# CHALLENGES TO THE EU: REFUGEE POLICY IN WESTERN EUROPE WITHIN A 21ST CENTURY NATIONALIST CONTEXT.

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**Relevant Information**

This document summarises the key point of one of the round tables held at the Fide Foundation 2nd International Congress at Oxford, on Nationalism, Populism and Identities: Contemporary Challenges. The key topic was the Impact of nationalism and populism at the national level.

The panel was comprised of **Borja Lasheras,** Senior Fellow at the Centre for European Policy Analysis (CEPA). He served at the Spanish Presidency of the Government between 2018 and late 2021, where he held the position of Senior Foreign Policy Advisor (2020-2021), **Stavros Papageorgopoulos,** Senior Legal Officer at the European Council on Refugees and Exiles (ECRE) in Brussels, **Fernando Irurzun Montoro,** Partner in charge of Litigation and Dispute Resolution practice in Clifford Chance Spain. He has been Agent of the Kingdom of Spain before the European Court of Human Rights, and State Attorney before different Spanish Courts. (Leader of the Working Group) and **N. Ela Gökalp Aras, Senior Researcher,** Swedish Research Institute in Istanbul (SRII)

2

**About the Fide Foundation**

The Fide Foundation is a legal-economic think-tank based in Spain, committed to involving the civil society in all major legal and economic developments in Spain, the EU and abroad.

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# TABLE OF CONTENTS:

3

# M. CHALLENGES TO THE EU: REFUGEE POLICY IN WESTERN EUROPE WITHIN A 21ST CENTURY NATIONALIST CONTEXT.

## INTRODUCTION

In the last decades, the EU has faced the need to respond to different humanitarian crises and the sustained pressure of immigrant flows.

The EU has increasingly been seen as a problem and not a solution by many nationalists. Even moderates such as Theresa May declared European cosmopolitanism to be in opposition to "the people down the road", stating that citizens of the world were, 'citizens of nowhere'. This speech has been used by other nationalists to build a narrative of "us and them" which forms/is used as an obstacle to the implementation of an EU Humanitarian policy.

The main answer to the Refugee Policy challenge has been the prioritisation of the externalization policy, the outcomes of which are far from satisfactory.

4

Recent events, in particular the invasion of Ukraine by Russia and the reaction of some EU Members States that were traditionally reluctant in their reception of refugees, raise the question of whether all this will lead to a change of paradigm with regard to the EU's refugee's policy.

## A BRIEF ASSESSMENT OF EXTERNALISATION AND ITS IMPLICATIONS

The externalisation of migration policies has become the central policy framework for the governance of international migration, with implications for many regions and countries, particularly the source, transit, and destination countries.

The primary purpose of externalisation in migration policy is, 'to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of [European] destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims' (Frelick et al., 2016: 193). In Frelick's framework, destination countries focus on

containing or even preventing migration movements before they reach their territories. Where entry cannot be prevented or controlled, readmission and return policies apply, drawing on collaboration with third countries.

Externalisation is often framed and presented as a means to justify acts of securitisation, to prevent irregular migration, or to support life-saving humanitarian efforts to protect migrants from the journey's dangers, rather than simply as a strategy of migration containment and control.

Externalisation results in the systematic enlistment of third countries to prevent migrants, including asylum seekers, from entering destination states. Today, cooperation with third countries appears as the most critical dimension of externalisation, and those countries are given important roles in preventing migrants and asylum seekers from entering primary countries territories or apprehending and returning them. They are encouraged through incentives to prevent migrants by physical or legal barrier policies, or more directly in exchange for aid or support to build the capacity of immigration or asylum systems in these third countries.

In forced migration, externalisation aims explicitly to reduce access to asylum by incentivising or paying a country of the first arrival or a transit state to keep the migration flow through its enforcement measures. The other strategy is to determine the transit or first country of arrival as a "safe third country" or "first country of asylum", and to use this as a basis for determining the country within a broader set of countries with harmonised standards that would be responsible for examining an asylum claim. Thus, this means to divert asylum seekers to those countries, as the protected areas near countries of origin, and externalise the international protection responsibility. Those efforts mainly result from the increased role of law enforcement or military assistance, pushbacks, apprehensions, and problematic access to protection mechanisms in apprehension and deportation practices. However, no risk of persecution of the 1951 Convention and no serious harm, no risk of non-refoulment, compliance with relevant international refugee and human rights standards, and access to a right of legal stay should be guaranteed.

