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Crossing the Externalised Border:

A Postcolonial Perspective on Outsourcing Asylum by Australia and the EU

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Abbreviations

AUS	Australia
CAT	Convention Against Torture
CJEU	Court of Justice of the European Union
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
IND	Indonesia
IOM	International Organisation for Migration
IPT	Incentivised Policy Transfer
NPAA	National Program for the Adoption of the Acquis
OPCAT	Optional Protocol to the Convention Against Torture
TFEU	Treaty on the Functioning of the European Union
TR	Turkey
UNHCR	United Nations High Commissioner for Refugees

Abstract

The Westphalian state system divides sovereign territory through the use of “imaginary lines”, or rather, sovereign borders. In recent years, we have been witnessing states of the Global North cooperating with the Global South in an effort to extend these borders with the goal of preventing migrants from accessing sovereign territory. This thesis will analyse, from a postcolonial perspective, how Australia and the EU have outsourced their asylum responsibilities and examine the implications this has for the protection of human rights and the diffusion of human rights norms across the globe. Can recognising the legacy of colonialism aid us in making sense of how normative powers such as Australia and the EU utilise their normative might to persuade poorer, dependent neighbours such as Indonesia and Turkey that it is in their interest to cooperate in their border operations? Are Australia and the EU effectively redefining the conception of the refugee from its humanitarian manifestation to a more securitised understanding of the term? This thesis will explore the concept of the “postcolonial refugee” as a victim of a system that has been defined by the era of colonialism while also as an object that is traded between the North–South impasse.

1. Introduction

1.1 Problem Diagnosis

The externalisation of borders by Australia and the EU represents a gap in the conceptualisation of refugee protection as we know it today. For almost half a century, refugee policies have been guided by a single peremptory principle of international law: *non-refoulement*. As a *jus cogens* principle, non-refoulement prohibits sending asylum seekers whose claims have yet to be processed back to their country of origin or a country of transit. Despite its acceptance as customary international law, this principle alone is not sufficient to protect those seeking asylum. Non-refoulement is legally binding on those states that have ratified the 1951 Refugee Convention, but there is vagueness as to *where* asylum seekers should be sent. More specifically, the principle of non-refoulement offers protection only after one has accessed a "safe" territory, but there is no instrument in international law that serves to hold states accountable for protecting the right to seek asylum when asylum seekers are in transit and outside the relevant jurisdiction. This leads to the following question: if refugees are not able to access the jurisdiction in which they wish to claim asylum, how can their right to seek asylum be protected? This problem represents what Asher Hirsch and Nathan Bell have defined as a "protection gap", where refugees are protected from refoulement once they are within a state's jurisdiction but are often prevented from accessing their desired state in the first instance. In this thesis, the phrase protection gap will be used interchangeably with the term implementation gap, referring to the lacunae in international law that allows states to evade the spirit of the 1951 Refugee Convention. International powers such as Australia and the European Union have asserted policies that aim to deter the arrival of asylum seekers within their jurisdiction, raising concerns about the protection of the rights of the subjects in question. This gap in international law can be recognised as the origin of the problem that this thesis will investigate: the concept of neo-refoulement as an expression of sovereign power and European imperialism, which has transformed the refugee into the "postcolonial refugee" – an object to be transferred between state actors with power disparities of their own. This thesis will demonstrate that the discourse around irregular migration conveys the prioritisation of sovereign security over human rights protection and an increasing tendency to treat the refugee as a commodity: as something that can be transferred between states.

This paper will examine the phenomenon of border externalisation, more specifically the border regimes of the EU and Australia, understood as manifestations of European imperialism and ‘expressions of sovereign power over the body which emerged during colonialism’ (O’Dwyer 2018). I will argue that Europe and Australia demonstrate how the prioritisation of state security leads to policies of externalisation that take advantage of the dependencies of poorer neighbours, all the while transforming asylum seekers into commodities. Border externalisation makes irregular migrants susceptible to infringement of fundamental rights such as the prohibition of torture and inhuman treatment, the principle of non-refoulement, the right to leave any country, the right to liberty (arbitrary and prolonged detention), the right to seek asylum, the rights of vulnerable people (children, victims of trafficking, etc.) and the right to effective remedies.

I also argue that this focus on state security may act as a veneer for other internal or diplomatic motives on the part of states and state actors. The EU has ‘turned the [migrant] crisis into a test of “postcolonial responsibility” whereby non-European nation states such as Turkey are confronted with a dutiful obligation to serve Europe and help it to “re-fortify” its borders, for quite modest returns’ (O'Dwyer 2018). Meanwhile, ‘border policing has been an important mechanism for extending Australian influence in the Asia Pacific region … PNG and Nauru have historically been under Australian control or influence and the willingness of the current governments to implement offshore processing and entertain resettlements cannot be separated from their dependency on Australian aid and development funding’ (Grewcock 2014).

I argue that border externalisation is an exercise that has transformed the refugee into the “postcolonial refugee” – an object in the transfer of responsibilities and burdens between the Global North and its less powerful neighbours. This transfer is justified by governments as it is based on the presumption of an absence of fear of persecution or ill-treatment in host or transit countries, an assumption which undermines the integrity of non-refoulement. The process of border externalisation has melted away the traditional conception of the refugee and has undermined the power of non-refoulement as a protection mechanism to the extent that we can observe its transformation into “neo-refoulement” in international law. As a result, the diffusion of human rights norms by international powers such as Australia and Europe have been hindered. The overall impact this may have on the socialisation of human rights norms is not easily quantifiable; nevertheless, theoretical analysis of the process of outsourcing asylum and the

impact of such policies can demonstrate the extent to which these policies of exclusion have both legitimised human rights violations and simultaneously delegitimised the normative power of the EU and Australia as leaders in the protection of human rights.

1.2 Political and Scholarly Relevance of the Work

The phenomenon of externalisation raises the issue of how asylum seekers can mobilise their rights without having access to a sovereign territory. The study of policies of externalisation is fundamental to the field of human security in that it represents the conflict between sovereign security and human security. Research and analysis in this field acts as a mechanism that checks the accountability and responsibility of powers such as the EU and Australia. Through further research, development and recommendations in this field, civil society actors and policy makers can push for the prioritisation of policies of inclusion that adhere to international human rights norms.

This thesis will attempt to add to this research field in three ways:

A. By approaching the application of cooperative non-entrée policies through the lens of postcolonial theory, I attempt to bring attention to how “burden-sharing” in the international migration system situates the refugee as an object of power disparities that mimic a colonial dynamic. Refugees are thus vulnerable to international actors who take advantage of gaps in international law, and this undermines human rights protection.
B. I also attempt to illustrate this hypothesis by using theories of international relations that allow us to make better sense of the state interactions at play. The variety of theories I will use express the importance of having a pluralistic approach to the study of international relations. Furthermore, by using conflict analysis models combined with Adamson and Tsourapas’s migration diplomacy model, we can theorize about the state of migration politics and make sense of the actions undertaken by Australia and the EU.
C. Finally, I compare the relationship between the EU and Turkey with the relationship between Australia and the Asia-Pacific region and find similar expressions of normative power by Australia and Europe.

Why is it useful to examine the border solutions devised by Australia and the EU? Simply put, they are both signatories to international conventions establishing the principle of non-refoulement, and both in practice accept significant numbers of asylum seekers. In addition, they are 'hard cases for explaining the paradox of strict policies of remote control that subvert the spirit of international asylum law by manipulating territoriality' (Fitzgerald 2019 p. 11).

The literature on the EU's exercise of control is centred around its relationship with states in Northern Africa, such as Libya and Morocco, or with the Balkan states. Thus, the literature on the EU's relationship with the aforementioned states is plentiful and comprehensive. This thesis will shift the focus to the more recent Syrian refugee crisis, as it has made Turkey an important player in the EU's security agenda. This is largely due to Turkey's geographic position, which has meant that it functions as a "buffer zone" between Syria and the EU, ultimately deterring refugees who are attempting to access EU territory.

Australia, on the other hand, is arguably the most troublesome case of externalisation, and its cooperative non-entrée policies are prime examples of how bilateral cooperation can be an expression of power over states of the Global South. This thesis will examine Australia's relationship with Indonesia, Papua New Guinea and Nauru to draw comparisons with the cooperative non-entrée policies of the EU with regard to Turkey. Ultimately, I will argue that both Australia and EU states have evaded humanitarian norms 'by conducting them in spaces that are inaccessible to the public and contracting other state and non-state actors to do their dirty work' (Fitzgerald 2019 p. 19).

1.3 Central/Guiding Questions, Research Goals, Hypotheses

The central hypothesis of this thesis is as follows:

> The border regimes (specifically cooperative non-entrée policies) established by the EU and Australia are expressions of the sovereign power over the body (the refugee) that emerged during colonialism and that has transformed the refugee from its humanitarian manifestation into the postcolonial refugee: an object of transfer between state actors engaged in "migration diplomacy".

If this hypothesis holds true, it follows that:

I. This erodes the significance of non-refoulement as an effective protection mechanism and compromises the protection of the human rights of those seeking asylum. Policies of exclusion have been introduced under the veneer of security, and this has revealed the weakness of non-refoulement alone as a protection mechanism in customary international law. Our conception of the right to seek asylum must encompass the right to enter. 'Externalisation policies reshape the boundaries of sovereignty and blur the lines of responsibility among states. By avoiding their legal and political responsibility, many states violate their legal obligations. Externalisation deflects responsibility, transforming the governance of refugee protection and border control. Regional cooperation for refugee protection is weakened, and human rights protections are undermined' (CONREP 2019).

II. Securitisation and border externalisation undermine the normative power of the EU and Australia and their credibility as leaders in human rights protection. In turn, this inhibits the diffusion of human rights norms and reproduces a system that disregards the importance of upholding human rights.

By comparing Australia and its Asian-Pacific counterparts to the case of the EU and Turkey and the 2016 deal, my research aims to show:

1. How situating the application of cooperative non-entrée policies in a postcolonial framework illustrates how this act of "burden-sharing" positions the refugee as an object among power disparities between international actors that take advantage of gaps in international law, thus undermining human rights protection. Using a postcolonial framework to investigate the international refugee system is useful for understanding how the refugee constitutes an object in the transfer of responsibilities and burdens between the Global North and its less powerful neighbours. Border externalisation is a residual effect of colonialism, and the exporting of control over and the trade of asylum seekers emulates a relationship characterised by hegemonic power and spheres of control.
2. How the deterrence paradigm sustained by Australia and the EU undermines their normative power and poses a risk to the socialisation of human rights norms in transit countries (Turkey, Indonesia) and internationally.

3. How the international community can build an international migration regime that holds states accountable for sharing the responsibility of protecting vulnerable people attempting to access territories. I will engage in an analysis of various recommendations by other researchers and scholars with the aim of highlighting the strengths and weaknesses of their recommendations.

The above research goals will be measured using the following indicators:

1. Conflict analysis models such as needs-fears mapping (Mason 2005) and the migration diplomacy framework (Adamson & Tsourapas 2019) to establish the asylum seeker as an object in the powerplay between wealthy states and those states that are dependent on them. This should indicate the extent to which cooperative non-entrée policies are the result of bargaining, negotiations and diplomacy between actors (e.g. Europe has monetary power, while Turkey has the geographic advantage to diffuse the influx of irregular migrants to Europe).
2. The vulnerability of asylum seekers in transit states (measured by examining the eminent risk of refoulement and by analysing the conditions in which asylum seekers find themselves in transit countries).
3. The use of theories of norm socialisation and measures of normative power (principles, impact and actions) to examine the EU and Australia's use of normative power in their effort to keep irregular migrants outside of their jurisdiction.

1.4 Method of Inquiry and Structure of the Work

This thesis will address the phenomenon of border externalisation through theoretical and empirical analysis. I will use a comparative analysis of two border systems in an attempt to reveal the extent to which these policies are a residual effect of colonialism that renders refugees as victims of an international system that created them in the first place.

This thesis will begin by approaching the problem of access to territory through a postcolonial lens. Through theoretical analysis, I will attempt to show how using postcolonial theory is effective in accounting for extra territorialisation, and I will examine the incompatibility of the concept of sovereign territory as it relates to seeking asylum, outlining how states approach maintaining their sovereignty in the face of their humanitarian responsibilities in the international

system. The second part of the chapter will outline a definition of the “postcolonial refugee” that allows us to encompass the cultural critique of imperialism and Eurocentrism within the definition of the term “refugee”. The final part of this chapter will briefly outline the theoretical framework that will be applied to the cases in the following chapters. This framework will use Fiona Adamson and Tsourapas’s migration diplomacy theory, incorporated with tools for conflict analysis and postcolonial theory.

Chapter 3 will outline the first case: Australia and Asia-Pacific. This chapter, along with Chapter 4, aims to test Hypothesis I put forward in Section 1.3. After providing a brief overview of Australia’s history of externalisation and setting the scene for the political discourse surrounding its approach to managing asylum seekers, I will outline the policies and agreements with Asia-Pacific that undermine its international legal obligations. In Section 3.2, I will highlight how a) Australia's cooperation with Indonesia and the International Organisation for Migration (IOM) exemplifies how Australia’s efforts to outsource asylum responsibilities relieves it of “effective control” over offshore detention facilities that are hosted by third states, b) the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, and c) Australia’s offshore processing facilities. Section 3.3 will use the theoretical framework outlined in Section 1.5 to map the interests of Australia and its neighbours in Asia-Pacific. This framework will test the hypotheses put forward in this thesis by revealing the power relationship between these actors as an expression of colonial thought impressed on the modern regional order.

Chapter 4 will assess the implications of the EU–Turkey deal and its effects on safeguarding the rights of asylum seekers hoping to gain access to EU territory. Section 4.1 will provide a brief overview of the political and historical context of EU–Turkey relations and will briefly outline the state of Turkey’s democracy. Turkey’s democratic processes will be relevant to contextualising some of the concerns brought to the surface by the agreement. In 4.2, I present the specifics of the EU–Turkey agreement, dividing this into three parts: the humanitarian crisis, terms of the agreement and problems with the EU–Turkey agreement. Section 4.3 will rely on the framework outlined in Section 1.5 and tested in 3.3 in the case of Australia and its neighbours. This section will apply the same method to the case of the EU–Turkey agreement to examine the similarities and differences between the two contexts, ultimately aiming to prove Hypothesis I put forward in Section 1.3. Lastly, this chapter will assess the legality of the deal.

