



## **Governing Migration: EU-Turkey Refugee Deal and the Interplay of Norms and Interests**

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**Abstract:**

The article aims to address the issue of the EU's normative power in its approach to the Syrian refugee crisis and the consequent deal reached with Turkey within the perspective of the March 18 EU-Turkey Statement. This EU-Turkey refugee deal is particularly important in analyzing the external aspects of the EU's migration governance since it was hailed as a success in limiting irregular migration towards the EU by way of externalizing the problem to transit countries. The article asks the question whether the EU-Turkey migration deal reflects the normative instruments of the EU's external presence and aims to analyze the interplay of norms and interests in the EU's approach to the Syrian refugee crisis within the framework of the EU-Turkey deal. The article also aims to locate the issue in the larger perspective of Turkey and EU relations and analyze the EU-Turkey deal in view of the credibility of the EU's enlargement policy towards Turkey. The impact of the deal on Turkey and EU relations and the apparent paradox between the normative nature of the accession process and the pragmatic/interest-based nature of the Turkey-EU deal is analyzed.

**Keywords:** migration, refugees, Turkey-EU relations

### **Introduction and Theoretical Framework**

The EU's normative power has been a driving force in its external relations and foreign and security policy. The normative power debate rests on the assertion that the EU “exerts its normative power by diffusing a set of principles –including peace, liberty, democracy, the rule of law and human rights- that the Member States adhere to, setting an example in world politics” (Del Sarto 2016: 217). Hence any doubts about the single-handed pursuit of norms in the external realm could damage the normative power that the EU is thought to exert. The use of political conditionality in negotiating trade agreements and the emphasis on values such as

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the stance against the death penalty manifested a norm-based approach to the conduct of external affairs (Manners 2002). A contested attribute of the EU's external presence, normative connotations acquire a salience in several cases such as support to the International Criminal court and abolition of the death penalty.

The emphasis on norms in external relations may also be seen as a corollary to the EU's reliance on adherence to values and norms in its internal governance (Youngs 2004). EU's structural basis on common norms and values in turn translated into a strong emphasis on normativity in external relations manifested by prominence attributed to the search for compliance with cherished norms and values in the external realm. In cases when the EU appeared to be basing its policies on interests rather than altruistic norms or when it lacked the capacity to enforce its normative power, the EU's portrayal as a force for good (Barbe, Johansson-Nogues 2008), normative power or ethical power (Aggestam 2008) became contested (Hyde-Price 2006). It may be argued that the normative component of the EU's foreign or external policies may be evaluated as more interest-based than normative. Yet in a constructivist understanding, the perception of the EU as a normative power is intrinsic to its identity construction.

Del Sarto in her analysis of the EU's response to the Arab spring questioned the analytical distinction between norms and interests when studying the EU's foreign policies. From a constructivist-rationalist approach, she argued that norms and interests were interlinked: "...an actor's utility-maximizing strategies and norm-based behaviour interlock, reinforce and constitute each other" (Del Sarto 2016: 217). In the case of the EU-Turkey refugee deal however rather than an interdependence and a locking-in of norms and interests, a contradiction between the two may be observed. Any doubts about the single-handed pursuit of norms in the external realm could damage the normative power that the EU is thought to exert.

The cooperation deal between Turkey and the EU achieved by way of the 29 November Joint Action Plan and March 18 EU-Turkey Statement can be seen as a case of external migration governance by the EU involving a quid pro quo between norms and interests. There were three important issues involved in managing the refugee crisis that destabilized the EU in 2015:



-Syrian refugees that left the terror and fighting in their countries mostly met the conditions to qualify as refugees and hence had the right of asylum in the countries that were party to the Geneva Convention.

-As shown by the upsurge in the number of illegal border crossings at the external borders of the EU reaching 1.882.107 in 2015 (Frontex), the EU has been a natural destination for migrants and asylum-seekers fleeing war and oppression in their home countries.

-Turkey, along the Eastern Mediterranean and Western Balkans route, was the main transit country for Syrian, Iraqi and Afghan refugees on their way to the EU.

