with the further addition of third-country migrant readmission (Abderrahim). Bill Frelich, Director of the Refugee and Migrant Rights Division of the Human Rights Watch, calls the extension of the European Commission’s migration policies a continuation of “the EU’s efforts during the refugee crisis to deflect responsibility and legal obligations away from EU member states and onto transit and origin countries.” By exporting control over border management to origin and transit nations, the fundamental protections afforded by the asylum process are often endangered, rendering the EU’s externalization strategy as a waning force to the legitimacy of the right to asylum.

1.2 United States - Mexico Border

Across the Atlantic, migration across the US-Mexico border is multidirectional and multifaceted, as migrants from many nations cross the territorial division between two nations. Similar to the EU-Mediterranean border, the last decade witnessed crises events of mass migration of vulnerable populations. The 2014 humanitarian crisis of unaccompanied minors from Guatemala, El Salvador, and Honduras prompted Mexican policy changes to care for the more vulnerable nature of the migrants journeying to the United States (Ruiz Soto). Only four months into 2021, and the Biden administration’s immigration policies are shaping up to be just as focused on externalization, though articulated in more humanitarian terms. The transition of power of US presidents marks clearly distinct immigration agendas between presidential terms; however, the strategy of externalization of migrant controls is a novel theme of twenty-first-century American migration policy. A review of the externalization of borders across the US-Mexico divide includes the Merida Initiative, Migrant Protection Protocol and asylum

cooperation agreements, and the Biden administration's burgeoning migration management announcements.

In the twenty-first century, migration agreements between the US and Mexico represent not only the flow of migrants between the US and Mexico but also the more general flow of migrants north from Central and South America. The first ten years of the twenty-first century saw falling rates of apprehension on and immigration across the US-Mexico border from record highs at the start of the century (Gonzalez-Barrera; Passel et al.) In 2008, the United States and Mexico signed the Merida Initiative, a 2008 bilateral security agreement in which the United States appropriated $2.5 billion for the training of Mexican border forces, as well as proactive measures to build economic and security capacity to lessen the "push" factors of migration to the United States (Bureau of International Narcotics and Law Enforcement Affairs). In a clear example of Del Valle-Gálvez's extraterritorialization, the Merida Initiative included the training of police forces, border patrol officers, and other law enforcement personnel to combat trafficking and crime along the border, in addition to training for judicial personnel to build capacity in the Mexican domestic judicial system (INL). By supporting Mexican border strengthening along their southern border with Guatemala, the reach of US migration management extended south to the Mexico-Guatemala border. Since the Merida Initiative, the demographics and tone of migration have shifted; the unaccompanied minor migrant crisis of 2014 and the election of President Donald Trump altered the tactics of border enforcement but continued with a strategy of externalization.

Under the Trump administration, the Migrant Protection Protocols, a 2018 bilateral agreement with Guatemala, and 2020 asylum cooperation agreements with Guatemala, Honduras, and El Salvador exemplified the migration management policy of the United States.

An analysis of each policy's terms reveals the tactics by which the US attempted to distance migrants from the jurisdiction of the United States to stem migration north.

The Migrant Protection Protocols (MPP), announced in January of 2019, is colloquially referred to as the "Remain in Mexico" policy, as asylum seekers are required to remain in Mexico while awaiting a court date in the United States. In exchange for increased enforcement of the border, the United States promised economic support for Mexico to stem the causes of migration in Central America and southern Mexico, as well as promising to hurry the processing of asylum seekers waiting in Mexico (Ruiz Soto). Another term of the MPP expansion required a deployment of Mexican troops to prevent unauthorized immigration from Guatemala to Mexico to further stem the flow into the United States. This part of the agreement externalizes the border of the United States further south to the border between Guatemala and Mexico. Regarding the requirement for asylum seekers to wait on the Mexican side of the border, concerns arose about the conditions of border towns and domestic resources to protect a perilously vulnerable class of migrants from criminal activity and uphold human rights (Frelick et al.). The Secretary of the Department of Homeland Security herself called the MPP "an unprecedented action," emphasizing the novel tactics of externalization by an alternation of jurisdictional responsibility through domestic policies (Frelick et al.). In July of 2019 at the threat of increased tariffs, Mexico agreed to an expansion of the MPP to increase migrant policing along the US-Mexico border. The deployment of the Mexican National Guard was rather fruitful, returning over 60,000 migrants to their country of origin and preventing another 20,000 from illegally crossing into the United States (Ruiz Soto). While the Mexican side of the border carried out their enforcement objectives, the United States returned almost 40,000 migrants to wait in Mexico for American asylum processing (Ruiz Soto). By forcing migrants to wait in Mexico for their court