The next chapter, ‘Postcolonialism, normative power and norm socialisation’, aims to demonstrate the correlation between power disparities between refugee-receiving states and third/transit states, as informed by the legacy of colonialism, and how this power translates to normative power and the diffusion of human rights norms in the region and internationally. Section 5.1 will define normative power, followed by a brief overview of methods of conceptualising norm socialisation in Section 5.2. Here, I will present four theories of international relations that explain the process of human rights learning through identifying the main actors and tools in the socialisation process. By doing so, I will attempt to identify the extent to which norm socialisation is dependent on the normative capacity of a regional hegemon such as the European Union or Australia. It then follows that we must assess the normative power held by these actors: Section 5.3 will thus use a set of indicators put forward by Ian Manners (namely principles, actions and impact) to assess the normative power possessed by these actors. As a whole, this chapter will test Hypothesis II put forward in 1.3 (‘Central/guiding questions, research goals, hypotheses’).

The final chapter will draw on the findings of the previous chapter to critically engage with the recommendations and conclusions of various scholars and researchers in an attempt to promote international accountability within the international migration system.

1.5 Theories and Methods

This thesis will refer to a number of theories and concepts in international relations to both frame and account for border externalisation by the EU and Australia. It will also use theories and models put forward by other scholars to test its central hypothesis. The use of many various theoretical approaches in this thesis attempts to address the reality of pluralism in international relations. In this section, I will clarify the definitions of a number of terms and theories to which this thesis will refer.

1.5.1 Theories of International Relations

Postcolonialism

In the context of this thesis, the term postcolonialism refers to the theoretical approach in international relations that is concerned with the residual impact of colonisation on the world

order and how it determines power disparities between states. This is not to be confused with the term “post-colonialism”, which refers to the immediate period following the retreat of imperial powers from their colonial territories. By using a postcolonial framework to analyse border externalisation, I attempt to deconstruct the relationship between refugee-receiving states and transit/third countries and to examine how border externalisation entrenches a power dynamic that is reminiscent of European hegemony. More specifically, I argue that the border regimes that have been established by the EU and Australia are reminiscent of a postcolonial dynamic between the “West” and its developing neighbours. This concept of the West (and the “other”) is central to the claims of colonial thought: a way of seeing the world that expresses European exceptionalism and that fears anything that does not align with Europeanism. With this line of thinking, we see states re-asserting their sovereignty through strict border regimes that dictate who can access sovereign territory and on what terms.

Irregular Migrants

This thesis will largely focus on the movement of irregular migrants – that is, the ‘movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination’ (International Organisation for Migration 2020).

Neo-refoulement

Jennifer Hyndman and Alison Mountz define the state practice of neo-refoulement as the ‘return of asylum seekers and other migrants to transit countries or regions of origin before they reach the sovereign territory in which they could make a claim’ (Hyndman & Mountz 2008 p. 2). As codified in Article 33 of the 1951 Refugee Convention, non-refoulement prohibits a signatory state from forcibly repatriating refugees. As customary international law, this principle aims to protect asylum seekers by ensuring that they are not sent back to a country where they face danger or persecution based on race, religion, nationality, membership of a particular social group or political opinion. Hyndman and Mountz argue that neo-refoulement can be understood as the use of geography to suspend asylum. This is achieved through the cooperation between donor countries and transit states and the ‘[shift] from legal frameworks of protection to more politicized and securitized practices of exclusion’ (Hyndman & Mountz 2008 p. 21). This thesis will use the term “neo-refoulement” interchangeably with “border externalisation” and “extra territorialisation”. Although their specific meanings may vary slightly, they all refer to actions

taken by states to extend their borders beyond their sovereign territory, with the broader aim of deterring irregular migrants from accessing that territory.

Border Externalisation/Extra Territorialisation

Border externalisation (or extra territorialisation) can be defined as a 'bundle of political, securitized practices that reconstitute asylum as part of state-centric international relations discourse' (Hyndman & Mountz 2008 p. 4). This leaves the protection of refugees subject to the ad hoc decisions of governments that aim to prevent asylum seekers from ever landing on the territory of a signatory to the 1951 Refugee Convention or the 1967 Protocol. This politicization of a humanitarian concept ultimately undermines the spirit of international treaties that were created to protect individuals from state behaviour:

> This architecture of enmity, framed as protection, has been constructed policy by policy. The respatialization of asylum is a deliberate political project stoked by fear and buttressed by incredible funds and 'aid' in the name of 'security'. We then trace the 'architecture of enmity' that both Australia and the EU have erected through policies that include readmission agreements (in return for aid), safe third-country agreements, aggressive visa regimes, detention and interdiction practices, among other strategies. By mapping systematic geographical projects that make access to asylum all but impossible for those travelling overland and across seas, we argue that this bundle of policies and spatial practices constitutes neo-refoulement (Hyndman & Mountz 2008 p. 5).

When referring to neo-refoulement and border externalisation, this thesis will be specifically examining these concepts as they relate to the process of border externalisation that is being exercised by the Australian government through "Operation Sovereign Borders" and the "Pacific Solution" (outlined in Chapter 3) and by the EU through immigration policies that have resulted in migration agreements such as the EU–Turkey deal (outlined in Chapter 4). These border regimes have institutionalised the dichotomy between the West and the "other" and have further entrenched the process of extending borders.

1.5.2 Methods/Models

Conflict Analysis: Needs-Fears Mapping

A conflict analysis model will be used to map the needs and fears of the actors involved because 'without a model or theory, explicit or implicit, it is almost impossible to gain a firm hold

of an issue as comprehensive and complex as that posed by refugees' (Hakovirta, 1993 p. 38). This thesis will use a method outlined by the Swiss Agency for Development and Cooperation called needs-fears mapping, which 'focuses on actors and their issues, interests, needs, fears, means and options. It allows for a clear comparison of actors' similarities and differences in the form of a table' (Mason & Rychard 2005 p.10). By mapping the needs, fears and interests of the relevant state actors, we can better understand the balance of power between these actors and analyse whether they are attributable to the central claims put forward by postcolonial theory.

Migration Diplomacy

'Migration Diplomacy in World Politics', by Fiona Adamson and Gerasimos Tsourapas, argues that an international actor's position in the web of global migration flows is just as important as military and economic indicators of a state's power and interests (Adamson & Tsourapas 2019). Ultimately, it refers to the process in which states with varying power positions bargain and assert their interests, with the aim of managing cross-border population mobility. Migration diplomacy places the focus on state and sovereign power and how this informs relations between international actors. This means of conceptualisation assumes that the power structures within the international migration regime are shaped by existing power relations between states, and these existing power structures are dependent on whether a state is refugee producing/sending, refugee receiving or a third/transit state. I wish to add to this argument by demonstrating that a state's belonging to one of these three categories is largely determined by the lasting effects of colonialism on state power structures. This thesis will thus use postcolonial theory combined with this model of diplomacy to contextualise the behaviour of states that have implemented extra-territorial migration policies.

I will rely on this theory in my attempt to map the power positions of the EU and Australia in relation to their regional neighbours (namely Turkey and Indonesia, respectively). This should explain how cooperative non-entrée policies that are implemented by hegemonic states take advantage of their power to carry out tasks that mask ulterior state interests, i.e. deterrence in the name of security. Migration diplomacy is shaped by the interests of (and existing power relationship between) states, namely their 'bargaining position vis-à-vis other states based in part on whether they are migration-receiving, migration-sending, or transit states' (Adamson & Tsourapas 2019 p.118). Thus, due to this focus on power structures within the international order, migration diplomacy largely draws on a realist approach to international relations: it

identifies how state power and interests are affected, including security interests, economic interests and issues of identity, soft power, interdependence and public diplomacy:

> Diplomacy is often about negotiation, and migration diplomacy centers on how states employ cross-border population mobility management in their international relations, or how they use diplomatic means to obtain goals relating to migration. In other words, migration diplomacy can include both the strategic use of migration flows as a means to obtain other aims or the use of diplomatic methods to achieve goals related to migration (Adamson & Tsourapas 2019 p.116).

Drawing on postcolonial theory, I will first deconstruct the relationship between what Adamson and Tsourapas categorise as s*ending, receiving* and *transit* states. I will then consider their position within the context of the international migration regime, as a result of the lasting impression that European imperialism has had on the world order. Sending or refugee-producing states are primarily concerned with "migration diplomacy". Receiving states are primarily concerned with "immigration diplomacy", while transit states, as third countries that are neither countries of origin nor countries of destination, engage in transit migration diplomacy because of their geopolitical location as part of a migrant route. The position of these states, regardless of whether they are former colonies, represents a type of regional hegemony that is based on the idea of a European identity versus the "other". The phenomenon of border externalisation is a manifestation of this line of thought, and policies of externalisation entrench these power structures within the international migration regime. The border regimes that have been established by the EU and Australia are reminiscent of a postcolonial dynamic between the "West" and its neighbours. This thesis will examine these cases and will identify the factors that have paved the way for these policies of externalisation and the extent to which they constitute an expression of European exceptionalism.

Game Theory

Game theory is a strategic mathematical model that is widely used in political science and international relations as it helps us to understand different concerns in international politics through a simplified framework. It is most commonly associated with the use of economic diplomacy and conflict resolution (Ross 2019). In this thesis, game theory will be used to frame the diplomacy of migration and the various outcomes of cooperation versus non-cooperation among international actors in policies of deterrence. Adamson and Tsourapas's theory of

migration diplomacy draws on game theory, as they claim that it is to be expected that migration diplomacy will emulate a state's broader diplomatic efforts.

> The bargaining process reflects two types of situations—zero-sum and positive-sum strategies. Zero-sum perspectives are those of relative gain, where only one side is expected to benefit, while positive-sum perspectives highlight mutual or absolute gains, where both sides are expected to benefit, albeit to different degrees (Adamson & Tsourapas 2019).

Norm Socialisation

This thesis will use various perspectives of human rights learning, or norm socialisation, to analyse how the delegitimisation of a normative power such as the EU can inhibit human rights norm "diffusion". The term "diffusion" in this sense refers broadly to the spread of ideas that treat the protection of human rights as an inviolable principle. Norm socialisation can occur through both social learning and/or the diffusion of these norms in any given society. The literature on which I will draw includes Tim Dunne and Nicholas Wheeler's 'We the Peoples: Contending Discourses of Security in Human Rights Theory and Practice' (Dunne & Wheeler 2004); Beth Simmons' 'Mobilizing for Human Rights' (Simmons 2009); Emilie Hafner-Burton and Kiyoteru Tsutsui's 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (Hafner-Burton & Tsutsui 2005); and Thomas Risse and Kathryn Sikkink's 'The Power of Human Rights: International Norms and Domestic Change' (Risse & Sikkink 1999). This literature will allow me to present four varying explanations as to norm socialisation can occur in the international system from four different perspectives of international relations: realism, liberalism and rational institutionalism social constructivism.

1.6 Sources and Literature/State of Current Research

There is an abundance of literature surrounding the topic of the deterrence paradigm and policies of border externalisation by Australia and the EU. This thesis draws on a wide range of literature in the field of border externalization, refugee law, and theories of international relations and norm socialisation. A large portion of the literature used for my research are scholarly journal articles, as much of the analysis in which I engage is theoretical. The primary sources I will draw on are data and reports from state institutions and human rights organisations. The most referenced authors in this thesis are Asher Hirsch, David Fitzgerald, Amy Nethery,

Jennifer Hyndman and Alison Mountz, who are specialists in the field of border externalisation and the outsourcing of asylum responsibilities. This thesis will engage with the work of these scholars and will contribute to their research as outlined in Section 1.2.

2. A Postcolonial Perspective on Accessing Territory

> In order to “seek” asylum, a refugee must be able to present himself before the appropriate authorities of the country of refuge (Hannum 1987 p. 50).

The above statement presents us with the central concern of policies of deterrence: the right to access territory. This chapter is devoted to answering the following question: why is it useful to study policies that prevent access to territory, namely border externalisation, through a postcolonial framework? As we will see, the answer is that it is useful for recognising why states such as Australia and supranational organisations like the European Union behave the way they do when faced with the responsibility of managing migrants who are attempting to enter their territory. Postcolonial conceptions of their approaches are able to reveal Eurocentrism and the belief that there are inherent hierarchies of “civilisation”. Approaching the study of border externalisation through a postcolonial lens highlights the impact that colonial and imperial histories still have in shaping ‘how Western forms of knowledge and power marginalise the non-Western world’ (Nair 2017). This framework allows us to identify the power disparities at work in the global political system and how this affects asylum seekers’ access to rights. Now more than ever, the reactions of governments in the Global North to the Syrian refugee crisis reflect their commitment to securitisation over humanitarianism. Furthermore, the discourse surrounding these policies focus on “othering” those attempting to cross borders “illegally”, portraying them as a security risk. This discourse ultimately reveals that the residual effects of colonial enterprises are “landing on the doorstep” of Europe and Australia, which are thus faced with the burden of sharing their ‘imperially acquired’ wealth and resources (O’dwyer, C. 2018). Western perceptions of non-Western regions are the result of the legacies of European colonisation and imperialism and have constructed non-Western states and peoples as an “other” while exerting European exceptionalism. To further complicate the situation, European powers continue to justify the fortification of their sovereign territories through cooperation with states that may have historically been, or currently are, dependent on them:

> Persuasion, via political and financial promises of fund transfers, visa facilitation, or accession talks, has been mobilised on a grand scale by the EU Member States so as to ensure the commitment in exchange by key transit countries to the containment of potential asylum seekers within their jurisdictional domain. Thereby, the global South is being impelled to deal not only with ‘their own refugees’, but with those unwanted by the North as well—they are being financed for ‘pull-backs’, detention camps, and pre-

> emptive rescue at sea, which transform (pre-)entry controls (by destination countries) into exit vetting (by countries of departure) that negates the right to leave and forecloses refoulement responsibilities (Moreno-Lax & Giuffré 2017 p. 3).

As displayed above, this type of cooperation between states of the Global North and the Global South is deeply problematic. Furthermore, the international migration regime places importance on the concept of "burden-sharing", namely the control of migration flows through international cooperation. The perception of irregular migrants as a burden that must be shared internationally reveals the extent to which the Global North views refugees not as individuals in need of protection but rather as objects of pity that can be transferred between wealthy states and their dependent neighbours. In light of these considerations, this thesis will argue that we should understand postcolonialism as a legacy of colonialist thought that has implications for the current state of migration and security. We can conceptualise this hypothesis through analysis of the current state of migration policies and by understanding the priority of security over protection of human rights as an expression of the ideologies that are interconnected with colonialism, such as Eurocentrism, Western hegemony and "the white man's burden". Joseph Conrad used this phrase in his novella *Heart of Darkness* to refer to the supposed duty, on the part of the colonial powers, to bring civilization to the "barbaric" places of the world. Adapted to the 21st century, I now use this phrase to refer to the "burden" impressed upon wealthy states to protect those who are stateless and displaced in an international system riddled with conflict.