-While the Eastern Mediterranean route through the Aegean provided a way to reach Greece and further north to other EU countries, it was also a dangerous journey particularly due to the fragile boats provided by migrant smugglers, costing 806 migrants their lives through the course of 2015 (IOM 2016),

-Turkey was a party to the Geneva Convention of 1951 but due to its geographical limitation it only provided asylum to refugees originating from Europe. However, Turkey granted Syrian refugees temporary protection under the “Foreigners and International Protection Law” of 2013 UNHC, DGMM 2014).

Faced with the sudden inflows of refugees, the EU Schengen area of free movement came under increasing strain. While countries on the external borders of the EU especially Greece and Hungary lacked the capacity to deal with the influx of refugees, they demanded help and support from the other Member States for effective burden-sharing. In line with the European Agenda on Migration, the council upon the commission’s proposal decided to relocate 120.000 refugees in need of protection from Greece, Italy and Hungary under a mandatory quota arrangement among the Member States (European Commission 2015).

Caught in a situation of an impending crisis with no easy solution in sight the EU sought a fast and effective solution that promised to provide a balance between norms of refugee rights and interests of stopping uncontrolled migration. The EU in this case prioritized the norm of protecting human life by closing the dangerous Eastern Mediterranean route over refugee rights involving the right to international protection and non-refoulement principle. The March 18 EU-Turkey Statement introduced a 1:1 formula whereby Turkey would accept the return of irregular migrants from the Greek islands and Syrians in Turkey qualifying for international protection would be resettled in the EU. Until 2018, an important aspect of the



agreement, that of resettlement of refugees from Turkey to EU Member States was not fully carried out. One of the reasons for this was that several EU Member States also did not fulfil their quotas under the internal arrangement in September 2015.

This situation attested to a lack of agreement on common norms in the EU. Although the EU and its Member States shared common norms with regard to the protection of refugees and right of asylum, the adherence to this norm was eroded as a result of the pressure caused by a sudden and testing situation. It turned out that common norms regarding the rights of refugees and migrants were not shared by all in the EU, both between Member States and within Member States. Failing a resolve to protect the Schengen area of free movement and the common asylum system, the EU and its Member States could not enforce this norm in the external migration governance. What created this dilemma between norms and interests in the Turkey-EU refugee deal was the underlying lack of consensus in the EU regarding the norm of refugee protection.

The Charter of Fundamental rights of the EU which brings together civil, political, economic and social rights enforceable in the EU embodies the right to asylum (Article 18) and Protection in the event of removal, expulsion or extradition (Article 19) in addition to the basic right to life (Article 2), right to liberty and security (Article 6) (EU 2000).

The EU's asylum procedures directive laid down a common policy on asylum as an integral part of the Area of Freedom, Security and Justice which is to be "open to those who, forced by circumstances, legitimately seek protection in the Union". The directive also added that "Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States (OJ 2013)". It was also stated in the preamble of the Directive that the European Council in Tampere agreed to establish a Common European Asylum system which would be "based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967 ('the Geneva Convention'), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution." It was also added that the Common European Asylum System was agreed to embody "common standards for fair and efficient asylum procedures in the Member States and, in the longer term, Union rules leading to a common asylum procedure in the Union" (OJ 2013).



The EU-Turkey Deal, which involved the return of irregular migrants to Turkey, thereby effectively denying refugees the right to seek international protection in the EU and suffice with the temporary protection in Turkey, was regarded by many refugee and humanitarian organizations as a case where the EU deviated from these norms of refugee protection.

### **Background to the Crisis: Common European Asylum System Under Duress**

Throughout 2015, 1.255.600 first time asylum applications have been registered in the EU, marking an increase of more than double compared to 2014 figures (Eurostat 2016). Among the Member States, the highest number of applications was made in Germany, followed by Hungary, Sweden, Austria, Italy and France while Finland saw an increase of 822% and Hungary 323% compared to the previous year (Eurostat 2016).