date, the US is seemingly enforcing detention in another state. Meanwhile, between 2018 and 2019, applications for asylum along the US-Mexico border grew more than two-fold, from 30,000 to 71,000 (Ruiz Soto). The collection of migrants-in-waiting along the Mexico side of the border reveals the domestic pressure that mass migration causes. In addition to stressing the resources available to house and protect migrants from illegal manipulation in border camps, these camps reflect an underlying policy move to externalize the US border. By requiring that Mexico care for migrants awaiting asylum in the United States, the United States' southern border is extended beyond territorial claims, applying American jurisdiction to the domestic behavior of another state.

A comprehensive view of American externalization includes agreements with countries from and through which migrants flow to the US-Mexico border, most notably the Northern Triangle countries – Honduras, El Salvador, and Guatemala. The Trump administration announced in July of 2018 that migrants from Honduras or El Salvador that crossed through Guatemala in the pursuit of asylum in the United States would be required to return to Guatemala to apply for asylum there first (BBC). With an expansion of the plan announced later, Mexican citizens would also be sent to Guatemala to first apply, according to the US Department of Homeland Security (BBC). By requiring primary asylum approval by a third-party nation, of which the Mexican migrants, particularly, did not pass through, the United States transparently externalizes its immigration controls by outsourcing the application processing to another country. The bilateral agreement with Guatemala was signed under the Trump administration's threat of tariffs, reflecting similar economic bargaining that mirrors the European approach to negotiating migration contracts with economically weaker neighbors. The agreement with Guatemala was followed in 2020 by the announcement of three asylum cooperative agreements

with Guatemala, El Salvador, and Honduras (U.S. Department of Homeland Security). These asylum cooperative agreements (ACAs) promise enhanced pathways for temporary worker visas for Northern Triangle nationals in exchange for asylum seekers being returned to Guatemala to first apply for asylum there. Geographically, migrants from El Salvador and Honduras cannot reach the United States by land unless they pass through Guatemala, bottlenecking migrants into applying for asylum in the "safe" third country of Guatemala. Following the transition of power from the Trump administration to the Biden administration, a policy of externalization continues, although with a greater focus on humanitarian protections. On February 6, 2021, the US Secretary of State announced the suspension and termination of the ACAs (Blinken). This is part of the Biden administration's plan to "collaborate with regional partners, including foreign governments, international organizations, and nonprofits to shore up other countries' capacity to provide protection and opportunities to asylum seekers and migrants closer to home" (White House Briefing Room). This statement focuses on the hopes of bolstering the infrastructure and socio-economic strength of southern nations to limit some of the "push" factors of migration towards the US, but also to receive and protect asylum seekers; nevertheless, the statement emphasizes the role that American migration management plays beyond its national territory. The greater strategy of migration is still one of externalization, reiterating the distancing of American soil by the work of intermediaries.

1.3 The EU-Mediterranean and US-Mexico Borders: A Shared Strategy and Policy History

Externalization tactics across the Mediterranean and the Rio Grande are enforced across geographically and politically different territories but share similar aims. The MPP's requirement for asylum seekers to wait on the Mexico side of the border, as well as the former asylum