Through examining the relationship between the EU and Turkey on the one hand and Australia and its neighbours in Asia-Pacific on the other, we can observe the extent to which border regimes are an expression of sovereign power and the exporting of control to neighbouring countries. Postcolonial refugees are to be regarded as 'victims of an international system that brings them into being' (O'dwyer, C. 2018), a system that 'then fails to take responsibility for them' (ibid). 'Postcolonialism interrogates a world order dominated by major state actors and their domineering interests and ways of looking at the world' (Nair 2017). In light of these considerations, it is useful to view the problem of access to territory by those seeking asylum through a postcolonial lens, as this allows us to understand the perpetuation of hierarchies between the Global North and the South: more specifically, how international asylum politics has been shaped by the ability of actors like the EU and Australia to exploit the "protection gap" in which preventing access to territory is made legally sound under international law (Hirsch 2017 p. 418).

2.1 Sovereign Territory and the Limits of International Law

This section will outline the incompatibility of the concept of sovereign territory, on the one hand, and the right to seek asylum and the right to enter, on the other. I will argue that the Westphalian state system is perpetually in conflict with the concept of seeking asylum and is thus mitigated through extra-territorial border controls that attempt to prevent asylum seekers from reaching their territory and subsequently asking for protection. We see this in play through the behaviour of international actors such as the EU and Australia. For the sake of the argument put forward in this thesis, it is important to recognise the idea of sovereignty as pertaining not only to sovereign states but also to organisations of states like the European Union, whose borders emulate that of the sovereign state. Both of these examples involve international powers who pride themselves as leaders of liberalism, democracy and human rights. Paradoxically, we see them committing to policies that negate the spirit of the 1951 Refugee Convention, even going so far as to directly engage in operations that compromise the rights of irregular migrants. The policies to which states commit are 'no ordinary measures of non-entrée. Instead, they are targeted means frustrating the exercise of the right to leave—nullifying the refugee's flight' (Moreno-Lax & Giuffré 2017 p. 4). So, why do these state actors engage in such behaviour? Simply put, they do so in the name of maintaining their right to sovereignty and their ability to define which people can claim access to their territory. Of course, it is also worth noting that some countries of the Global South, such as China and Russia, also limit migratory flows across their borders. These actions do not fall within the scope of my research as, unlike Australia and the EU, these states have not explicitly committed themselves to standards of liberalism and humanitarianism. Indeed, under international law, states have a sovereign right to control their borders and to decide on who crosses those borders. Border controls and immigration restrictions are understood as a legitimate exercise of sovereign self-determination. The source of the problem is therefore evident: the concept of sovereignty must be able to coexist with that of the right to enter if the protection of those seeking asylum is to be ensured:

> Irregular migrants, particularly those who attempt to seek asylum, present a challenge to the state's claim to sovereignty because they challenge a core component of how the state defines itself—control over its territory (Hirsch & Bell 2017 p. 422).

What does this mean for the individual attempting to access a territory? Individuals can only have their 'humanity recognised' (Hirsch & Bell 2017 p. 420) through political membership and

belonging. Without political membership, asylum seekers are left without rights, and to acquire the possibility of obtaining these rights they require access to what is deemed as safe territory.

Despite the inconsistency between liberal discourse and the actions taken by many states who engage in this discourse, one cannot discount the effect that international law has had on the development of a humanitarian system in international politics. International law has allowed for the development of an international migration regime that recognises the importance of upholding the rights of displaced and vulnerable migrants. By ratifying international treaties, states have voluntarily agreed to limit their sovereignty and uphold certain rights for both citizens and non-citizens. To further illustrate the point made in this section, I will consider the concept of sovereignty from a realist perspective and then from the perspective of rational institutionalism. My aim will be to highlight the strengths and weaknesses of these two theories in conceptualising the international protection regime.

2.1.1 The Limits of Realism

Realism argues that international law is strictly epiphenomenal to state power; when states comply with their legal obligations to protect human rights, this is essentially coincidental. Realists perceive states as the major actors within the international order, so naturally one can assume that national interest will be of higher concern than individual rights. Thus, realism holds that there is an inherent conflict between the individual and the state – or a 'trade-off' relationship where one is sacrificed for the benefit of the other (Dunne & Wheeler 2004 p. 10). For example, realism has failed to explain the effectiveness of the European human rights system and of mechanisms in international law insofar as the presence of a regional hegemon, the EU, has transformed the sovereignty of states who are members of the EU. Despite this, realism does help us to more accurately make sense of the phenomenon of border externalisation, as it reveals the priority of state security interests over individual freedoms.

2.1.2 The Limits of Rational Institutionalism

By contrast, rational institutionalism holds that both the state and agencies, NGOs and international law are central actors in the international political process. States are still the primary agents of power, but they can be drastically influenced in the international arena. This theory of conceptualisation accounts for the effectiveness of international law ratification in the creation of a global human rights regime (Simmons 2009 p. 4). International law (in the form of

treaties) should ensure that the states that have ratified these treaties adhere to the standards they put forward as a matter of legal and moral obligation to the international community and the individuals concerned. This sense of obligation is constructed through the use of sanctions, shaming and cooptation. Currently, however, states such as Australia are now cooperating and transferring migration flows with neighbours, namely Indonesia, who are not party to the 1951 Refugee Convention. This adds a level of complexity to the equation as it blurs the boundaries of state responsibility.

Further, conceptualising the international migration regime through a rational institutionalist framework allows us to recognise the impact that globalisation has had on the diplomacy surrounding migration. In the 20th century, economic cooperation paved the way for interstate cooperation in areas such as migration. Ever closer trade links ensured closer diplomatic ties between states and the rise of the relevance of non-state actors such as the United Nations High Commissioner for Refugees (UNHCR) and the International Organisation for Migration (IOM) in the context of migration:

> While Globalization has diminished the monopoly of the sovereign state in world politics, the state is still the main actor in the regulation of cross-border population mobility and is likely to continue to be so, especially with the recent rise in populist nationalism and the renewed significance of borders (Adamson & Tsourapas 2019 p. 116).

The renewed significance of borders has intensified as a result of the Syrian refugee crisis, further entrenching ideas of statehood and national identity. Rational institutionalism presumes that wealthier states of the Global North who are signatories to international treaties such as the 1951 Refugee Convention should uphold the spirit of such treaties and refrain from intercepting those who are attempting to access their rights. In reality, we can see that this is clearly not the case, as there is no legally binding “right to enter” in international law, and states have not yet legally recognised that refugees have a right to access their territories and claim protection. ‘In effect, we can see the impact of human rights treaties as a paradox of empty promises’ Hafner-Burton & Tsutsui p.1378). This act of deterrence by states will be examined in further detail in Chapters 3 and 4 in the context of Australia and the EU. In these cases, international law appears to be insufficient to hold states accountable for their migration obligations.

By taking these theories of international relations into account, I conclude that control over migration is ultimately a key element of nationhood and national identity. Modern nation states exert state power not only through legitimate means of violence but through legitimate means of movement. This control allows states to exercise their sovereignty and their normative power through control over national borders, and lack of control over migration challenges the state's power to decide who is included and who is excluded.

2.2 Defining the Postcolonial Refugee

I use the term "postcolonial refugee" in reference to Satvinder Juss's 'The Post-Colonial Refugee, Dublin II, and the End of Non-Refoulement', where he poses the following question: 'is modern refugee law an exercise in "post-colonialism", which can be defined as a cultural critique that is opposed to imperialism and Eurocentrism?' (Juss 2013 p. 307). Juss defines postcolonial exercise as being concerned with containing the historical effects of colonialism in postcolonial societies where failed or semi-failed states and internal instabilities may in part be a consequence of European imperialism and its aftermath. Today, we view irregular migrants from the Middle East and North Africa as the major consumers of refugee law, and a direct link between refugee-producing countries and their colonial histories can be identified:

> The experience of colonisation was not a one-way process. It is not only colonised, but also in turn influenced the colonisers, forcing them to intellectually essentialise the 'others' in the mind of the West. (ibid)

While Juss's analysis focuses on refugee law as an exercise of postcolonialism, I extend this argument further to include border externalisation as a manifestation of this concept of the "West" and the other. In light of this consideration, how can we define refugees who have been displaced in an international system that effectively works to prevent them from accessing territory and protection? By using the term postcolonial refugee, we can encompass the cultural critique of imperialism and Eurocentrism within the definition of "refugee". We can understand the refugee as a product of a system in which the power disparities between the colonised and the colonisers have had a lasting impact on the international order. In simpler terms, we can define the refugee as a postcolonial refugee by examining his or her propensity to be an object of transfer between states: refugees have become objects of diplomatic exchange between states with power disparities. In this sense, critically thinking about the refugee through the lens

of postcolonialism and realism allows us to make sense of the prioritisation of state interests over the individual.

According to Hannah Arendt, history has shown that the moment human beings lack their own government and have to fall back on their minimum rights, no authority is left to protect them, and no institution is willing to guarantee them (Arendt 1973). This expresses the importance of citizenship in the realisation of human rights, particularly the right to asylum. In this section, I will define the postcolonial refugee as the victim of an international system that allows the Global North to exploit the divide between it and states that fall within its sphere of influence:

> Consequently, we can understand the meaning of the 'right to have rights' in relation to Arendt's understanding of what it is to be a human being. This political articulation of human dignity underscores the importance of a legal right to entry for people seeking asylum — to access a shared world (and its political and legal instruments) — it is necessary to be able to interact with others, which under the prevailing Westphalian model of sovereignty, remains possible primarily at the level of the sovereign state. The limitation of the right to entry by states of the Global North thus constitutes a denial of the right of refugees to belong somewhere and to appear in a shared space (Hirsch & Bell 2017 p. 425-426).

Following this understanding, we can define the postcolonial refugee as an object in the transfer of burden between wealthy governments such as Australia and the EU on the one hand and states that are economically or politically dependent on them on the other. This thesis will argue that this colonial dynamic exists in the policies of exclusion that have been adopted by the EU and Australia – policies that reveal the extent to which the 'willingness of transit and origin states to cooperate with the Global North on mobility controls, such as restricting exit and allowing readmission, is contingent on their position in the hierarchy of sovereignty, the broader state of their relations, and their domestic messages and international branding (Fitzgerald 2019 p. 260). We can call this transfer of wealth from receiving states to transit countries "dysfunctional burden-sharing" as it leads to the avoidance of accountability in established migration controls. The following chapters will examine this process in further detail.

3. Australia and Asia-Pacific

This chapter will examine transactions between Australia and the neighbouring states of Indonesia, Nauru and Papua New Guinea that illustrate the use of extra-territorial non-entrée policies that exploit a “protection gap” in international law. The Australian government has used geography, namely its proximity to smaller island states, to maintain “buffer zones” between the West and irregular migrants. These inter-state activities ultimately indicate the politicization of refugees and their use as a diplomatic tool among the Global North and the Global South. Australia's extension of immigration detention beyond its domestic borders through policies like offshore processing is an example of the exercise of power and the exporting of control by the Global North. This section will first provide the political and historical background of Australia’s policies of exclusion. With this contextual information, we can best understand the Australian government’s attitudes and values towards those seeking asylum. In the second part of this chapter, I will examine Australia’s extra-territorial migration controls, in particular its cooperative non-entrée policies. I will largely focus on trilateral cooperation between Australia, Indonesia and the International Organisation for Migration (IOM) and how it has had considerable implications for the ability of asylum seekers to secure effective protection in Asia-Pacific (Nethery et al. 2012 p. 89). This chapter will also briefly outline the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime to highlight Australia’s influence and normative power in the region. Following this, I will take a closer look at Australia's offshore detention facilities and how they blatantly exemplify “burden shifting” when it comes to accountability for the wellbeing of detained irregular migrants. Section 3.3 will utilise needs-fears mapping, game theory and migration diplomacy models to map the interests and fears of the relevant actors in these transactions. The application of these models should ultimately reveal the refugee as a mere object of transaction between states that are pursuing their own interests.

3.1 Political and Historical Context

Australia, along with the US and Canada, is a historic settler society that has a high level of participation in refugee resettlement programs relative to other states in the Global North (Fitzgerald 2019 p.13). This stems in part from a desire to project an image of Australia as a humanitarian country and to distract from its historically racist “White Australia” immigration policy. Apart from this, there are a number of additional reasons that make the case for asylum

in Australia problematic: the intense political spotlight on asylum seekers is largely due to the absence of an Australian constitutional bill of rights, such as that found in the US and Canada, and of supranational courts such as the European Court of Human Rights and the European Court of Justice to act as a check on the government's activities surrounding asylum. These mechanisms provide stronger protections for asylum seekers, and their absence in Australia contributes to the government's ability to 'enjoy a regional hegemony that allows it to push boats back into Indonesian territorial waters and pay governments of Papua New Guinea and tiny Nauru to conduct offshore processing' (Fitzgerald 2019 p. 219). In addition to this, scholars and analysts have explained the negative attention given to asylum seekers in Australia as resulting from its historical aversion to spontaneous arrivals and as a political tool used to ease white populist anxieties resulting from the large percentage of non-European immigrants (Fitzgerald 2019 p. 222). These factors have polarised the debate surrounding asylum seekers in Australia, which continues to be a point of contention within Australian society.

Australia's immigration history reflects the racist and xenophobic ideals on which the country was founded. This is reflected in policies like the "White Australia" policy and the *Immigration Restriction Act* of 1901, which was abolished in 1973, followed by a "multiculturalist" immigration policy aimed at improving Australia's image in the international community as a humanitarian country. Since the late 1990s, increasing numbers of asylum seekers fleeing conflict in the Middle East and Sri Lanka have arrived in Australia by boat, giving way to the collapse of this period of multiculturalism and the adoption of policies aimed at intercepting maritime arrivals. The 2000s saw consensus among the major parties in support of a policy of deterrence. Both centre-left and centre-right parties shared the same interest in protecting Australia's borders, and thus a strategy of deterrence was swiftly adopted.

David Fitzgerald summarises the relevant means of deterrence through the following core concepts: buffers, barbicans, moats and cages. These words evoke traditional images of fortress security and can be explained through the following examples:

> The strategy is built on buffers in Indonesia and Papua New Guinea, the idiosyncratic construction of legal barbicans by redefining rights in particular Australian territories, aggressive interceptions of visa-less travelers in the moat, and caging maritime asylum seekers in other countries' territories where most have been determined to be refugees by the UNHCR definition (Fitzgerald 2019 p. 219).