The externalisation of EU migration policy has evolved in the wake of several significant developments (Lavanex, 2006):

1) Schengen Agreement of 1990 (to determine who are insiders and outsiders)

2) The 'Safe Third Country Rule' that became prominent in the Dublin Regulation of 1990

3) The Readmission agreements

According to those developments, the EU's externalisation in the field of migration and asylum can be categorised into three time periods (Gökalp-Aras, 2021):

1) The First Phase: The Emergence of the Legal and Institutional Framework of Externalisation (1990–2003)

2) The Second Phase: Emergence of the General Frame in External Action (2004–2014)

3) Third Phase: From the State of Exception to the New Normal (2015–present)

The third phase started after 2015, as migrant arrivals from the Middle East as well as Africa peaked in 2015 following the Arab uprisings that broke out in 2011. Whilst individual member states responded differently to this mass migration movement, migration in general became a top priority on the EU's overall political agenda and for all its members. The EU's asylum system proved to be weak in responding to this unexpected mass migration. The Dublin Regulation resulted in an uneven distribution of migrants within Europe and pressure on the frontline countries. The migration pressures at the borders became one of the significant challenges for the EU's migration and asylum policies and significantly impacted the external dimension of these policy fields. Within this period, great importance has been given in particular to cooperation with third countries on readmission in order to increase the EU policy's effectiveness in stopping the 'unwanted population' at the border and sending them back under the readmission agreements and the return policy.

The European Commission's new communication, "The EU Pact on Migration and Asylum" (2020), stands as an essential document of this period. It is arguably the first significant statement of the post-European migration crisis era and seeks to draw together the key justifications for the EU's ongoing crisis-management decisions and protocols. The EU Pact seems committed to justifying those flexible, and mainly non-standardised, ad-hoc and crisis driven bilateral acts of cooperation with third countries and to emphasising the importance of externalisation. It also emphasises the importance of cooperation with countries of origin and/or transit to contain and control departures and allow repatriation.

Consequently, the EU Pact seems far from having the potential to deliver sustainable solutions, or to address specific externalisation changes. It strongly emphasises tailor-made and more balanced cooperation with third countries regarding return policy, yet fundamentally misses the target of increasing respect for fundamental rights and facilitating access to the European protection system (except for vulnerable migrants).

Undoubtedly, externalisation has significant consequences for destination, transit and source countries. However, it has worked in the interest of the EU not to notice two critical implications, especially in the post-2015 period: the weaponization of migration by the transit and source countries, and the increased violation of migrants' and asylum seekers rights.

- Externalisation has traditionally underscored the more powerful position of the EU in relation to the source and the transit countries, which are portrayed as passive recipients. This perspective downplays the dynamic, interactive nature of the EU relations with neighbouring countries and the capacity of the latter to exert agency in how policy frames are accepted and adopted. However, this period also showed how, by destabilizing or embarrassing adversaries, mass migration is used by sending and receiving countries as a tool to achieve foreign-policy objectives.

- Greenhill (2010) has proposed the concept of "coercive engineered migration (CEM)" to capture this dynamic. Tsourapas' concept of "coercive and cooperative migration diplomacy" refers to the strategic use of migration flow to obtain other aims and the use of diplomatic methods to achieve goals related to migration (2017). During the present period of externalization in Europe, the 'weaponizations of migration' and asylum has become more visible as one of the significant implications of this policy.

- In the light of the increased number of mass refugee movements, in particular from Syria, then Afghanistan, and most recently from Ukraine, the EU is forced to partly adopt the potential role of external actors in the asylum and migration policies of the EU. Consequently, since 2015, the EU has been adopting more tailor-made, informal, flexible, and differentiated externalization strategies, rather than formal and standardized cooperation with third countries.

- Externalisation policies and practices in the field of migration and asylum directly affect the human rights of migrants and the international obligations of states to protect them in significant ways. Most importantly, by directing migrant flows to third countries, externalization influences the nature and duration of state legal obligations, and states are charged under international law with the protection of the rights of migrants. The rights of migrant and asylum seekers are violated in such third countries as a result of a destination state's externalization efforts, and this can raise complicated issues of state responsibility for both destination states and third countries. Therefore, externalization policies and practices place significant and unequal burdens on third countries.

Since 2015, externalisation and the cooperation with third countries is mainly based on bilateral soft law— such as the EU-Turkey Statement (European Council, 2016)— allowing signatories to evade responsibilities in terms of human rights and international protection due to the lack of reliable monitoring and accountability mechanisms. Thus, we encounter more human rights violations, where reception and detention conditions are abysmal and has consequently shifted migratory routes. Success is measured by low flows and decreased number of entrances or asylum applications, while the protection of people fleeing violence and persecution does not seem to be a priority.