While the refugee crisis is usually attributed to the sudden increase in irregular migration to and search for asylum in the EU, in retrospect it was more related to the already existent weaknesses in the EU's asylum policy and the sudden arrival of refugees was a development which actually tested the effectiveness of the regime. In the words of Niemann and Zaun, "...the increase of applications only uncovered persistent dysfunctionalities and shortcomings of the common European Asylum System (CEAS). The so-called European 'refugee crisis' should therefore more accurately be termed a crisis of the CEAS" (Niemann, Zaun 2018:3).

The system which was based on common rules and burden-sharing between the Member States cracked under pressure when countries such as Italy and Greece which were at the forefront of the irregular entries to the EU could not cope with the asylum applications and burden of hosting and processing asylum-seekers. Most of the refugees went through these countries, especially along the Eastern Mediterranean and Balkans route and reached Northern Europe (Niemann, Zaun 2018:4). The Dublin system which was based on the principle that applications by asylum-seekers should be handled by the country of first port of entry in the EU was suspended by Germany in August 2015 when the German authorities started accepting asylum applications (DW 2015). While this move was evaluated as a sign of solidarity with countries such as Greece, Italy and Hungary it was also harshly criticized as an irresponsible behaviour that would trigger further migrant smuggling across the Aegean and



the Balkans. International and human rights organizations also noted that what the EU was doing was not enough and noted the need for a “human-rights based, coherent and comprehensive migration policy” (DW 2015).

Angela Merkel’s open door policy took a turn towards a more restrictive stance when border controls at the German-Austrian border were reintroduced followed by several other Member states such as Austria, Denmark, France and Sweden. This situation followed by Hungary’s building of a fence along its borders with Croatia and Serbia, effectively closed the Balkan route leading to West and Northern European Member States (Niemann, Zaun 2018:4). Hence EU solidarity and burden-sharing principles failed leading to a normative deficit in the EU’s handling of the refugee crisis.

### **The Samsom-Merkel Plan and the road to the EU-Turkey Statement**

While the EU was in the throes of the refugee crisis, one organization was struggling to find a working plan that would work and save face for the EU. The 1:1 exchange which provided the crux of the March 18 Turkey-EU Statement emerged out of a plan supported by the leader of the Dutch Labour Party, Diederik Samsom and German Chancellor Angela Merkel, the so-called Samsom-Merkel Plan. Samsom in an interview he gave also noted that the deal put forth resettlement of up to 250,000 refugees from Turkey which would be shared by about 10 willing countries in the EU and return to Turkey of irregular migrants crossing the Aegean to Greece. The Labour leader also said that the plan was being negotiated behind closed doors with the German, Swedish and Austrian governments since November 2015 (Kingsley 2016). The Plan paved the way for the March 18 Turkey-EU Statement.

The idea behind the Samsom-Merkel Plan was originally proposed by the think tank European Stability Initiative (ESI). Gerald Knaus the Chair of this organisation implemented sort of a shuttle diplomacy between Turkey, Greece, Germany and other EU capitals in order to get support to his proposal which he saw as the only available solution to the crisis. The proposal was aired in September 2015 with a paper titled “Why people don’t need to drown in the Aegean” (ESI 2015). The paper skilfully portrayed the gravity of the situation noting the high number of refugees reaching the EU through Greece in the first eight months of 2015. The use of adjectives in this paper attested to a certain outlook to the issue. The paper noted the



pressure on Greece by emphasizing that the island of Lesbos received 114,000 migrants between January and August while it itself had a population of 86,000. The writer of the paper<sup>2</sup> noted the distance between Lesbos and the Turkish coast as being a “scant 15 kilometers” in a way pointing to the urgency of the matter by accentuating the closeness to the source of the refugee problem. The writer also noted that the majority of the migrants arriving in Greece were Syrians and that “they are all likely to be given refugee status in the EU if they reach it”.

Hence the right of asylum recognized under the Geneva Convention to which all EU Member states were parties was perceived as a potential threat when so many people who had the right to claim asylum could in fact reach the EU territory. The writer then noted the existence of a threat regarding the asylum-seekers themselves: “to claim asylum in the EU, they [migrants] need to undertake a perilous journey by land and sea”. In this understanding, the right to life seemed to contradict the right of asylum. If a migrant sought to seek his/her right of asylum, he/she was faced with the dilemma of risking one’s own life. The paper proposed that the way out of this dilemma was an agreement between the EU and Turkey, a country “that determines what happens at Europe’s southeastern borders”.