What I will refer to as the "*Tampa* debacle" in 2001 sparked the beginning of a series of border policies that have caught the attention of the international community, including human rights organisations such as Amnesty International and Human Rights Watch (Amnesty International 2013). The *MV Tampa* is a Norwegian container ship that rescued 433 passengers, most of whom were Afghani asylum seekers, from a sinking boat off the northern coast of Christmas Island – an external Australian territory that lies south of the Island of Java, Indonesia. This humanitarian disaster was perceived as a "security crisis" and transformed the course of Australian politics. The then Australian Prime minister, John Howard, responded to the crisis as follows: "We will decide who comes to this country, and the circumstances in which they come" (Leaky Boat 2011). The enactment of this isolationist approach ultimately prevented the *Tampa* from docking on Australian land, and the asylum seekers were transferred to Papua New Guinea, New Zealand and Nauru for processing. Had an Australian ship rescued the asylum seekers, the passengers would have been required by law to be detained in Australia. This presented an opportunity for the Australian government, and the response to this incident was institutionalised shortly after in what became known as the "Pacific Solution".

David Fitzgerald briefly summarises the four stages of border policy implemented by the Australian government (Fitzgerald 2019 p. 233):

- Pacific Solution I (September 2001 to 2007). Interception and transfer to Manus and Nauru. A few boats were turned back to Indonesia under Operation Relex and Operation Relex II.
- Indian Ocean Solution (2008 to July 2012). Interception and transfer to Christmas Island.
- Pacific Solution II (August 2012 to August 2013). Interception and transfer to Manus Island and Nauru.
- Operation Sovereign Borders (September 2013; ongoing). Most boats were turned back to their country of embarkation.

Despite their costly nature and the controversy surrounding these policies, it cannot be disputed that they have been effective in deterring maritime arrivals seeking protection. 'After a record high of 300 boats with 20,587 passengers arrived in 2013, only one boat arrived in 2014, and none for the next four years' (Fitzgerald 2019 p. 237). This raises questions regarding whether

the success of these policies justifies using them as a method for managing irregular migration. Does their success in deterring irregular arrivals on Australian shores represent a commendable policy achievement, or does it represent an attempt on Australia's part to use its neighbours to avoid legal and moral responsibility for the refugees at its borders? The next section will examine in closer detail the extent to which these policies rely on the cooperation of Australia's willing neighbours.

3.2 Extra-territorial Migration Controls: Cooperative Non-entrée Policies

This section will examine how Australia's engagement in regional cooperation and its financial support of the International Organisation for Migration (IOM) contribute to 'building and reproducing a system where people's unequal access to safety is secured by border regimes' (Hirsch & Doig 2018 p. 684). These activities blur the lines of state responsibility and raise concerns about the transferring of this responsibility between states. In an attempt to escape its obligations under international law, Australia has secured agreements with its regional neighbours under the guise of "regional cooperation" and "burden sharing". These regional agreements to disrupt, detain, deport and deter asylum seekers seeking access to Australia extend to its neighbours in Southeast Asia, including Sri Lanka and Malaysia. This section will focus on the agreements that have been made closer to home: the Australian government has negotiated agreements with its economically dependent neighbours – Indonesia, Papua New Guinea and Nauru – who host irregular migrants intercepted at sea by maritime border police in processing facilities. Because these facilities are not located on Australian soil, they fall under the category of extra-territorialisation. The agreements that bring these facilities to life ensure that responsibility and accountability lie outside of Australia's jurisdiction and within the control of neighbouring countries that have no legal obligations under the Refugee Convention. This exporting of control is achieved through the constant 'development of regional cooperation agreements, disruption activities in countries of asylum, border control legislation and policies, the training, funding and support of foreign law enforcement agencies, the provision of equipment and resources, and the extra-territorial detention and processing of asylum seekers' (Hirsch 2017 p. 49).

Australia has thus outsourced its border protection regime through the strategic use of diplomacy, substantial levels of funding, the provision of infrastructure and training, and intelligence sharing. This is exemplified through a number of activities including the Bali process, regional cooperation, exporting legislation and policy, law enforcement and border policing, the provision of military equipment, funding and capacity building, and extra-territorial and third-country resettlement (Hirsch 2017). Amy Nethery and Carly Gordyn refer to the exporting of Australia's protection regime as 'incentivised policy transfer' (Nethery & Gordyn 2014). This section will outline how Australia's involvement with the IOM, its leadership in the Bali Process and offshore processing support the hypothesis put forward in this thesis: that refugees have been stripped of protection due to states' involvement in outsourcing activities. The following subsections will serve to demonstrate this politicisation of irregular migrants in a postcolonial state system.

3.2.1 The International Organisation for Migration in Indonesia

Although Australia is largely responsible for its extra-territorial operations, many of these policies would not be possible without the assistance of third parties such as the IOM. The IOM is an international organisation that, unlike other international organisations, has the ability to exercise a great deal of autonomy in the management of migration, and thus to define its own role in the international system. This ability stems from its project-based funding, which allows it to undertake activities related to migration on behalf of Western donor states such as Australia. The IOM is frequently described as a United Nations organisation due to its close cooperation with the UN. In a study commissioned by the Swedish International Development Agency (SIDA), the IOMs activities relating to humanitarian assistance were evaluated:

> The study shows that IOM is substantially involved in humanitarian activities. Based on UN General Assembly resolution 46/182 (1991) and its membership in IASC and the active support and participation in the Humanitarian Reform, IOM is an established partner in the coordinated system for humanitarian emergency assistance (Bengtsson et al. 2008 p. 3).

Despite its humanitarian engagement, the IOM does not have a rights-based protection mandate and functions independently of the UN. Without this humanitarian mandate, it is able to engage in ethically and legally questionable activities without direct checks or accountability

(Hirsch & Doig 2018 p. 681). The organisation performs five main functions (Hirsch & Doig 2018 p. 683):

1. Facilitating the movement of emigrants, migrant workers and refugees,
2. Building states' capacities to control migration,
3. Active migration control through practices such as running detention centres and conducting public information campaigns,
4. Participating in humanitarian emergency operations, and
5. Shaping the discourse on international migration policy.

These functions operate under the guise of legitimacy, but they represent the IOM's participation in a 'broader system of harm' in which it plays the role of state agent (Hirsch & Doig 2018 p. 697). By cooperating with the IOM, the Australian government outsources to a private entity, duties that traditionally belonged to the sovereign state, thus "dispersing" its sovereignty and blurring the lines between burden sharing and state responsibility. In the following, I will outline how the cooperation between Australia, Indonesia and the IOM under the Regional Cooperation Agreement is an example of the institutionalisation of outsourcing policies by wealthy states such as Australia.

Asylum seekers from refugee-producing countries such as Iran, Iraq, Afghanistan and Pakistan travel by boat to Indonesia in the hopes that their asylum claims will be approved and that they will be resettled. The nature of Indonesia's geographical position, its proximity to Australia, has determined its role as a transit country for refugees and asylum seekers en route to Australia. Although Indonesia is not a member state of the IOM, it seeks to support the Indonesian government, with the goal of preventing irregular migrants from leaving transit countries bound for wealthy states of the Global North. In 2000, a trilateral agreement between Indonesia, the IOM and Australia (the Regional Cooperation Agreement) put into force the policy of intercepting migrants thought to be travelling to Australia or New Zealand. Upon interception, they would be transferred to the IOM, and later to the UNHCR if they wished to claim asylum. Fitzgerald has noted that in recent years:

> [The] Australian government has implemented a range of unilateral extra-territorial measures such as boat turnbacks … an increasing number of refugees and asylum

> seekers have found themselves stranded in Indonesia, unable to reach Australian territory in order to seek asylum (Fitzgerald 2019 p. 686).

Unlike Australia, Indonesia is not a party to the Refugee Convention, meaning that it has no direct obligations under it. It still has legal obligations under other international human rights treaties, however, including the International Convention on Human Rights and the Convention against Torture (Hirsch & Doig 2018 p. 686). In addition, domestic law recognises those without visas as "illegal immigrants", and the law focuses on the criminalisation of such persons. This means that many asylum seekers and refugees stranded in Indonesia remain vulnerable to human rights abuses, caught in a state of "legal limbo". This incomplete legal framework creates a gap for asylum seekers and refugees in Indonesia. The IOM, funded by Australia, fills this gap and plays a role in the 'management of these vulnerable people' (Hirsh & Doig 2018 p. 687). The IOM operates under the guise of migration governance and brands itself as a sister agency of the UNHCR, which Hirsch calls "blue-washing": 'creating the impression of a humanitarian organisation while simultaneously carrying out migration control activities on behalf of donor states of the global north' (Hirsch & Doig 2018 p. 681). Australia's willingness to cooperate with such an entity illustrates the extent to which the government perceives irregular migrants as a threat to security and as objects that can be immobilised and redirected. Ultimately, this collaboration is a cause for concern – Australia is able to shift responsibility beyond its territorial boundaries and to claim that it does not have "effective control", an issue which will be further discussed in Chapter 6. The IOM, as a non-state actor conducting operations on Australia's behalf, is thus used by Australia in its claim to sovereignty.

3.2.2 The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime

The Bali Process refers to a forum for policy dialogue where members share information and cooperate to address the issues of people smuggling, human trafficking, and related transnational crime (Hirsch 2017). Largely funded by Australia and co-chaired by Australia and Indonesia, Australia's involvement in this forum lays bare its agenda in controlling irregular migration flows to its borders. The current framework in which it operates is the Regional Cooperation Framework (RCF), and in its conception 'the UNHCR presented a proposal improving regional cooperation on refugee protection, [while] the Bali Process ultimately adopted a more securitised and State sovereignty focused framework' (Hirsch 2017 p. 70).

With Australia being the wealthiest state in the region, this forum exemplifies the ‘perception that it is the region’s responsibility to protect Australia, on the basis that Australia’s interests are self-evidently more important than those of other states in the region’’ (Hirsch 2017 p. 70). As a result of the Bali Process, we have seen the increased prosecution of people smugglers and the implementation of policies that are aimed at deterring asylum seekers from engaging with human traffickers. This securitisation is justified by the importance of keeping asylum seekers safe from harm, but it conveniently serves the Australian government’s security goals and the maintenance of its sovereign borders.

3.2.3 Offshore Processing

This section will briefly outline Australia’s offshore detention activities to highlight its drastic implications for migrants attempting to access Australian territory. Furthermore, I will outline how Australia has used offshore processing to shift burden, blame and responsibility such that it cannot be held accountable for evading its legal and moral obligations. Immigration detention is a growing phenomenon as governments strive to regulate unwanted cross-border migration. Australia’s offshore detention and processing centres have been in the international spotlight due to their blatant and systematic human rights violations. Elaine Pearson, Australia director at Human Rights Watch, has stated that ‘Australia has gone from being a country that once welcomed immigrants to a world leader in treating refugees with brazen cruelty’ (Human Rights Watch 2018). Immigration detention is a highly controversial form of policy export employed by wealthier states of the Global North, made possible through substantial funding and the willingness of neighbouring states to bear the logistical, moral and legal burden of hosting asylum seekers.

Australia has been found in violation of various aspects of the Convention on the Rights of the Child and has been publicly criticized by the United Nations High Commission on Human Rights (UNHCHR), Human Rights Watch, and Amnesty International:

> Asylum seekers detained on Manus Island are exposed to the risk of refoulement – the forcible return of individuals to countries where they face a real risk of persecution or other serious harm. They have been denied their right to present asylum claims on arrival in Australia and to have those claims heard in Australia. They have not been afforded a full right to seek asylum, nor have they enjoyed their right to a fair process in

> the determination of their asylum claims. They have been subjected to arbitrary detention in Papua New Guinea. Many have suffered inhumane treatment in detention (Amnesty International 2013 p. 83).

Mandatory detention in Australia is clearly problematic in a number of ways. Vulnerable people without valid visas are criminalised and secretly detained in remote facilities that deprive them of adequate health care and other services, including adequate legal assistance. These facilities are cut off from the community and grant the media and civil society only limited access. There have been various reports of inhumane conditions and an oppressive and isolating atmosphere, where detainees' mental health deteriorates, in some cases leading to self-harm. It is vital that systems be put in place to ensure that the offshore detention facilities in these locations are recognised as falling under Australia's jurisdiction, given that these sites were established by Australia and are effectively operated and controlled by Australia (Australia OPCAT Network 2020).

The processing facilities on Nauru and Manus Island can be described as Australian satellites, 'representing an unequal relationship reminiscent of the colonial dynamic' (Garton 2017). The relationship between these island states and the Australian government is one of profound economic and political influence. Nauru, 'though nominally today an independent state … is effectively a client of Canberra' (ibid). In April 2016, The PNG Supreme Court ruled that the detention centre on Manus Island was unconstitutional. This ruling is based on evidence that the detention and treatment of asylum seekers violates their rights of personal liberty under the PNG constitution. Australian Immigration Minister, Peter Dutton, maintained that the ruling did not affect Australia's immigration policy: "People who have attempted to come illegally by boat and are now in the Manus facility will not be settled in Australia" (BBC News 2016). This response was echoed by the government's claim that it does not have "effective control" over the Manus Island processing centre and that it is solely managed by the government of PNG (Hirsch 2017 p. 78). This exemplifies a clear evasion of responsibility in regard to the illegality of these processing centres by the Australian government.

3.3 Migration Diplomacy: Australia and Indonesia

Australia's position as a refugee-receiving state is unique. The vast oceans surrounding its shores make it close to impossible for irregular migrants to enter Australian territory. The most

accessible route is made possible by transit through Indonesia, making diplomatic ties between Australia and Indonesia essential to Australia's aim of protecting its borders, and thereby its sovereignty. Nethery and Gordon's 'Incentivised Policy Transfer' (IPT) 'offers an explanation for how wealthy states may influence the policy of other states without the use of coercion and to the political benefit of both' (Nethery & Gordyn 2014 p. 190). I will draw on this theory by incorporating it into the migration diplomacy framework, where Australia is to be considered a receiving state given its economic, political and social capacity to host refugees. Indonesia, by contrast, constitutes a third or transit state due to its geographical position. I argue that this power dynamic is the result of two factors: geography and Australia's standing as a regional hegemon. It is evident that Indonesia's positioning relative to Australia makes it an ideal partner for Australia in the effort to externalise borders and to deter maritime arrivals. Geography is not the focus of this paper, however, so this section will focus only on geopolitical relations that are relevant to Australia's position as a regional hegemon.

There is no denying Australia's influence in both economic and political spheres in Asia-Pacific. With its normative power – a concept that will be discussed in more depth in Chapter 6 – Australia has taken on a leadership role in the region. It is able to use this influence to its advantage in its diplomatic processes, and as a result is able to coax governments to cooperate in its border regime. According to Amy Nethery, Australia has effectively exported control beyond its borders to Indonesia (Nethery et al. 2012). This assessment is also true of the smaller island states neighbouring Australia. Although this section will not analyse the agreements between Australia and Nauru or Papua New Guinea, it is worth noting that Nauru and Papua New Guinea are financially dependent on Australia, as funding to these states makes up a large portion of their domestic budget. 'Australia is Nauru's most significant donor, providing development assistance equivalent to 25 percent of Nauru's gross domestic product in 2017–18' (Department of Foreign Affairs and Trade 2020).