Similar issues of principle arise in respect to the UK's 2022 agreement with Rwanda, under which so-called "illegal refugees" will be sent to Rwanda for the processing of their claims. The policy is under legal challenge in the English courts. Yet, as recently as 25 January 2021, in the view of the UK's Foreign Office Rwanda was a country whose record on civil and political rights needed to be remodelled in line with, 'Commonwealth values of democracy, rule of law and respect for human rights' (37th Universal Periodic Review, UN Human Rights Council, Geneva - UK statement on Rwanda).

From an intra-EU political perspective, externalisation was a response to securitization concerns and to the lack of commitment among Member States to share the charges and responsibilities of a common Asylum policy. Dealing with asylum seekers while they remain outside of the EU borders would theoretically reduce the EU Member States burdens.

However, this has not served to moderate the discourse on asylum and immigration. The Syrian Refugee Crisis in 2015 has caused an East-West division in the Union, interpreted by Krastev as a confrontation between a 'German´s drive for cosmopolitism as a way to flee the xenophobic legacy of Nazism and the Central Europe´s anti-cosmopolitism rooted in an aversion to communist imposed internationalism' (Ivan Krastev[1]).

The rise of nationalism and populism in the EU could exacerbate the externalisation policy. Radical nationalism and populism have built a narrative about the economic impact of refugees, consisting of i) allegations of exclusion of EU citizens from social benefits to be provided to refugees and immigrants; ii) the distortion of the economic charges of their allocation in the EU; iii) the narrative linking refugees and immigrants to public safety problems. Therefore, any alternative to externalisation policies shall be accompanied with a pedagogical effort to combat this narrative from politicians, media, and social leaders.

9

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[1] Ivan Krastev, "The Refugee Crisis and the Return of the East-West Divide in Europe", Slavic Review, Vol. 76, No. 2 (SUMMER 2017), p. 296 (6 pages), Published by: Cambridge University Press

## DOES THE UKRAINE CRISIS MEAN A CHANGE IN SOCIAL PERCEPTION CONCERNING REFUGEES?

In short: probably not. The overwhelming support towards Ukrainian refugees is very much case specific. This can be attributed to, on the one hand, the evident nature of a wholesale aggression: a genocidal war against Ukraine, of the likes not seen in Eastern Europe since Hitler and Stalin, and the impact of this on public opinion, combined with images of continuing Russian atrocities: Bucha, Mariupol, Kharkiv, and so forth. On the other, an inevitable outpour of solidarity driven by empathy – the feeling that these millions of people, families crossing into Poland, Moldova, Slovakia, etc.- are Europeans and thus "like us" (a common message these days). Unfair as it may be to, for instance, Syrians or Afghans, it is a powerful social perception. Adding to this is the worst refugee crisis in Europe since the end of the Second World War, comparable in size to the expulsion of millions of ethnic Germans from Poland and Czechoslovakia in 1944/1945. A quarter of a Ukrainian population numbering 40 million has been displaced by war, both as internal displaced persons and refugees. And things would be much worse had Ukrainians not been successful in defending themselves against the multi-front Russian onslaught.

Moreover, Ukraine is an EU and NATO partner country, and now a country with a clear prospect for European integration.

These factors weighed heavily in the rapid EU consensus to apply the European directive for granting full temporary protection to Ukrainian refugees, initially conceived after the Balkan wars. As reckoned by government officials engaged in the EU discussions, this time there was collective ownership of this humanitarian decision, with limited internal debates.

Mid-term, key challenges will inevitably arise, especially as the war is set to drag on and its economic impact sinks in. However, it seems plausible to conclude that the response to Ukrainian refugees does not point to a change in the tendency towards externalization of refugee policies. If anything, it could make it more acute, as EU member states will claim they are already full enough and strained because of hosting Ukrainian refugees, at the cost of refugees from other countries. An EU-wide agreement for a Migration Pact is still elusive.

In general, governments will continue to approach humanitarian crises very unevenly.