The writer, Gerald Knaus compared the German and Hungarian approaches to the refugee issue and argued that neither the open door policy of Chancellor Merkel nor the restrictive, security-conscious approach of Prime Minister Orban could prove to be a cure to the refugee crisis (ESI 2015:2). The agreement that was proposed between Turkey and the EU would result in resettlement of 500,000 Syrian refugees from Turkey in Germany in return for Turkey’s agreement “to take back all refugees that reach Greece, from the moment the deal is signed”.

The paper argued that “If Syrian refugees have a safe and realistic option for claiming asylum in the EU in Turkey, and if they face certain return back to Turkey if they cross illegally, the incentive to risk their lives on the Aegean will disappear” (ESI 2015:2). Here the right to life and right of asylum did not necessarily contravene each other since the refugee would be able to file for asylum in the EU in Turkey. Taking into account, the backlog and lack of capacity in dealing with asylum applications in the EU and the resistance shown to the granting of

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<sup>2</sup> Although the writer’s name is not available on the paper, in a footnote it is noted that comments should be sent to Gerald Knaus’ e-mail, who is the Director of ESI.





asylum to Syrian refugees not only in countries such as Hungary but also in Germany, this part of the deal could be evaluated as quite unrealistic and hard to realize<sup>3</sup> (BBC News 2016). What was quite critical was the emphasis on getting Turkey's approval to accepting the return of migrants from Greece. In the paper, the term "refugee" was used which meant that not only economic migrants but also Syrians with a legitimate claim to asylum were to be sent back effectively putting on hold the Geneva Convention.

Turkey's agreement was essential to the resolution of this uneasy paradox between the right to life and right to asylum. After a deal could be reached on these terms, Syrians would no longer seek to engage in journeys across the Aegean and thereby not be a prey to migrant smuggling networks and instead wait to be resettled to the EU in Turkey. This plan could have worked only if the process of resettlement could work effectively which did not materialize.

The deal which later matured to become the Turkey-EU Statement worked to end the business model of smugglers however, nearly 3 and a half million Syrians were left in Turkey creating a huge burden on Turkey and at the same time while these Syrians were provided with temporary protection since Turkey did not lift the geographical limitation to the Geneva Convention. Hence the result of the deal was that Syrians in Turkey could not claim the right to asylum in the EU that they might have done if they were allowed a safe passage to the EU.

While the deal worked to protect the right to life as we observe in the decreasing numbers of deaths across the Aegean, it restricted the right to asylum. It should also be added that as the Balkan route and Eastern Mediterranean routes were closed, migrants increasingly sought more dangerous routes to reach the EU hence putting their lives even in more danger.

What prompted the March 18 deal and marked its distinctness compared to the November 29 Joint Action Plan was Turkey's acceptance expressed by the then Prime Minister Ahmet Davutoğlu, on 7 March 2016, of "rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters" (Council of the EU 2016). The Statement laid the emphasis on stopping irregular migration from Turkey to the EU (Council of the EU 2016):

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<sup>3</sup> Chancellor Merkel's open door policy was later seen as a major reason that contributed to the rise of the right-wing Alternative für Deutschland Party (AfD). The Christmas events in Cologne when several women were harassed by men of "Arab or North African appearance" also contributed to the shift in public opinion regarding the open door policy. See BBC News, "Germany shocked by Cologne New Year gang assaults on women", 5 January 2016, <http://www.bbc.com/news/world-europe-35231046>





“In order to break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk, the EU and Turkey today decided to end the irregular migration from Turkey to the EU.”