cooperation agreements, place similar domestic pressures parallel to EU-Mediterranean readmission policies on countries of origin and transit countries. The readmission of third-country nationals moves the border of the EU south across the Mediterranean, as does the American ACAs' requirement that migrants from Northern Triangle countries apply for asylum in Guatemala. The European and American policies have different names and precise iterations but manifest the same results across two different borders. Furthermore, the negotiating history between both destination states and their respective neighboring origin and transit states emphasizes the distancing between vulnerable migrants and the destination states. Although incentivized and pressured by the US and EU, their negotiating partners are generally at an economic and political disadvantage. Both the US and EU have incentivized their negotiating partners with foreign aid and expedited visa processes. Both the MPF and MPP agreements require increased border enforcement by the respective southern neighbors. The United States' MPP asks for more grunt work from their southern neighbors *before* migrants reach the US-Mexico border, while the European Union focuses more on their southern neighbors' efforts *after* migrants have been processed and readmitted to North Africa. The announcement of the MPP in January of 2019 initiated an outcry over migration control "outsourcing" on both sides of the Atlantic, with the US following Europe's lead in externalization strategy (AP). The Pulitzer Center on Crisis Reporting has sponsored the Associated Press's series entitled "Outsourcing Migrants" for the past year, sharing human impact stories of European and American migration management tactics and the casualties to human life and dignity that result. What the journalists call an outsourced migration management scheme of both Europe and the United States *is* the novel externalization strategy that both states employ, leaving grave human consequences and legal implications that threaten international law and human dignity.

2. LEGAL IMPLICATIONS

The legal implications of European and American border externalization reveal a critical juncture both authorities are encountering, as domestic agenda runs contrary to international law. By examining the manifestations of border externalization on both sides of the Atlantic, a greater picture of the legitimacy of the right to asylum will be created.

2.1 Compromised Human Rights: The Principle of Non-Refoulement

One of the legal implications that arises out of border externalization is the compromise of the principle of non-refoulement. The 1951 Refugee Convention is rooted in defending refugees and asylum seekers from *refoulement*. The United Nations High Commissioner for Refugees articulates that "the most essential component of refugee status and asylum is protection against return to a country where a person has reason to fear persecution," expressed in the obligation of *non-refoulement* (Sub-Committee of the Whole on International Protection). As outlined in the 1951 Convention relating to the Status of Refugees, "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." By returning unauthorized migrants to territories where their refugees face threats to life or freedom on account of national, political, ethnic, or religious characteristics, countries endanger violating non-refoulement. However, a nation's behavior may also violate international non-refoulement standards by *indirectly* sending refugees back to a territory where they face threats to their life or freedom. Although the US is not party to the 1951 Convention Relating to the Status of Refugees, the US did ratify the 1967 Protocol, binding it to the same commitments as the 1951

Convention, and all EU member states have ratified both the Convention and Protocol (UNHCR). Regardless of the specific terms of each composition, the principle of non-refoulement is accepted as customary international law, binding all states, whether party or not, to the Protocol, to upholding this critical principle of refugee protection (UNHCR). However, the migration management policies enforced by the US and EU seem at odds with this universal principle of international law.

Both the US and EU nations face accusations of refoulement because of the consequences of strategic externalization. As early as 2005, readmission policies employed by the European Union backfired in accusations of refoulement. Italy held a readmission agreement with Libya, by which unauthorized migrants were sent to Libya by Italian authorities (Cassarino). The European Parliament reprimanded Italy for failing to “meet their international obligations by not ensuring that the lives of the people expelled by them [to Libya] are not threatened in their countries of origin” (Cassarino). The reprimand prompted no significant change in Italian immigration policy, but rather an expansion of readmission continued, encroaching on the non-refoulement principle of international refugee standards and without regard for those returned to Libya (Cassarino). Following the Arab Spring, readmission policies were strengthened as Europe exploited the weakened bargaining positions of freshly shaken North African governments (Abderrahim). Renegotiations of readmission agreements gradually created a system of quid pro quo, prioritizing domestic policy over human rights standards and preserving the dignity of life. On the other side of the Atlantic, Mexico rejected a Trump administration plan to deport Mexican asylum seekers to Guatemala, expanding beyond the contemporary policy that required migrants from the Northern Triangle to be returned to Guatemala to apply for asylum there before the United States (BBC). Guatemala, to the alarm of