10

Moreover, there is a potential danger that humanitarian driven policies for refugees would be taken as a substitute for an equally powerful response to the root causes of conflicts driving them - and which entail uncomfortable questions. Namely, whilst the EU has been very forthcoming towards Ukrainian refugees, it is struggling to curtail the hefty energy bills it pays to the Russian state, thus funding and sustaining Putin's war machine that drives millions of Ukrainians away from their homes. Increasing energy independence from Russia would enhance Europe's strategic autonomy – but also, coupled with export restrictions and similar sanctions, deprive Putin of precious resources to pursue his open-ended war. By the same token, sustained military support to Ukraine, including the heavy weaponry that can offset Russia's superiority (displayed now in Donbas), would increase the chances of Ukraine's survival as an independent, viable country that many of these refugees could one day return to.

Some of these questions were also raised in Bosnia. There, the West, through the Dayton Peace Agreements (1995), tried to achieve an uneven balance between, on the one hand, recognizing the military realities on the ground through power-sharing agreements to stop the war, and, on the other, fostering the return of refugees and displaced persons.

Ultimately, the depleting political will to enforce Dayton consolidated spoilers in power— the same ethnic nationalist elites that led to war and genocide— making a real return unviable and unrealistic.

It would be desirable for European peace and stability that European leaders do not make the same mistake as they did in Bosnia, regardless of their current commendable humanitarian policies for Ukrainian refugees.

## ALTERNATIVES TO EXTERNALISATION FOR THE EU'S REFUGEE'S POLICY

Europe is able to develop and manage alternatives to externalisation, and to promote responsible and rights-based approaches to migration globally.

Furthermore, such alternatives would be imperative in light of the founding EU values. The difficulties of the challenges posed by refugee policy cannot be denied. However, this does not justify responses incompatible with these values. In practice, the policies pursued so far (in particular, externalisation) have not stopped the populist narrative, nor the use of immigration and asylum seekers as part of the populist discourse of fear. What is needed, therefore, is an effort of leadership and pedagogy from politicians and EU Institutions with citizens.

Alternatives to externalisation in asylum policy should include safeguards to guarantee compliance with EU and international obligations, and to maintain an actual connection between the EU's external objectives and its external affairs:

### Global responsibility sharing

- Global action must consider the root causes of displacement; EU development assistance should address the eradication of poverty, prevention of conflict, sustainable development, and the realisation of rights.

- External action should be based on needs and identified protection situations, including protracted refugee situations.

- Protection and realisation of rights of displaced people should be explicit objectives for EU funding.

## A functioning asylum system in Europe

- Access to procedure, dignified reception of refugees, strong procedural guarantees for everyone and quality asylum procedures are the minimum requirements for a robust system of protection.

- International refugee and human rights law, the European Convention on Human Rights and the EU Charter of Fundamental Rights must be the basis for any legislative action on behalf of the EU and any action transposing EU law on behalf of the Member States.

- Any proposals for the reform of the Common European Asylum System must not tilt the burden of responsibility to third countries.

## Inclusion of refugees in Europe

- Access to safe and dignified living conditions from day one is indispensable for a meaningful and effective inclusion policy. Any form of containment of asylum seekers and refugees at the borders of the EU restricts access to societies and communities and undermines the possibility for future inclusion.

- Protection should not stop at the granting of international protection- Member States must provide for the inclusion of refugees in Europe primarily through wide access to rights.

- Where third-country nationals are not found to be eligible for international protection, deportation must not be the only measure; other national means of regularising stay should be considered, depending on case-specific circumstances.

## Safe and legal channels for refugees

- The EU must ensure that safe and legal channels are in place for people in need of protection.

- Prioritisation of countries or caseloads should be based on global resettlement needs and identified protection situations, including protracted refugee situations.

- Partnerships with third countries should be based on humanitarian principles, as well as those of solidarity, with the aim to create stabilisation and safety for populations. A constructive approach to cooperation with third countries on readmission should include incentives for third countries, in the form of increased opportunities for legal and circular migration to Europe.

Beyond the practical obstacles, the need for an EU Humanitarian policy is also part of the response to the challenges posed by hyper-nationalist narratives, undermining the founding spirit — and treaties — of the EU.

14

## AUTHORS:

- **Borja Lasheras**, Senior Fellow at the Centre for European Policy Analysis (CEPA). He served at the Spanish Presidency of the Government between 2018 and late 2021, where he held the position of Senior Foreign Policy Advisor (2020-2021).
- **Stavros Papageorgopoulos,** Senior Legal Officer at the European Council on Refugees and Exiles (ECRE) in Brussels.
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- **N. Ela Gökalp Aras,** Senior Researcher, Swedish Research Institute in Istanbul (SRII)

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15

# NATIONALISM, POPULISM, AND IDENTITIES:

# CONTEMPORARY CHALLENGES

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