According to the Statement, returns of irregular migrants from the Greek islands to Turkey would commence as of March 20. Only those “not applying for asylum or whose application has been found unfounded or inadmissible” (Council of the EU 2016) would be sent back to Turkey. Assurances were given that relevant international standards would be fulfilled and all asylum applications would be processed in accordance with the Asylum Procedures Directive. The 1:1 formula was the ingenious element in the Statement: “For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU” (Council of the EU). A 72,000 cap was specified regarding the number of Syrians to be resettled in the EU in accordance with the refugee quota arrangements agreed by the Council in July and September 2015. The Statement also included other provisions regarding the improvement of Turkey-EU relations by accelerating the visa liberalisation process with a view to lifting the visa requirement by the end of June 2016, stepping up the allocation of the €3 billion under the Facility for Refugees in Turkey, upgrading the customs union, and “re-energising the accession process” (Council of the EU).

The deal worked out between Turkey and the EU was hailed as a humane solution to the Syrian refugee crisis while it was criticized bitterly by rights-based organizations. Amnesty International regarded the deal with the words “Europe’s Year of Shame” (Gogou 2017). The EU heads of state and government were criticized for “disregarding their international obligations” towards refugees by stipulating the return of all irregular migrants including asylum-seekers arriving on Greek islands to Turkey. The organization also contested a fundamental premise of the Turkey-EU deal that Turkey was a safe country for refugees citing decisions by Greek asylum appeals committees to the contrary (Gogou 2017). Director of Migration Policy Institute, Elisabeth Collett also criticized the deal by noting that it displayed the EU’s paradox between its need to reduce irregular arrivals to the EU and violating its own high standards of refugee protection (Collett 2016).

Another problem with the Agreement was that the resettlement from Turkey to EU Member States could not be carried out effectively. In an evaluation report published by the European



Commission in September 2017, it was stated that overall 9000 Syrians have been resettled to the EU. The deal was still regarded as a success (European Commission 2017:2):

Since the Sixth Report, the total number of arrivals from Turkey to the Greek islands was 7,807 (from 9 June 2017 to 31 August 2017) – representing an average daily arrival of 93 persons. Although the number of daily arrivals is higher than before the summer, it is still substantially lower in comparison to the month that preceded the Statement. 113 fatalities and missing persons have been recorded in the Aegean Sea since the activation of the EU-Turkey Statement. 1,150 people died or were reported missing during the year preceding the Statement.

According to figures published on 30 April 2018 regarding resettlement of Syrian refugees from Turkey after 4 April 2016, 13,309 refugees were resettled, 4840 in Germany, 2608 in the Netherlands, 1671 in France and 1002 in Finland followed by 13 other Member States. Not a single refugee was resettled in the following Member States: Bulgaria, S. Cyprus, Czech Republic, Denmark, Greece, Hungary, Ireland, Poland, Romania, Slovakia, Slovenia, and the UK (EU 2018).

One of the primary problems with the deal in terms of refugee rights was the insufficient capacity that Greece had in processing asylum applications. Hotspots were created in Greece, and Italy where the EU officials helped with the registration, fingerprinting, screening, document checking and rapid processing of asylum applications (EU 2017). The European Commission provided €605.3 million under the EU Emergency Support Instrument to alleviate the refugee situation in Greece (European Commission 2018). A briefing note produced by the International Rescue Committee (IRC), the Norwegian Refugee Council (NRC) and Oxfam drew attention to the situation of refugees stranded on the Greek islands (International Rescue Committee, Norwegian Refugee Council, Oxfam 2017). The brief note also argued that the EU with this refugee deal was also “setting a dangerous precedent to the rest of the world” which could “trigger... a race to the bottom”. The note underlined 3 important developments that jeopardized refugee protection (International Rescue Committee, Norwegian Refugee Council, Oxfam 2017):

- I. The growing difficulty in seeking international protection and the diminishing access to fair and efficient asylum procedures;
- II. A convoluted and constantly changing process that lacks oversight, checks and balances; and
- III. The increasing vulnerability among those stranded in Greece.



An international aid organization, the Medecins Sans Frontieres (MSF) declared that it would no longer accept funds from the EU and its Member States as a reaction to “their damaging deterrence policies and their continued attempts to push people and their suffering away from European shores” (Medecins Sans Frontieres <sup>2017</sup>). The organization regarded the EU-Turkey Deal together with the closing of the Balkan route –“the only hope for thousands of people seeking protection in Europe”, as two interlinked events that altered the “paradigm in the EU’s approach to mixed migration flows” (Medecins Sans Frontieres 2017).