human rights activists, boasts a murder rate five times higher than the US and lacks domestic resources to process migrants in accordance with international standards, much less protect asylum seekers (BBC). The ACAs attempted to shift jurisdiction for processing asylum seekers to origin and transit countries, creating a realm of unsure protection for asylum seekers from Honduras and El Salvador forced to apply for asylum in Guatemala. When migrants seek asylum, the responsibility for the protection of their human rights is shifted into a state's domestic political realm. Elected officials in both the European Union member states and the United States are elected by domestic citizenry, not foreign migrants seeking membership. Given the respective domestic pressures applied to the EU and the US surrounding curtailing unauthorized migration, the politicization of immigration further justifies externalization either in terms of humanitarian generosity or firm security to the appeasement of domestic populations (Frelick et al., European Commission). This lends the justification of refoulement to domestic financial and political concerns; however, those domestic concerns are not justifiable defenses before international law. The return of vulnerable populations to countries where human rights are not offered is at odds with international law and casts doubt on the legitimacy of international protections.

2.2 Detention and Asylum in "Safe" Third Countries

Alternatives to the readmission agreement tactic of border externalization are third-country detention and exported asylum to "safe" third countries. As a tactic pursued primarily by the EU, third-country detention camps threaten human rights standards, hail accusations of refoulement, and increase asylum seekers' and migrants' exposure to illegal activity. A report by the Associated Press in 2019 revealed that EU developmental aid money was flowing into the hands of Libyan militias who run detention camps full of vulnerable migrants, but the abuses

suffered by migrants at the hands of the traffickers and corrupt border patrol officers accused of torture, ransom, and other human rights abuses were largely dismissed (Michael et al.) Both the EU and UN have washed their hands from jurisdictional responsibility for the results of their developmental dollars and administrative work, claiming that Libya has the responsibility for protecting and providing for detained migrants and refugees under international law (Michael et al.). In a waterfall of finger-pointing, the EU relies on the UN to distribute aid to African detention centers, the UN claims that they must cooperate with whoever appears to be in charge of detention centers, and those in charge are criminal actors (Michael et al.) While third country detention is a problem in the EU-Mediterranean borderland, the US tends towards the "safe" third country tactic to export migrants. The EU and US have both, however, attempted to export the care for migrants, therefore, export the responsibility for the protection of human and refugee rights to others.

The US's exportation of migrants manifests more so in "safe third party" countries. By directing migrants to origin, transit, or first arrival countries, destination states attempt to shift the responsibility of upholding the right to asylum, whether or not the country's economic or government infrastructure can legitimately assure asylum protections. Bill Frelick highlights that border externalization creates a forked asylum reduction strategy pursued by destination states – the first path is declaring a third country to be "safe" and therefore an asylum-bestowing authority; the second path being one of pressuring or incentivizing transit and origin countries into better policing their borders. In these "safe" third-party nations, asylum seekers can be awarded refugee status in another "safe" state; but this refuge is cheap. The same problem arises from this tactic of border externalization – when the United States or European Union member states redirect migrants to a "safe" third party state, they are passing off jurisdictional

responsibility to a nation that cannot necessarily protect the human rights of the refugee. Georgetown Law's Human Rights Institute published a report in June of 2020 finding that Guatemala does not qualify as a "safe" third country in accordance with American or international law standards, therefore disqualifying the asylum cooperation agreements that the Trump administration signed with Honduras, El Salvador, and Guatemala (Fuscoe et. al.). Regarding the differences between the EU and the US, European experience has demonstrated that anti-smuggling efforts are more effective to border management objectives than "safe" third country agreements (Fratzke). The Human Rights Committee has been clear in their expectation of countries' jurisdictional responsibility – nations are responsible for their behavior as it impacts the enjoyment of human rights of individuals outside of the national border. By this mechanism, the United States and European Union member states are jurisdictionally responsible for the effects of their exported migration controls on the rights to life and freedom of asylum seekers and migrants. Therefore, by exporting detention or asylum processing functions to unsafe third-party locations where asylum seekers' life and freedom is threatened, there is risk of violation of customary international law.

2.3 Illicit Market Increase and Criminal Threats

The reality that some nations lack the domestic resources to protect and process migrants to the standard of the international community reveals local power vacuums filled by illicit markets along borderlands. Much of Europe and the United State's external migration policy intends to prevent illegal smuggling of persons across borders as a central purpose of the policies. However, where countries of first arrival, transit, and origin groan under the weight of increased migration, domestic criminal actors find fertile ground. Under the MPP, the United States' non-Mexican asylum applicants wait in territories that are also flagged in the U.S.