As set out in Chapter 1, this chapter will use two models to simplify the gains and losses in the mutual cooperation between Australia and Indonesia. The first model, Figure 1, maps the interests and needs of each party. This needs-fears mapping allows us to visualise the desires of each international actor and what is at stake for them. Mapping these interests and fears is crucial to the next step of my analysis in Figure 2, where game theory will be used to understand the mutual dependency of these states.

Figure 1. Needs-fears mapping of Australia and Indonesia

Actor	Issues	Interests/ Needs	Fears	Means	Options
Australia	Irregular migrants	Capacity for refugee intake	"Security" (or pressure on social system, etc.)	Border externalisation	Outsourcing responsibility OR accepting irregular arrivals
Indonesia	'Obstructed' civil space, overpopulation, strained social system and developing economy	Financial assistance, investment, political guidance	Harming diplomatic relations with Australia	Bilateral agreements with Australia	Agreeing to cooperate OR non-cooperation

This table demonstrates the varying interests of each actor, which can be attributed to their colonial histories as either European colonisers or colonies. As a former colony, Indonesia is riddled with democratic instability; there is immense pressure on its social system due to overpopulation, and its economy is still developing. Furthermore, Indonesia is labelled as having an "obstructed" civil space – a term that applies to civil spaces that are 'heavily contested by power holders, who impose a combination of legal and practical constraints on the full enjoyment of fundamental rights' (CIVICUS 2020). This explains its reliance on Australia for financial aid and investment. Cooperation with Australia is more feasible for the Indonesian government compared to the risk of harming diplomatic relations.

The table below (Figure 2) provides a simplification of Indonesia's cooperation vs. non-cooperation in the border regime pushed by Australia. Game theory is used to highlight the mutual gains that cooperation brings to each state.

Figure 2. Game theory analysis of mutual cooperation between Australia and Indonesia

		INDONESIA	
		COOPERATION	**NON-COOPERATION**
AUSTRALIA	**EXTERNALISE BORDER**	*Outcome 1* AUS - Maintains peace IND - Financial assistance/investment	*Outcome 2* AUS - More irregular arrivals IND - Negative effect on bilateral relations
	MANAGE BORDER INDEPENDENTLY	*Outcome 3* AUS - More irregular arrivals IND - No financial assistance/investment	*Outcome 4* AUS - More irregular arrivals IND - No assistance

Using game theory, this table demonstrates a positive-sum perspective on migration diplomacy between Australia and Indonesia. This situation highlights mutual or absolute gains, where both sides are expected to benefit. The table shows that Outcome 1 exhibits dominant strategies, which result in a "Nash equilibrium" (Ross 2019) in which both players are expected to enjoy gains. More specifically, we can understand how Indonesia is encouraged to adopt policy changes in order to secure financial assistance or investment. This encouragement comes not from coercion but via incentivised policy transfer. This model reveals that the transit or host state – Indonesia – recognises the financial and diplomatic benefits of cooperating with Australia and thus adopts Australia's policy goals, aligning them with its own. Outcome 1 represents a win–win situation: Australia is able to achieve its own domestic political goals, while 'Indonesia is able to strengthen its relationship with Australia at little political or financial cost, and, by being seen to be making a rational decision without pressure from its wealthier neighbour, saves face in its own constituency' (Nethery & Gordyn 2014 p. 140). This analysis shows the extent to which Australia's hegemonic power has allowed the government to outsource its asylum responsibilities to Indonesia, with Indonesia willingly complying insofar as this also serves its own interests, albeit within a framework created by Australia.

4. The EU and Turkey

This chapter will focus on the agreement reached between the member states of the European Union and Turkey with regards to the emergency management of Syrian refugees attempting to access the EU via the Mediterranean between Turkey and Greece. This chapter briefly outlines the historical and political context of the deal in Section 4.1, followed by a brief overview of the specifics of the agreement in 4.2. Here, I will present a number of problems that the deal poses for the protection of human rights and its legality. The final part of this chapter, Section 4.3, will then examine how this form of extra-territorialisation reasserts European ideals of sovereignty, in the end transforming refugees into diplomatic bargaining chips in negotiations between the two international actors. Through using the same models used to analyse state interactions between Australia and Indonesia, I will map the fears and needs of Turkey and the European Union as a whole, with the aim of demonstrating that while "Fortress EU" (Akkerman 2018) and its member states appear to take up the cause of human rights, in practice they reach agreements with states with whom they otherwise would not negotiate.

4.1 Political and Historical Context

This section will outline the political and historical context of the European Union's relationship with Turkey to the extent that this is relevant to the Syrian refugee crisis and the current deal between the two actors. This section will not engage in an analysis of the European Union's history of immigration and policies of externalisation; rather, it examines the history of Turkey's road to democratisation, the relationship between the EU and Turkey, and how this has informed the asylum regime as it stands now:

> Turkey's approach to migration diplomacy vis-à-vis European states has changed over time. During the 1960s and 1970s, Turkey pursued absolute gains via its signing of guest worker agreements with various European states, which served to reduce its unemployment and facilitate the flow of foreign exchange via remittances—all while also benefiting the economies of Western Europe. By 2015–2016 Turkey's relationship with European states had become more antagonistic as it attempted to leverage Europe's interest in stemming migration to secure substantial economic benefits (Adamson & Tsourapas 2019 p. 124).

The vision pursued by Mustafa Kemal, the founder of the Turkish Republic, centered around the creation of the Turkish Republic and was intended to prioritise the civil liberties of Turkish

citizens and to establish a secular democratic system that would be safeguarded from the rise of political Islam and the interference of Sharia law. In 1999, Turkey was officially granted pre-accession status: this entailed the commencement of pre-accession talks and negotiations. The granting of pre-accession status can be interpreted as a sign that the EU was considering granting membership to Turkey, but this was a possibility that would only be realised if Turkey demonstrated a willingness to fulfill the Copenhagen Criteria. March 2001 therefore saw the establishment of the National Program for the Adoption of the Acquis (NPAA), with the aim of aligning Turkish law with EU law, eliminating discrepancies between the two and ultimately leading to the overall Europeanisation of Turkish domestic practices. This program was meant to address a number of important aspects of Turkish society. Turkey was able to make notable developments toward promoting the rule of law, protecting minorities and abolishing the death penalty.

Turkey's democratic regime has been subject to periodic breakdowns, however. In 2005, the Turkish government made an official statement asserting that it would not recognise the Republic of Cyprus, prompting the decision to block the further progress of Turkey's path to membership (Stathopoulos 2016 p. 24). Under the leadership of Recep Tayyip Erdoğan, we are witnessing a slow regression to conservative Islamic values and the possible de-secularisation of the state, two developments that are incompatible with the core foundational premises of democracy and the upholding of basic human rights. The relationship between Turkey and the EU has been in steady decline over the last decade due to numerous activities undertaken by Erdoğan's "imperial presidency". There have been concerns regarding freedom of speech, censorship and government control of the media, the Turkish military operation in Syria, the Turkish incursion into Libya, and other geostrategic issues, such as matters involving Cyprus. Erdoğan has pushed the country towards a state of democratic unease. The failed military coup of 2016 further eroded the EU's faith in Turkey's ability to uphold democratic standards.

Turkey's rocky road to democracy thus helps to contextualise the concerns raised by various observers when it comes to the EU's collaboration with Turkey in determining the flow of irregular migrants.

4.2 Extra-territorial Migration Controls: The EU–Turkey deal

> Whilst offshore controls have been in existence in various guises for some time, the strategy launched by the EU in 2016 represents a powerful shift in asylum and migration policy and practice. By transferring the coercive management of exiles to third countries, it aims to eliminate any physical contact, direct or indirect, between refugees and the authorities of would-be destination States. The ultimate goal is thus to sever any jurisdictional link with EU countries, in an attempt to elude any concomitant responsibility (Moreno-Lax & Giuffré 2017 p. 4).

This section will provide a brief description of the EU–Turkey deal and address four main questions: first, why was the agreement made? Second, what are the terms of the EU–Turkey deal? Third, why is the deal problematic? And finally, how is the deal justified under International Law?

4.2.1 Humanitarian Crisis

In the summer of 2016, the arrival of irregular migrants in Greece had doubled compared to the number of arrivals in 2014. This influx of migration pushed Greece into both political and economic instability (Stathopoulos 2016 p. 32). Greece was collapsing under the weight of the pressure that irregular migrants were putting on its social system. Later, in 2015, President of the European Council Donald Tusk met with Turkish Prime Minister Ahmed Davudoğlu with the aim of finding a solution to the migration flow from Turkey and providing refugees in Turkey with humanitarian and financial aid (ibid).

4.2.2 Terms of the EU–Turkey Agreement

In March 2016, the EU entered into an agreement with Turkey that was designed to deter the flow of migrants and refugees through Turkey into Europe. The agreement allowed Greece to return irregular migrants who arrived after 20 March 2016 to Turkey, while simultaneously placing greater importance on intercepting flows of migrants from the Turkish coastline to Greece. ‘For every Syrian returned to Turkey in the scheme, the European Union pledged to resettle another in Europe, up to a cap of seventy-two thousand’ (Adamson & Tsourapas 2019 p. 117). The EU’s need for assistance with the influx of migrants placed Turkey in a position of power over the EU, giving it the upper hand in negotiations. In return for hosting the migrants, Turkey was promised that the EU would accelerate visa liberalisation for Turkish nationals and would recommence “talks” on accession to the EU. Of course, these political desires alone were

not enough for Turkey, and thus these promises were accompanied by a sum of €6 billion to fund refugee hosting facilities on both an emergency and a long-term basis. Much like Australia's policy of deterrence, the deal has been a policy success: the number of arrivals in Greece has fallen dramatically (Anderson & Keen 2019 p. iii). Nevertheless, the negative consequences for those seeking asylum have been equally dramatic.

4.2.3 Problems with the EU–Turkey Agreement

The EU–Turkey deal has been criticised on many different levels. The problems associated with it make it very clear that the deal constitutes neo-refoulement: insofar as it deters irregular migrants from accessing EU territory, they are ultimately prevented from making asylum claims within EU borders. This section will outline three primary concerns regarding the EU–Turkey agreement.

First, the agreement places vulnerable migrants at risk of refoulement. Turkey has been formally and informally returning people to Afghanistan, Iraq, Pakistan and Syria through readmission agreements that place migrants and asylum seekers at risk of repatriation and refoulement (Moreno-Lax & Giuffré 2017 p. 7). In June 2016, the Greek Asylum Appeals Committees 'unanimously held that the principle of non-refoulement is systematically violated in Turkey, recalling incidents of violent rejection at the borders and mass deportations to Syria' (Gkliati 2017 p. 218). The EU has remained passive as Turkey has tightened its refugee policies, closing its border with Syria and forcibly returning refugees amidst the rapid spread of Covid-19. According to the UNHCR, 'approximately 87,000 refugees returned to Syria from Turkey between 2016 and January 2020. It is fair to assume that a sizable portion of them did not do so voluntarily' (Adar et al. 2020a p. 3).

Second, the categorisation of Turkey as a "safe third country" has been highly disputed. A ruling by the Human Rights Watch has received reports of the inhuman treatment of asylum seekers by Turkish border guards. 'During March and April 2016, Turkish border guards used violence against Syrian asylum seekers and smugglers, killing five people, including a child, and seriously injuring 14 others, according to victims, witnesses, and Syrian locals' (Human Rights Watch 2016). It is worth considering whether Turkey's status as a "safe third country" is well founded. The deal has been widely criticised on the grounds of human rights violations related

to both the conditions faced by irregular migrants and their limited access to fair and efficient asylum procedures. ‘The Parliamentary Assembly of the Council of Europe, as well as a number of scholars and NGOs, have challenged the definition of Turkey as a “safe third country”’ (Moreno-Lax & Giuffré 2017 p. 6). Ultimately, Turkey has been deemed a safe third country under Greek law, and the conditions for refugees have been mostly judged as safe. But it is worth bringing attention to the refugee population that lives outside the camps, which is approximately 98% of the 4 million refugees hosted by Turkey, are faced with financial difficulties, poor housing conditions, limited access to healthcare and increasingly negative sentiments towards refugees (Balcioglu & Erdogan 2020).

Finally, this collaboration is problematic to the extent that the Turkish government is deeply authoritarian and the recognition it receives often goes to precisely those organs that are most responsible for repression and human rights abuses. European nations continue to sell arms to countries such as Turkey, even though they feed further conflicts, violence and repression. This contributes to reinforcing conflicts that produce even more refugees. The total value of licenses issued by EU member states for arms exports in the period from 2007 to 2016 is over €122 billion (Akkerman 2018 p. 3). The Erdoğan government is engaged in military operations intended to counter the influence of Kurdish forces in the Syrian conflict. With this aim, Turkey has reinforced its military presence in Syria, placing civilians at risk of violence. ‘The EU’s standing and influence on Turkey and its role in Syria has been undermined by its apparent disregard for the UN Refugee Convention and its failure to deliver on commitments to refugee resettlement, pushing Turkey closer to Russia’ (Anderson & Keen 2019 p. iii).

4.3 Bargaining and Migration Diplomacy: Reaching the EU–Turkey Agreement

In this section, we will use the framework of migration diplomacy to evaluate the positions taken by Turkey and the EU in reaching a solution to the influx of irregular migrants into the EU. Although I argue that there are many similarities between the two cases assessed in this thesis, there is also a key difference. What makes this case more complex than that of Australia and its neighbours in Asia-Pacific is Turkey’s attempt to use Europe’s reliance on it as a bargaining chip. Georgios Stathopoulos has engaged in a thorough analysis of the bargaining process that led to the EU–Turkey deal and highlights the importance of interdependence in the bargaining

process: ‘every state, even the most powerful, has to respect the international order and the sovereignty of other states’ (Stathopoulos 2016 p. 10). This is exemplified by the pressure put on the European Union to recognise and legitimise the Turkish government in order to reach a diplomatic understanding. As discussed in Section 4.2, this meant implicitly validating Turkey’s behaviour under Erdoğan’s presidency.

The European Union uses its relationship with Turkey, in its capacity as a refugee-receiving state, to moderate the influx of irregular migrants crossing the Mediterranean via Greece. Much like the case of Australia, the power dynamic can be traced back to two primary factors: geography and the EU’s standing as a regional hegemon. Turkey’s geographical position provides the Turkish government with the great advantage of control. Many migrants use the Aegean passage from the Turkish coast to reach the Greek islands of Lesbos, Chios, Samos, Kos and Leros, where they attempt to make an asylum claim in EU territory. Although the journey from Turkey to Greece is significantly shorter and far less dangerous than the journeys undertaken by those travelling from Indonesia to Australia, the journey nonetheless puts those who choose to undertake it in danger, as demonstrated by the highly publicised death of Alan Kurdi, a three-year-old Syrian Kurdish boy who drowned aboard a boat off the coast of Turkey in 2015. Turkey has used its geographic position as a diplomatic strategy during the Syrian refugee crisis, and this distinguishes the EU–Turkey case from that of Australia and Indonesia.