A third problem in terms of the legal applicability of the Deal was the fact that it was negotiated and put into implementation without going through the proper institutional processes. Actions brought by asylum seekers in Greece argued for the annulment of the Turkey-EU Statement. The case rested on the argument that the deal violated the principle of “non-refoulement and the prohibition of collective expulsion” which were basic components of refugee rights. The case also argued that the Statement was illegal since it was not conducted in accordance with legal procedures found in the Treaties (Carrera et al. 2017). The Court issued its opinion on the cases brought about by the three asylum-seekers on 28 February 2017 (ECJ). The Court in these orders concluded that it did not have the competence to hear the actions brought by the applicant since the EU-Turkey Statement was not adopted by one of the institutions of the EU. Although both the European Council and the European Commission appeared to be the architects of this Statement, the Court found that it was not the European council or any other organ of the EU but the Member States themselves acting collectively that are behind the refugee deal (ECJ):

The Court takes the view that the evidence, provided by the European Council and relating to the meetings on the migration crisis held successively in 2015 and 2016 between the Heads of State or Government of the Member States and their Turkish counterpart, shows that it was not the EU but its Member States, as actors under international law, that conducted negotiations with Turkey in that area, including on 18 March 2016.

It was argued by Carrera et al, that since the EU-Turkey deal was not reached through the conduct of proper procedures regarding international Treaty negotiations, the democratic scrutiny of the European Parliament and the jurisdiction of the Court of Justice were circumvented. This in their opinion constituted an action in *mala fide*, and the heads of state or government “...jeopardised their legal duties of sincere cooperation laid down in Article 4.3



of the Treaty on the European Union (TEU)” (Carrera et al. 2017:2). In their view the Turkey-EU Statement was a “strange legal creature.... which exposes and ...undermines the legitimacy of the EU’s responses to the ‘refugee crisis’ (Carrera et al. 2017:2).

### **The EU-Turkey Refugee Deal and Impact on Turkey and EU Relations**

The refugee deal did not only concern the refugee issue but had other provisions which were likened to “sweeteners” in order to facilitate Turkey’s compliance with the requirements of the Deal. These included the specification of a target date for visa-free travel of Turkish citizens to the Schengen area, acceleration of Turkey’s accession negotiations, modernization of the Customs Union etc. Commission’s report on Turkey which was due to be published in October 2015 was postponed until after the elections so as not to put undue pressure on the government whose acquiescence the EU needed. While the EU was critical of the developments in Turkey with regard to the fulfilment of conditions for membership and noted serious backsliding in the areas of freedom of expression, freedom of media and assembly which were integral aspects of the Copenhagen criteria. The sudden enthusiasm shown by the EU in its turn to Turkey in an effort to find a resolution of the refugee crisis contravened the political conditionality it implemented to candidate countries. The EU made a distinction between conditions for accession to the EU and conditions of cooperation in averting crises. However since the deal also was linked to the accession process and described with the term “re-energizing” of relations, such a clear differentiation was not apparent and readily legible for Turkey. The EU’s approach could be likened to the use of a “carrot” in getting Turkey’s approval to the deal by bringing in related but vaguely defined areas of improvement in Turkey-EU relations.

Assuming that political conditionality is a necessary aspect of the EU’s normative power, a relaxing of the conditions for Turkey in the case of averting the refugee crisis presented a dilemma and placed the EU’s normativity under doubt. The use of double messages and constructive ambiguity apparent in the EU’s approach to Turkey was also evident in this case since the EU in effect divided and compartmentalized Turkey’s standing vis-a-vis the EU between Turkey as a candidate and Turkey as a third country. The refugee deal had the effect of strengthening and prioritising the transactional element in Turkey-EU relations further



eroding the credibility of the EU's norm diffusion in its relations with Turkey (Dimitriadi et al. 2018).

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