Department of State's travel advisory list because of kidnapping and crime (Frelick et al.). The dangers of waiting in Mexico include exposure to violence, threat of kidnapping, extortion, forced trafficking, and sexual assault, deprivation of basic resources. The U.S. Immigration Policy Center at the University of California San Diego surveyed MPP asylum seekers waiting in shelters along the US-Mexico border to analyze the execution of the MPP. Finding that a quarter had been threatened with violence, and half of those experiencing the manifestation of that threat, the human impact of border externalization is clear in its deviation from international standards (Wong). Asylum seekers were asked in DHS interviews if they are fearful about being returned to Mexico (or country of origin), and *still* migrants express that they shared their fears with DHS and were returned nevertheless without investigation (Wong). Given that fear is a critical component in consideration of refoulement, the US system risks violating international law and placing migrants at further risk. With limited domestic resources to protect migrants on the Mexico side of the border, cartels fill the local power vacuum, preying upon migrants in violence and smuggling (Aguilar). In the eastern hemisphere, aid intended by the European Union to repair detention centers and decrease trafficking has instead ended up in the hands of Libyan militias and traffickers (Michael et al.). Without strong local governance systems, the 327.9 million euros channeled through the United Nations worsen the very conditions it was intended to prevent, as migrants disappear from detention centers after being sold into trafficking or are tortured and extorted (Michael et al.). The illicit functioning of the cartels in Mexico is parallel to the militias in North Africa – the vacuum of power left by incapable local governments is filled by illegal power agents that take advantage of migrants' vulnerability for profit. The extension of US and EU migration enforcement in other nations without jurisdictional protections leaves vulnerable populations in an even more vulnerable position. Migrants in

detention in Libya, where militia leaders control detention centers, UN food contracts, and border control agencies, sell migrants between centers, and ransom family members for freedom that is never given (Michael et al.). The illegal trafficking network is so intertwined with legally established immigration processes, symbiotically fostering and initiated by Libyan government disarray, civil conflict, and lack of judicial process. The lacking rule of law cannot maintain human rights standards or legal protections for migrants and asylum seekers; rather, externalization policies contribute to and expose migrants to the expansion of criminal networks on both sides of the Atlantic. The process of awaiting asylum exposes migrants to human rights violations because externalization places them in jurisdictional limbo. The losing party, however, is not immediately the states. The losing party is the asylum seeker, the refugee, the vulnerable in need of protection but without justice.

3. THE LEGITIMACY OF THE RIGHT TO ASYLUM

The European and American strategy of exported migration management manifests through a handful of tactics, but cascades into a multitude of legal implications. The legal implications of these tactics glaringly reveal risks of compromising international law, domestic standards, and human dignity. In a press release in February 2021, the office of the new American president admitted that the previous Trump administration's immigration policies "effectively closed the U.S. border to asylum seekers" (White House Briefing Room). This admission of a violation of international law and the American legacy of moral leadership is a critical juncture for immigration policy for destination states. The three legal implications of border externalization discussed include violations of non-refoulement, detention and asylum processing in "safe" third countries, and exposure to illicit markets and criminal activity; however, each of these effects is interconnected in the discussion of the legitimacy of the right to asylum. Given the strict protections against direct or indirect refoulement, the EU and US have little excuse for the consequences of their migration strategies before international law. Moreno-Lax and Lemberg-Pedersen explain that jurisdictional responsibility is unavoidable – states cannot transfer or dilute their responsibility to ensure non-refoulement. By attempting to do so, the externalization policies of the EU and US cheapen the protections of universal human rights, not exonerate themselves from the obligations of international law. By exporting border control functions and migrants themselves to third party countries, the EU and US have been accused of imposing "de facto refoulement" (Fuscoe et. al.). The Human Rights Institute at Georgetown Law explained that, after being removed from the US to a "safe third country" under agreements like the MPP and ACAs, asylum seekers are confronted by migrant processing systems that

cannot sufficiently process or offer asylum, rendering the argument about "safe" third country readmission or asylum application null. Furthermore, by exporting migration control functions through third-party detention, destination states expose migrants to abuses outside of the jurisdictional responsibility of the destination state. Epitomized by the EU detention centers in Libya, not only do the detention camps cause many cries of refoulement (Moreno-Lax and Lemberg-Pedersen), but this process casts doubt on the assurances of asylum. The accusations of EU and US policies violating the non-refoulement principle is not the dead end of legal implications, but rather, refoulement affects the legitimacy of the right to asylum.