The European Union’s role as a regional hegemon has historically informed its normative power over Turkey. Turkey’s potential EU membership has long been a driving factor in its actions and policies, and, as explored in 4.1, the prospect of membership has prompted Turkey generally to acquiesce to the Europeans Union’s power. This dynamic has changed since the Syrian refugee crisis and the EU–Turkey agreement, with Turkey demonstrating that it will not refrain from fearlessly antagonising the EU to hasten membership talks. Figure 3 arranges the main interests and fears in a simplified model to illustrate the EU’s diplomatic aims and fears in relation to those of Turkey.

Figure 3. Needs-fears mapping of the EU and Turkey

Actor	Issues	Interest/Needs	Fears	Means	Options
European Union	Irregular migrants as a threat to "EU values"	Capacity for refugee intake	"Security" (or pressure on social system, etc.)	Recognising Turkey as a diplomatic power	Outsourcing responsibility OR accepting irregular arrivals
Turkey	Repressed civil space, developing economy, overpopulation	Economic gain, mobility privileges, domestic and international credibility as a democracy	Suspension of EU membership talks, economic and security cooperation with EU	Agreeing to EU preconditions	Hosting refugees from the EU, stricter controls on boats leaving Turkey OR noncooperation

In the case of Australia and Indonesia, my findings assert the positive-sum outcome of mutual cooperation between the two actors. In this analysis of the power relations between the EU and Turkey, Turkey is clearly positioned in the migration diplomacy framework as a transit or third state, as transit states will often assume a zero-sum mentality as per their transit migration diplomacy strategies (meaning that they perceive a situation with the mentality that "one's gain is another's loss"). Turkey has employed this mentality to threaten the EU with the prospect of opening migration channels. This may not truly reflect the reality of the bargaining or negotiation process, however, as the Erdoğan government relies on its relationship with the EU too heavily to compromise it:

> … international legitimacy and prestige matters for the AKP. Unilaterally ending Turkey's accession process would equate to an acknowledgement of international and domestic criticisms that the AKP undermined democracy. Given the cumulating international criticism over Erdoğan's high-handed politics, the end of the EU membership process would also lead to Turkey's marginalisation in the West and a very likely blow in the economy, a cost that the AKP is not yet willing to bear (Yabancı 2016 p. 31).

Despite this, Turkey's zero-sum mentality has shaped the process in which the two parties have reached agreement. 'The manipulation of migration flows for the purposes of projecting power is a strategy commonly employed by weak actors. States that lack capacities in other areas can at times attempt to leverage the issue of migration to enhance their bargaining position vis-à-vis

more powerful states' (Adamson & Tsourapas 2019 p. 118). This illustrates the varied power and interests that states have due to their different positions in migration systems and their roles as migration-receiving, migration-sending, or transit states. The zero-sum mentality is exemplified by Turkey's bargaining power: the ability to control the flood gates that determine the flow of migration across the Mediterranean. Turkey had an advantage in this situation that allowed it to "bully" the EU into compliance. 'In November 2016, as the European Parliament voted to suspend EU membership talks with Turkey, the Turkish president threatened to renege on the agreement: "if you go any further," President Erdoğan warned, "these border gates will be opened' (Adamson & Tsourapas 2019 p. 117). Turkey's power in this situation should not be misinterpreted as "real" normative power; in reality, it is a tactic employed by a dependent state to leverage financial, political and diplomatic aims. The table below (Figure 4) depicts a simplified analysis of Turkey's cooperation vs. non-cooperation in the border regime pushed by the EU. Game theory is used to highlight the mutual gains that each state can expect from such cooperation.

Figure 4. Game theory analysis of mutual cooperation between the EU and Turkey

		TURKEY	
		COOPERATE	**NON-COOPERATION**
EUROPEAN UNION	**EXTERNALIZE BORDER**	*Outcome 1* EU - Maintains peace TR - Financial assistance and continued economic cooperation with EU	*Outcome 2* EU - More irregular arrivals TR - Negative effect on bilateral relations
	MANAGE BORDER INDEPENDENTLY	*Outcome 3* EU - More irregular arrivals TR - No financial assistance and discontinued economic cooperation with EU	*Outcome 4* EU - More irregular arrivals TR - No financial assistance and discontinued economic cooperation with EU

Figure 4 demonstrates a positive-sum outcome of migration diplomacy between the EU and Turkey. Outcome 1 highlights mutual or absolute gains, where both sides are expected to benefit. The table shows that Outcome 1 exhibits dominant strategies, which results in a Nash

equilibrium, where both players are expected to see gains. Thus, Outcome 1 represents a win–win situation:

> [The] EU will not have to deal with the growing irregular migrant flows from Turkey, and on the other side, Turkey succeeded to re-energize [relations] with the EU …. [T]his deal offered Erdogan a new legitimacy in the international political scene (Stathopoulos 2016 p. 49).

4.3.1 The Legality of the Deal

In light of the considerations outlined in this chapter so far, what makes this deal legal? How has the EU evaded its obligations under international law by signing it? The EU–Turkey deal has been criticised for side-stepping scrutiny under international law because of the circumstances under which it was made. Because it is officially a deal with the member states of the European Union rather than the European Union as a single entity, it is not subject to the rigid standards imposed by the Court of Justice of the European Union (CJEU):

> In order to prevent scrutiny by EU institutions, such as the European Parliament and the Court of Justice of the EU, the deal with Turkey is not an agreement, but a statement, which was not adopted by the EU itself, but rather by the Heads of State/Government of its Member States (Üstün 2019 p. 18).

The European Commission website states that Greece and Turkey have taken the lead in implementing the deal, which means that they are responsible for any legal or operational considerations relating to it. They state that the Commission is assisting Greece with 'advice, expertise and support from the EU budget and by coordinating – via the EU Coordinator Maarten Verwey – the support which is being provided by other Member States and EU agencies' (European Commission 2016). To illustrate the "legal black hole" that the EU–Turkey agreement opens up, I will present a case that demonstrates how the European Union has defended the legality of the agreement.

The legal circumstances of the agreement have been disputed before the Court of Justice of the European Union in CJEU case *NF v. European Council* (2017). The applicant, from Pakistan, filed an application in Greece on the grounds that they feared persecution in their home country. The applicant was thus seeking the annulment of the EU–Turkey agreement concluded between the European Council and Turkey in 2016, arguing that a) it is incompatible with

fundamental EU rights, specifically Article 1,18,19 (prohibition of collective expulsion) of the EU Charter of Fundamental Rights, b) Turkey is not a safe third country (Art. 36 EU Directive 2005), and c) there had been a failure to comply with Art. 218 and Art. 78 TFEU which outlines the requirements for cooperating with a third country as one that must be compliant with EU law. This case is noteworthy as it raised the question of whether the agreement was between EU institutions and Turkey or between the member states of the European Union and Turkey. This detail is relevant because under Art. 218 TFEU, the court can only annul an agreement if it was made by the institutions of the European Union. The case was concluded, with the court reasoning that it does not have jurisdiction over the EU–Turkey agreement as it falls under the jurisdiction of the member states of the EU and not the European Council. The press release for the agreement indicated that the deal was between the European Union and Turkey, but the EU has since claimed that this press release was "informal" and that the reference to the EU was a simplification for the general public. It has reasserted that the term "EU" must be understood in this journalistic context as referring to the heads of state or governments of the Member States of the European Union (*N.F v. European Council* 2017).

> [T]he Court considered not to have competence to adjudicate the case … were Member States in a position to commit the EU to reinvigorate accession negotiations, promise visa facilitation, or create a Refugee Facility out of EU funds, if they were indeed acting in their autonomous international law capacity?' (Moreno-Lax & Giuffré 2017 p. 16).

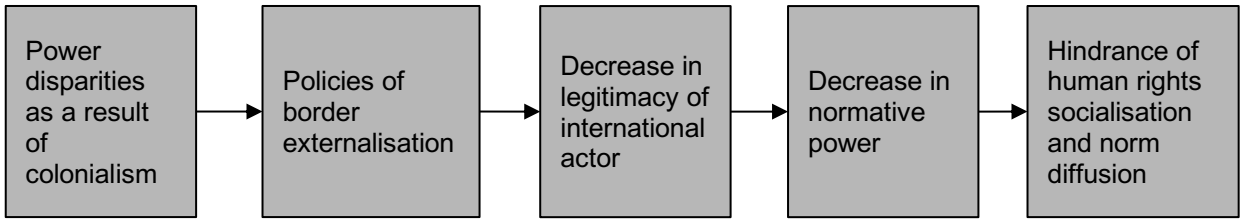
Furthermore, it is worth noting the geographic limitation on Turkey's signing of the Refugee Convention, which means that only those fleeing as a consequence of events occurring in Europe can be given refugee status (UNHCR 2009). This is considered a potential threat to the safety of the Syrian migrants being sent to Turkey, as it denies protection to those coming from non-European countries. 'These persons can only obtain the status of "conditional refugee", granted on a temporary basis under the Turkish Law on Foreigners and International Protection, in effect since 2014' (Moreno-Lax & Giuffré 2017 p. 6). To ease these concerns, Turkey has assured the European Commission and adopted the Temporary Protection Regulation. This regulation extends protection to Syrian refugees and provides a framework for their basic rights and access to social services during the crisis, as well as additional guarantees that the non-refoulement principle will be honoured (Üstün 2019 p. 18). Despite these assurances, refugees are still seemingly at risk of refoulement.

This chapter has demonstrated that the EU–Turkey deal represents a much larger problem than initially appears: not only does this deal make asylum seekers vulnerable to further human rights abuses, but it reproduces a system in which regard for human rights and fundamental freedoms is not prioritised. Furthermore, the prioritisation of migration management by the EU has the potential to strengthen anti-democratic behaviour on Turkey's part, promoting activities that undermine the EU's standing as a normative influence in the dispersion of human rights norms in the international community. 'For Europe, the migrant crisis has presented a struggle against itself and its preconceptions of what Europe and European values stand for' (O'dwyer 2018). As postcolonial subjects, migrants disrupt the European order by contesting the place assigned to them in the international system by political and legal boundaries, or rather, "the lottery of birth" that is subject to political and social structures that have been shaped by colonialism.

5. Postcolonialism, Normative Power and Norm Socialisation

The central aim of this chapter is to demonstrate how residual colonial power structures inform policies of border externalisation, ultimately hindering human rights socialisation at both the state level and internationally. The topic of normative power is fundamental to understanding the ways in which norms such as human rights norms diffuse through the international system. This chapter aims to demonstrate the colonial origins of key power disparities and how this power translates into normative power. I will engage in an analysis of how the normative power exercised by the European Union and Australia is undermined through policies of externalisation and the reproduction of an international refugee regime that prioritises border security over the rights of the individual. Figure 5 demonstrates the effects that colonialism has had on the state of migration politics and human rights socialisation. The figure refers to power disparities between receiving and transit states and how policies of externalisation undermine the legitimacy of actors such as the EU and Australia, thereby undermining their normative power and their ability to influence the socialisation of human rights norms.

Figure 5. Power, Border Externalisation and Norm Socialisation



The first part of this chapter will attempt to define normative power as it relates to border externalisation. Second, this chapter will briefly outline various ways of conceptualising human rights norm socialisation by providing a summary of these processes as perceived by the four primary theories of international relations: realism, liberalism, rational institutionalism and social constructivism. Each of these schools of thought emphasises various actors and tools for promoting human rights norms in a given society. This is briefly summarised in Figure 6. Once this has been outlined, I will assess the effectiveness of these frameworks in explaining the

normative power of the European Union and Australia, considering their engagement in policies of externalisation. Third, to assess the normative power exercised by these actors, I will use a set of indicators put forward by Ian Manners – principles, actions and impact – which will be further elaborated on in the following section.

5.1 Normative Power

Normative power can be described as a form of power in which influence is expressed through norms rather than military or economic might (Manners & Diez, 2007). Normative power can use military power when appropriate, as exemplified by humanitarian intervention (ibid). We can examine the effectiveness of normative power by considering the following three indicators: principles, actions, and impact.

First, an actor must be deemed legitimate by exercising coherence and consistency in the international promotion of its principles. This perceived legitimacy is a highly subjective conception. In order to define legitimacy in a more objective way, normative power should be seen as legitimate in relation to the principles promoted. This legitimacy can be established by an actor in international politics through previously established international conventions, treaties and agreements (Üstün 2019 p. 11).

Second, normative power should be persuasive through ‘constructive engagement, the institutionalisation of relations, and the encouragement of multi- and pluri-lateral dialogue between participants’ (Manners 2009 p. 3). An actor should be able to be persuasive in its actions in order to promote these principles through socialisation, partnership and ownership.

Third, for socialisation to be impactful, the promotion of principles in world politics should be seen as part of an open-ended process of engagement, debate and understanding (Manners 2009 p. 3). I will use these three indicators to assess the normative power exercised by Australia and the European Union in their engagement with policies of externalisation in Sections 5.2 and 5.3, respectively.

5.2 Methods of Conceptualising Norm Socialisation

The process of norm diffusion can be conceptualised and accounted for through various theories and ideological frameworks. This is where postcolonial theory becomes useful in contextualising the sources of the normative power exercised by the European Union. This section will present and briefly outline four major schools of thought used to understand the spread of norms: realism, liberalism, rational institutionalism and social constructivism. Through this analysis, I aim to draw attention to the extent to which (post)colonialism is an inherent part of the European project, regardless of which theory one uses to conceive of norm diffusion processes. Using these theories will also allow us to assess whether they are useful in explaining the phenomenon of border externalisation. I will assess how these theories of international relations determine how normative power is translated into the social learning of human rights norms at a governmental level. How, then, does this link back to border externalisation? I argue that applying postcolonial theory to processes of norm socialisation can help to determine how effective a normative power is in shaping the international migration regime and determining the flows of migrants across borders through policies of externalisation.