When externalization presents jurisdictional muddling of who is responsible for the refugee, false protections in countries that cannot *actually* provide safety and refuge threaten the principle of non-refoulement. If destination countries and regions that authored and codified critical human rights doctrines like the United States and European states do not actualize the right to asylum through their immigration protocols, instead referring migrants to countries that are not equipped to protect migrants' human rights or are not party to the UN Declaration of Human Rights, the intended protections of asylum are weakened.

The right to asylum is codified in the U.N. Declaration of Human Rights, to which the United States and all European Union member states are party. Article 14 of the UNCHR asserts that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Building on top of Article 13, which bestows freedom of movement across states and freedom to leave one's own state, Article 14 grants the right to flee from persecution in one's own country to seek protection and refuge in another state. Not only is Article 14 a beautiful reminder of the interconnectedness of humanity, but a critical protection in a most vulnerable time.

The waning protections of the right to asylum due to an externalized strategy of migration management falter on two fronts. The right of asylum is threatened in accessibility and legitimacy – whether or not a migrant can access a jurisdiction where asylum is offered, and the strength of such protections. By shifting jurisdictional responsibility through a strategy of externalization, the destination countries not only distance themselves from migrants, but distance migrants from protection (Moreno-Lax and Lemberg-Pedersen). When states effectively close their borders, as the Biden administration accused the Trump administration of doing, the jurisdiction that might offer a legitimate system of protection is not geographically accessible. If there is geographic access, then arises the weakening component of strength of protections. When a migrant is detained or exported to a "safe" third country, the right to asylum is not fully viable by virtue of insufficient government systems to protect human rights, and thereby not fully offering the intended protection of asylum. If a migrant is sent to Guatemala, which does not qualify as a safe third country (Fuscoe, et. al.) or detailed in Libya (Michael et al.), there is clearly lacking *actual* protections of life and freedom when no capable authority shoulders the responsibility to protect. Bill Frelick of the Human Rights Watch explains that "countries that have developed generally rights-sensitive standards and procedures for assessing protection claims of asylum-seekers within their jurisdictions [like the US and EU] have simultaneously established barriers that prevent migrants, including asylum-seekers, from setting foot on their territories or otherwise triggering protection obligations." By exporting jurisdiction to transit states or countries of first arrival, the EU and US comparably limit the actual application of the right to asylum and delegitimize its international protections.

CONCLUSION

The emergence of externalization as the primary strategy of migration management in the twenty-first century exposes jurisdictional avoidance and the waning legitimacy of asylum at the hands of the European Union and the United States of America. By considering externalization through a historical and comparative lens, the development of externalized migrant controls over the past twenty years contextualizes this novel strategy in response to migration crises on both sides of the Atlantic. The diverging political and geographic structures of the EU and US demonstrate the universality of externalization's legal implications, rather than demonstrate a causal link between a specific migration agreement, geopolitical arrangement of the destination authority, or particular flow of migrants and the violations of international law.

The policies enforced by the EU and the US render threats to the principle of non-refoulement, endanger migrants through detention or asylum exportation in "safe" third countries, and expose asylum seekers to criminal networks, violence, and trafficking. Not only do these legal implications hail cries of refoulement, but further cascade to the waning protections of the right to asylum. As destination states attempt to keep asylum seekers closer to home through externalization's distancing, the avoidance of jurisdiction does not dilute responsibility, but rather diminishes the power of the right to asylum by decreasing accessibility and the legitimacy of asylum protection. In a situation of profound vulnerability, it is critical that the authorities that can offer the hope and protection of the right to asylum to refugees and asylum seekers do so.

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