Figure 6. Perspectives of Norm Socialisation

IR Theory	**Realism**	**Liberalism**	**Rational Institutionalism**	**Social Constructivism**
Main Actor	States Government bodies	States Civil society Non-governmental groups	International Law Institutions	Civil society NGOs International human rights regimes/organisations
Tools for Human Rights Advocacy	Domestic legislation	Civil groups Advocacy groups	Treaties Sanctions Shaming Cooptation Court rulings	Norms

5.2.1 Realism

Realism holds that there is an inherent conflict between the individual and the state – or a "trade-off" relationship where one is sacrificed for the benefit of the other. 'The creation of law-making international institutions committed to the protection of human rights was predicated upon the assumption that sovereign states would stand guard over the security of their citizens and promote human rights internationally' (Dunne & Wheeler 2004 p. 10). Realism would suggest that international law is strictly epiphenomenal to state power – or rather, when states comply with their legal obligations to protect human rights, it is essentially coincidental. This assumption is the result of the presumption that the 'principal actors in the international arena to be states, which are concerned with their own security, act in pursuit of their own national interests, and struggle for power' (Korab-Karpowicz 2017). The principles of political realism best account for the premise that migration politics is shaped by colonial power structures and for why actors engage in policies of deterrence and the prioritisation of border security.

5.2.2 Liberalism

Andrew Moravcsik outlines a number of devices that facilitate the social learning of human rights at a governmental level (Moravcsik 1995). These processes represent the core beliefs of liberalism. An understanding of these concepts will give us insight into one of the most relevant devices for human rights diffusion – civil society and non-governmental organisations. The three concepts are as follows:

1. Sanctioning refers to the alignment of preferential economic relations to the protection of human rights and involves imposing restrictions on trade with states that are continuous offenders of human rights abuses.
2. Shaming can be described as the systematic creation of a climate critical of national practices, with the aim of 'shifting the domestic balance of power in the target state toward the protection of human rights' (Moravcsik 1995 p. 168).
3. The cooptation of domestic political institutions (namely courts and legislatures), on the other hand, is a means of shifting the balance of power in favor of the protection of human rights (Moravcsik 1995 p. 176). The European Court of Justice is a prime example of cooptation, as it has 'established a transnational legal order by coopting domestic courts' (ibid).

Through policies of externalisation, we can see that states and state actors are actively turning away from these tools of human rights norm diffusion; by entering into agreement with states that systematically violate human rights, they legitimise these violations rather than engaging in the three aforementioned methods of applying pressure to conform to human rights norms.

5.2.3 Rational Institutionalism

Theories of rational institutionalism hold that both structures (the state on the one hand and agencies, NGOs and international law on the other) are central actors in the international political process. States are still the primary agents of power, but they can be influenced in the international arena. This theory of conceptualisation accounts for the merit of international law ratification in the creation of a global human rights regime. Beth Simmons argues for the importance of international law in the diffusion of human rights norms (Simmons 2009). As she observes:

> [F]ormal commitments to treaties can have noticeable positive consequences. Depending on the domestic context to which they are inserted, treaties can affect domestic politics in ways that tend to exert important influences over how governments behave towards their own citizens' (Simmons 2009 p. 4).

Treaties and other legal commitments are an effective tool in norm socialisation. However, this thesis has already touched on the shortcomings of international law in protecting irregular migrants from policies of externalisation, namely what is referred to as the "protection gap" in Chapter 2.

5.2.4 Social Constructivism

Constructivists argue that human rights norms have transformative power and that the very discourse of human rights initiates the process of socialisation, as demonstrated by the 'Spiral Model' (Risse & Sikkink 1999). The Spiral Model asserts that the diffusion of international norms in the human rights arena crucially depends on establishing and sustaining networks among domestic and transnational actors (Risse & Sikkink 1999 p. 5). The central players in the processes of constructivism include members from all levels of society: civil society, NGOs and international human rights regimes/organisations. A five-phase build-up in the norm cascade of human rights is put forward and proceeds as follows (Risse & Sikkink 1999 p. 15-16):

1. Repression – the first phase describes a repressive situation in which the state in question represses all forms of opposition to the government.
2. Denial – the second stage puts the norm-violating state on the international agenda so as to raise public attention and scrutiny. This usually occurs in response to an event that provokes the international human rights community, such as a gross violation of rights (e.g. a massacre). Moral persuasion then takes place, involving the persuasion of Western states to join networks attempting to change human rights practices in target states. This stage is referred to as “denial”, as the initial reaction of the target state will generally be precisely that – denial of the validity of international human rights norms with the aim of protecting their international reputation.
3. Tactical concessions – at this point, the target state tries to use concession to regain military or economic assistance, or to lessen its international isolation through symbolic gestures, e.g. the releasing of prisoners.
4. Prescriptive status – at this stage, the validity of the relevant norms is no longer denied by the target state, and governments accept the validity of human rights norms through a number of indicators (ratifying conventions, the institutionalisation of norms in domestic law/the state’s constitution, institutionalised mechanisms to provide citizens with a voice, engagement in dialogue with critics).
5. Rule-consistent behavior – the final stage outlines the need for a consistent process that pressures national governments “from below” and “from above”. Once a target state demonstrates this kind of behavior, the internalisation of human rights norms has presumably been successful.

The relevance of social constructivism to the topic of this thesis is demonstrated by the ways in which the EU plays the role of a socialising agent in the Spiral Model. I argue that Turkey exhibits stage 3 of this model – tactical concessions – in its actions towards improving its human rights record in the early 2000s. This development was the result of conditionality: Turkey’s potential EU membership. This is relevant to understanding how this entire process has been undermined by the EU’s legitimisation of Turkey through collaboration in border externalisation. The EU, by collaborating with Turkey, has countered the effect that international scrutiny of Turkey’s illiberal behaviour could have, thus perpetuating further human rights abuses and hindering the norm internalisation process in Turkey. Essentially, constructivists argue that the very discourse of human rights initiates socialisation and has transformative power, and that the

EU has therefore brought a halt to this process by undermining its legitimacy and its ability to morally persuade Turkey to uphold human rights standards in its quest to externalise borders.

5.3 Australia

Australia's position and influence in the region accounts for its ability to promote reform in the region and globally. Through normative leadership and the concept of Responsibility to Protect, Australia has the ability to provide alternatives to refugee flight, to promote responsibility sharing, and to make use of its authoritative position as a major resettler of refugees. This section will frame Australia's normative power in terms of its independent power, but also in terms of its colonial history as a European satellite. Thus, this section acknowledges the power of 'Europeanisation beyond the EU and the impact of relations with the EU on respect for human rights and the rule of law in neighbouring countries and beyond' (Üstün 2019 p. 9).

5.3.1 Principles

As the wealthiest "liberal" state in the region, Australia has a responsibility to 'promote and facilitate the development of refugee law and refugee protection in transit countries in Southeast Asia, including by encouraging states in the region to ratify the 1951 Refugee Convention and its 1967 Protocol' (Amnesty International 2013 p. 97). Australia has been criticised for being hypocritical with regard to the principles it promotes in the region and its failure to lead by example:

> [Australia] is the only state that can realistically take the lead within its region. There is an historical imperative for Australia to uphold the principles of the international protection regime of which it has been architect and protector, one of which is responsibility sharing. Ultimately, reforming the international protection regime is in the national interest of Australia (Koser 2016 p. 17).

This notwithstanding, there have been inconsistencies with regard to the principles promoted by Australia. Australia was founded on ideals of identity that centre around egalitarianism and equal freedoms for all of its citizens. Despite this foundation, Australia has demonstrated a complete disregard for these principles when it comes to those who are non-citizens, particularly irregular migrants, who are commonly depicted in the Australian media as "illegal" persons. This has resulted in the dichotomisation of those who are perceived to be "Australian" and those who

are allegedly breaking international law by attempting to access Australian territory. It is thus clear that, both in this case and in Europe, conceptions of self-identity are a great source of hypocrisy when it comes to these international powers' approaches to external relations.

5.3.2 Actions

Chapter 3 outlined some of Australia's cooperative non-entrée policies. We have seen how its engagement with Indonesia, the IOM, Nauru and Papua New Guinea in establishing and maintaining offshore detention facilities, "effective control" over which it disavows, constitutes a failure on Australia's part to act as a persuasive agent in its expression of normative power:

> Australia has been at the forefront of the debate on the 'Responsibility to Protect' – a global political commitment to prevent genocide, war crimes, ethnic cleansing, and crimes against Humanity. Albeit, controversially, Australia has pushed the idea of regional processing, enlisting other countries in the region to fulfil their own obligations to protect and assist asylum seekers (Koser 2016 p. 6).

We are witnessing the legitimacy and credibility of the Australian government deteriorate as a result of these policies, which have been the subject of international scrutiny. How can an actor pursue liberal values when it engages in operations that are essentially deeply illiberal?

5.3.3 Impact

Australia's engagement in offshore processing has numerous implications for the region, including for Australia's role as a leader of liberalism and promoter of human rights in the region. This topic was briefly touched upon in Section 3.2.2, where I outlined how the Bali Process has been used as a tool of influence by Australia (as the wealthiest nation in the region). In pursuing its own security interests through a regional framework, Australia has set a standard that other nations in the region can then follow. In addition, it is worth noting those implications of Australia's activities that go beyond the Asia-Pacific region:

> The Turkey deal shows that Europe is moving in the direction of Australia. The EU and several member states have asked the Australian government for advice on how to handle migrant boats. Australia was also one of the eight non-EU-countries attending the first European Coast Guard Cooperation Network Meeting of the renewed Frontex in November 2016 (Akkerman 2018 p. 43).

Australia's deterrence paradigm is arguably the most developed cooperative non-entrée regime in the world, so much so that the European Union has looked to the architecture of Australia's border regime as an example. The impact of Australia's activities on the international human rights regime beyond the region is thus deeply concerning.

5.4 The European Union

In the early 2000s, we lived in an international liberal order in which the European Union was full of confidence and hope. US hegemony was still unchallenged, and there was general consensus that by acting together, the US and Europe would be drivers of positive change in the international system (Manners & Diez 2007). The EU was riding a high of international praise at the time, with many looking to the EU as a source of potential and confidence. Liberal and constructivist thought framed the European Union's lack of coercive instruments and its reliance on declaratory politics (generally perceived as weaknesses) as actually being the source of its strength. At the height of its normative power, the EU relied not on military power or economic might, but rather on the projection of ideologies that prioritised the rule of law, human rights and fundamental freedoms. The EU's leadership at this time determined the ability to shape what was perceived to be "normal".

We can look to the example of the EU as a socialising agent on the road to liberalism in Turkey's democracy. The EU has functioned as a normative power that has helped to drive democratisation from the governmental level in the hopes of producing a "trickle-down effect" to lower structures within Turkish society. This was largely due to the prospect of Turkey's accession to the EU in the early 2000s. States that are potential members of the European Union's project of enlargement have an incentive to improve their international reputation, allowing the spiral cascade theory to become a reality. Keeping in mind both internal conditions and EU motives, we can assess the relative success of the EU as a normative power in human rights learning. The EU–Turkey deal and the externalising of the EU's borders is a challenge to this process insofar as it has effects that go beyond the direct wellbeing of vulnerable asylum seekers: the curtailment of the EU's ability to set standards in the protection of human rights. I argue that the deal actually works against this proposition, as it requires Turkey to conform to EU standards as a precondition of that collaboration, but I argue that despite the possibility of

short-term conformity to EU principles, the long-term effects of this collaboration are far more damaging than the immediate effects.

In this section, I will examine how, through policies of externalisation, and specifically through the EU–Turkey deal, the EU's cooperation with Turkey may impact the normative power of the EU. The literature on this topic is not heavily researched, as it is difficult to quantify and collect data to assess a state's normative capacity following the execution of a single policy decision or agreement (such as the EU–Turkey deal). Nevertheless, Çiğdem Üstün (2019) provides a compelling argument in 'The Impact of Migration Policies on the EU's Image as a Value-Driven Normative Actor', where they conclude that the EU's migration policies have contributed to the decline of its credibility as a normative power. The credibility at stake involves the belief that the international actor in question is acting in a legitimate way that aligns with the values it projects onto the international community. Üstün grounds this conclusion in four factors:

> (1) Due to its externalisation efforts, the EU has become an actor financially supporting countries that do not respect the rule of law and human rights; (2) it has adopted security-oriented policies to pursue strategic and pragmatic short-term interests; (3) neither Turkey as a candidate for accession to the Union, nor Libya as a neighbour, have embraced the EU's people-oriented principles – instead, the EU has adopted policies that contribute to building a "fortress Europe"; (4) finally, the EU adopted restrictive measures when it became clear that the rights-based approach could not be sustained (Üstün 2019 p. 20).

I will further examine this argument by assessing how the European Union's actions may hinder the norm socialisation process, in particular by examining how the EU–Turkey deal interplays with the indicators put forward at the beginning of the chapter: principles, actions and impact.

5.4.1 Principles

The EU–Turkey deal has provided the Erdoğan government with political recognition and legitimacy. This recognition is morally unfounded and conflicts with the very ideals and democratic standards that the EU has worked hard to uphold within its borders, it raises questions about the EU's responsibility in the international asylum regime not only as a wealthy entity of the Global North but as a normative power in the socialisation of human rights in the region. As Natalie Martin observes:

> The EU remains a liberal actor, but it is not as liberal as it was – or aspired to be. I take a realist constructivist approach to argue that identity is fluid and varies according to the constraints under which the actor or institution is working. So, while the EU self-identifies as a liberal democratic institution, according to the Copenhagen criteria, the degree of liberality exhibited by the EU – and the member states – is subject to the geostrategic stress placed upon it (Martin 2019 p. 1349).

Overall, Martin argues that the European Union is "less liberal" than it was prior to its dealings with Turkey. This decrease in the EU's liberality corresponds to a decrease in normative power, as Turkey's EU membership prospects are now intertwined with the refugee crisis: 'the Copenhagen criteria constitute the default identity of the EU and have been seen as the standard by which it should be judged in its dealings with Turkey over migration' (Martin 2019 p.1351). Essentially, if we are to judge the EU by its own principles of membership, we encounter a problem.

5.4.2 Actions

Manners states that 'the actions taken [by states] must involve persuasion, argumentation, and the conferral of prestige or shame' (Manners 2009 p. 3). This means that the EU's actions should resemble the successful transfer of the aforementioned actions to less powerful actors in the international system. The EU's normative power has been subject to scrutiny through criticism of the way in which the EU has handled the refugee crisis. The number of migrants arriving at the EU's borders through the Eastern and Central Mediterranean required the EU to take action; in response to this increase, it leaned towards the externalisation and securitisation of its migration policies. Not only has the EU contradict itself in the promotion of the rule of law and human rights but has also remained passive by directly ignoring the repressive practices of autocratic regimes such as those in Turkey and Libya. If the execution of normative power is made possible through constructive engagement and the institutionalisation of relations, the EU–Turkey agreement exhibits a type of engagement of relations that is not constructive for the long term.

5.4.3 Impact

For a normative power to successfully have an impact on the international area, there must be (norm) socialisation, partnership, and ownership. 'Socialisation as an impact of the promotion of principles in world politics should be seen as being part of an open-ended process of

engagement, debate and understanding' (Manners 2009 p. 3). How can the EU promote the rule of law and human rights in Turkey and internationally when its impact on other states has been lessened? For Turkey, a driving factor of human rights norms socialisation was conditionality. If the prospect of accession to the EU is granted as a "reward" for Turkey's cooperation in deterring migrant flows, then this undermines constructive engagement and the socialisation process:

> The high price tag of the EU–Turkey deal has sent a message to other non-EU countries that their cooperation on migration is a commodity that is rapidly increasing in value, as well as a message to major refugee hosting countries – the vast majority of which are developing countries – that their responsibilities to the vulnerable and displaced are optional and can be outsourced (Üstün 2019 p. 18).

6. Creating Accountability

So far, this thesis has focused on identifying power relations between international actors and how this both informs the application of border externalisation and impacts the protection of migrants and asylum seekers and human rights learning. The management of migration flows is currently a cause for global concern and addressing the causes of this migration is too great a task for the international community to manage effectively. With this in mind, examining the root causes of irregular migration such as conflict, devastated economics and weak governance is beyond the scope of my work, and energy in this field is better focused on increasing states' capacity to manage this migration. States are left with the responsibility of finding reliable, cost-effective and humane ways of managing asylum seekers, refugees and migrants outside of detention, and in doing so must be able to engage in international cooperation with a genuine commitment to establishing and implementing international and regional instruments. In this chapter, I will present various means by which the international migration regime can promote greater accountability when it comes to states' responsibility for protecting those attempting to access territory.

> Psychologists have shown that people are more likely to mobilise around saving the lives of identifiable individuals in close proximity. Remote control policies by design or effect thwart that humanitarian impulse … This 'Hippocratic bubble' is created by the same logic of controlling space that puts up barriers to keep out asylum seekers. (Fitzgerald 2019, p. 254).

Fitzgerald outlines the logic behind the outsourcing of asylum responsibilities, as it allows actors like the EU and Australia to create a system of disassociation from the humanitarian responsibility associated with processing irregular migrants. It follows that eliminating the possibility of policies that allow for dissociation would address the lack of regard for humanitarianism in the international refugee protection regime. Furthermore, it is evident that questioning the legality of actions undertaken by states is also insufficient. Scholars who share this view then argue for humanitarianism as a solution, but 'paradoxically, [humanitarianism] can dehumanize refugees by reducing them to objects of pity' (Fitzgerald 2019, p. 255). This section will briefly outline and critically engage with suggested recommendations by relevant scholars. I aim to demonstrate the difficulty of creating a system of accountability within a legal framework and on a humanitarian basis in a postcolonial international system. If legal means and

humanitarian grounds are not sufficient to establish a framework for the creation of accountability for policies of externalisation, how can we conceptualise an international system that effectively shares responsibility for protecting vulnerable migrants?

6.1 State Responsibility and Complicity

In ‘State Responsibility and Migration Control’, Nikolas Feith Tan identifies two possible instruments for holding Australia accountable for the inhumane treatment of irregular migrants. The International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ‘can apply where Australia has “effective control” over persons or territory in cooperating states, certainly arguable when it comes to the management and coordination of detention centres’ (Tan 2008 p. 228). We can see this as an avenue for promoting Australia’s capacity to protect the rights and freedoms of those who are detained in offshore processing facilities. Australia has signed and ratified CAT, and on 19 May 2009 the Australian Government signed the Optional Protocol to the Convention against Torture (OPCAT). Several years later, on 9 February 2017, the Australian Government announced its intention to ratify OPCAT, and in December 2017 the instruments of ratification were lodged with the UN (Australian Human Rights Commission 2020). These steps indicate that the implementation of OPCAT by the Australian Government will theoretically promote increased accountability for and oversight of the conditions in the processing facilities. Despite these developments, the effectiveness of these measures rely on the ability to determine the extent to which Australia has “effective control” over its border operations. It will be difficult for jurisdiction to be extended to include the transfer of finances, equipment and training in Australia’s overall migration control operations. This is where legal instruments currently fall short. This can potentially be resolved, however, by looking at the use of the principle of complicity under the law of state responsibility:

> Derived responsibility for aiding and abetting is regulated in Article 16 of the ILC Articles on State Responsibility (ASR) whereby a State that assists another in the commission of an international wrong is internationally responsible for doing so ‘to the extent that its own conduct has caused or contributed to the internationally wrongful act’. Two conditions must be fulfilled in this regard: First, the aiding State ‘must do so with knowledge of the circumstances of the internationally wrongful act’. Second, the act perpetrated by the aided State should have constituted an international wrong also ‘if committed by [the aiding] State (Moreno-Lax 2017 p. 20).

Thus, it is extremely difficult to determine indirect responsibility insofar as the mere possibility that breaches of international law will occur as a result of facilitation from another state is not sufficient to establish wrongful conduct. State responsibility and state complicity clearly fall short when it comes to locating and identifying responsibility in the international protection regime. In addition, the activities of non-state actors such as the IOM deserve closer scrutiny and greater checks on their legal obligations.

6.2 A Legal Right to Entry in International Law

> If states are to recognise that refugees have the right to have rights, their policies and laws must reflect this (Hirsch & Bell 2017 p. 430).

As discussed earlier, in order for the protection of vulnerable irregular migrants to be fully actualised, a right to enter is required. Honouring the right to enter requires cooperation and commitment from the international community and the reconceptualisation of border security by the Global North. Asher Hirsch presents the case for a renewed Convention on Territorial Asylum, the original version of which fell to the side in the 1970s as a possible solution to addressing the legal black holes confronting the international refugee protection regime (Hirsch & Bell 2017). From a postcolonial perspective, a treaty of this sort risks undermining sovereign security as it compromises the ability of the postcolonial state to control its borders, and thus the ability to control who aligns with presumptions of national identity and the separation of the "other". Hirsch attempts to ease this fear by reiterating that 'while states must allow those who arrive at its border entry, they can also seek to regulate arrivals by offering humanitarian visas for those seeking protection' (Hirsch & Bell 2017 p. 431). This is also a highly criticised legal solution to the gap in international law that prevents the right to enter insofar as it is countered by the protectionist argument of opening the "floodgates" (ibid). This argument is simply struck down by recognising that "fear of numbers" does not constitute a legal argument and does not relieve states of their international legal obligations. Hirsch's argument is logically sound and pragmatic. As he goes on to observe:

> The 'right to have rights' would require 'newly defined territorial entities', but in the absence of any such new international order, the responsibility to receive asylum seekers remains largely at the level of individual states (Hirsch & Bell 2017 p. 435).

Issuing humanitarian visas and the fast-tracking of asylum claims may address the issue of the detention of irregular migrants and prevent the possibility of further human rights abuses in offshore detention facilities. These policies aim to speed up the process of making asylum claims. Fast-track processing was implemented in Australia in 2014 and has been criticised for reducing independent oversight over asylum claims and for subverting the definition of the term "refugee" outlined in the Refugee Convention (Refugee Council of Australia 2020). This misinterpretation of the definition of the term "refugee" places irregular migrants at greater risk of refoulement:

> … the definition of whether a person could safely live elsewhere in their country of origin (a principle known as 'internal relocation' or 'internal flight alternative') was changed to make it easier to find that, even though the person had a genuine fear, they could be sent back because they could in theory live elsewhere (Refugee Council of Australia 2020).

This example of Australia's implementation of fast-track processing illustrates the Australian government's failure to implement policies that are designed to address the lacunae that is the right to enter. I argue that the failure of policies like these demonstrates a lack of commitment on the government's part and are the result of Australia's continued prioritisation of security and protectionism over granting irregular migrants the right to absolute rights.

6.3 Reimagining Migration

In order to establish an international protection regime that protects irregular migrants from human rights abuses, the international community must not only acknowledge the legacy of colonialism when it comes to the concept of borders and sovereign territory but also attempt to conceive of migration in a manner that is not centered around security. By reimagining the concept of migration control so as to promote a more holistic approach to reducing migratory flows, states can better fulfill the obligation of responsibility sharing in the international protection regime. We currently view norms related to responsibility sharing as weak and largely discretionary (Koser 2016 p. 15). In 'Partners in Crime? The Impacts of Europe's Outsourced Migration Controls on Peace, Stability and Rights', Anderson and Keen make the case for humanising and normalising human mobility, and thus the shift from a security framework that views borders as a vulnerable enterprise in need of protections to a rights-based protection framework (Anderson & Keen 2019 p. 54):

> The current security system draws its justification from mechanistic economic theories of migratory decision-making: the basic idea being that policymakers may adjust not only the 'push' and 'pull' factors at origin and destination but – crucially as far as border security is concerned – also increase the obstacles on the journey from A to B to deter further arrivals … Using systems thinking to consider sustainability reveals that the short-term political benefits that politicians in Europe may gain from externalising borders have long-term implications not just for so-called transit and origin countries, but also for their own citizens. Contributing to wider instability abroad can have unforeseen and counterproductive consequences for societies in Europe, making them less secure and more politically exposed and fragile (Anderson & Keen 2019 p. 51).

I have chosen to highlight this passage as it reinforces a central concern of this thesis: short-term, goal-orientated ways of thinking about refugee mobility, through cooperative non-entrée policies designed to mitigate short-term crises, can actually have detrimental long-term implications. Anderson and Keen propose four steps to initiate this shift from the current unsustainable security approach implemented by the EU and Australia and to prevent the creation of "damaging negative feedback loops" within the system. Without repeating these recommendations, I will briefly highlight a number of recommendations that call for policy- and law-makers to challenge the existing parameters of the protection regime. First, what is needed is a more thorough evaluation of migration-related interventions, which means abandoning the belief that greater security equates to fewer arrivals. A thorough assessment and evaluation of the negative impact of policies in both the domestic and the international sphere can be achieved by governments through activities such as the full auditing of migration-related spending. EU policies and programs should be evaluated according to benchmarks and success criteria centred around protection and rights rather than a short-term fall in the number of migrants reaching Europe. In addition, they should allow for independent assessments that include the voices of migrants and civil society in countries of intervention and transparency and public access to policies (Anderson & Keen 2019 pp. 49-51). Second, governments should take a conflict-sensitive approach to migration and related dynamics. It is important for governments to consider how interventions can 'affect the incentives and behaviours of various actors and therefore exacerbate or help reduce drivers of conflict' (Anderson & Keen 2019 p. 52). The EU and European governments need to take full account of the risks of fueling conflict, repression and authoritarianism in outsourcing migration controls to other countries. This can be achieved through undertaking thorough human rights risk assessments.

Policy- and law-makers should redirect their efforts to ‘changing the political narrative on migration, rather than reinforc[ing] the emergency narrative and security framing for fear of anti-immigration politicians gaining votes’ (Anderson & Keen 2019 p. 55). Overall, states must recognise that the rhetoric of security has damaging effects on the protection of human rights. By transforming the discourse surrounding irregular migration and responding to civil society actors, the power of human rights norms can be strengthened, and human security can be prioritised over border security.

7. Conclusion

In this thesis, I have presented a basic framework for thinking about the relationship between postcolonialism, border externalisation, and the diffusion of human rights norms in the international system. By providing a thorough examination of the cooperative non-entrée policies established by Australia and the EU, I have demonstrated that the central hypothesis of this thesis holds true: border regimes (specifically cooperative non-entrée policies) established by the EU and Australia are indeed expressions of the sovereign power over the body (the refugee) that emerged during colonialism and that has transformed the refugee from its humanitarian manifestation into the postcolonial refugee: an object of transfer between state actors engaged in “migration diplomacy”. This thesis has also demonstrated that Hypothesis I holds true, as policies of exclusion have been introduced under the veneer of security, and this has revealed the weakness of non-refoulement alone as a protection mechanism in customary international law. Hypothesis II aimed to reveal how securitisation and border externalisation undermine the normative power of the EU and Australia and their credibility as leaders in human rights protection. I have demonstrated how this inhibits the diffusion of human rights norms and reproduces a system that disregards the importance of upholding human rights.

The outsourcing of migration controls is grounded in a postcolonial fear of a migrant invasion: a politicised ‘mistrust and fear of the uninvited other’ (Hyndman 2008 p. 21), and the deterrence paradigm ‘is a deliberate political project buttressed by readmission agreements and development funds that ensure cooperation among donor states and transit countries’ (ibid). Using a postcolonial framework to view the international refugee system reveals the extent to which the Global North has been able to utilise diplomatic relationships with less powerful neighbours to blur the lines between state responsibility and to evade their legal obligations under international law. It is without doubt that the ‘only winners of policies of externalisation are the military and corporate profiteers and institutions and those politicians that derive support by spreading hate, racism and repression’ (Akkerman 2018 p. 88).

I have also analysed the extent to which these policies of exclusion have ultimately undermined the normative power held by Australia and the EU. As an evaluation of normative power and processes of human rights learning, this thesis has shown the impact of policies of externalisation beyond their direct human rights implications: we can conclude that these

policies fuel the reproduction of an international system that prioritises security over protection. The outsourcing of migration controls damages actors' diplomatic leverage and is contradictory to a commitment 'to protect human rights, prevent conflict, promote peace, and support genuine and accountable governance and sustainable development' (Anderson & Keen 2019 p. 50). It is easy to criticize the EU's approach to security and development in their cooperation with neighbours, but it must also be recognised that the EU is constantly struggling to reach an equilibrium between balancing security and the aforementioned principles. This struggle can be attributed to the vast interests of member states that the unified policy of the EU must represent. The final chapter shows even more clearly that the creation of an effective international protection regime is easier said than done: creating accountability and the sharing of responsibility between states might be achieved through the further development of international law and the reimagining of refugee mobility and the protection of borders. Evidently, the concept of reimagining refugee mobility is an area that deserves further examination.

This thesis has demonstrated how recognising the legacy of colonialism aids in understanding how powers such as Australia and the EU utilise their normative might to persuade poorer, dependent neighbours such as Indonesia and Turkey that it is in their interest to cooperate in their border operations. This thesis views the "postcolonial refugee" as a victim of a system that has been defined by the era of colonialism, and as an object that is traded between the North–South impasse. In order to recognise the humanity of those seeking asylum, normative powers of the Global North must recognise how their actions have the power to transform the Westphalian state system to evolve beyond the prioritisation of border security.

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Honour Statement

I pledge that this Master's Thesis, entitled '*Crossing the Externalised Border: A Postcolonial Perspective on Outsourcing Asylum by Australia and the EU*' has not been submitted for academic credit in any other capacity and that this Master's Thesis has not yet been published.

I further pledge that I wrote this Master's Thesis myself, without help from others. I did not use any sources or aids other than those listed. I appropriately identified and acknowledged all words and ideas taken from other works.

Berlin, 8th of August 2020

(Signature)