

ELEMENTS OF THE EU ASLYUM LAW WITH SPECIAL RELEVANCE TO SYRIAN REGUGEES

**Presented by Boldizsár Nagy,
at the workshop:
Syrian refugee crisis: Response and coordination
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THREE LEVELS OF REGULATION

- International law (1951 Geneva Convention, 1950 European Convention on Human Rights, etc.)
 - European Union Law (in EU member states)
 - National law – implementing both
-

Control (enforcement):

UNHCR

European Court of Human Rights („Strasbourg“)

Court of Justice of the European Union („Luxembourg“)

Domestic courts

**THE RATIONALE BEHIND DEVELOPING
AN EU ACQUIS:**

SCHENGEN

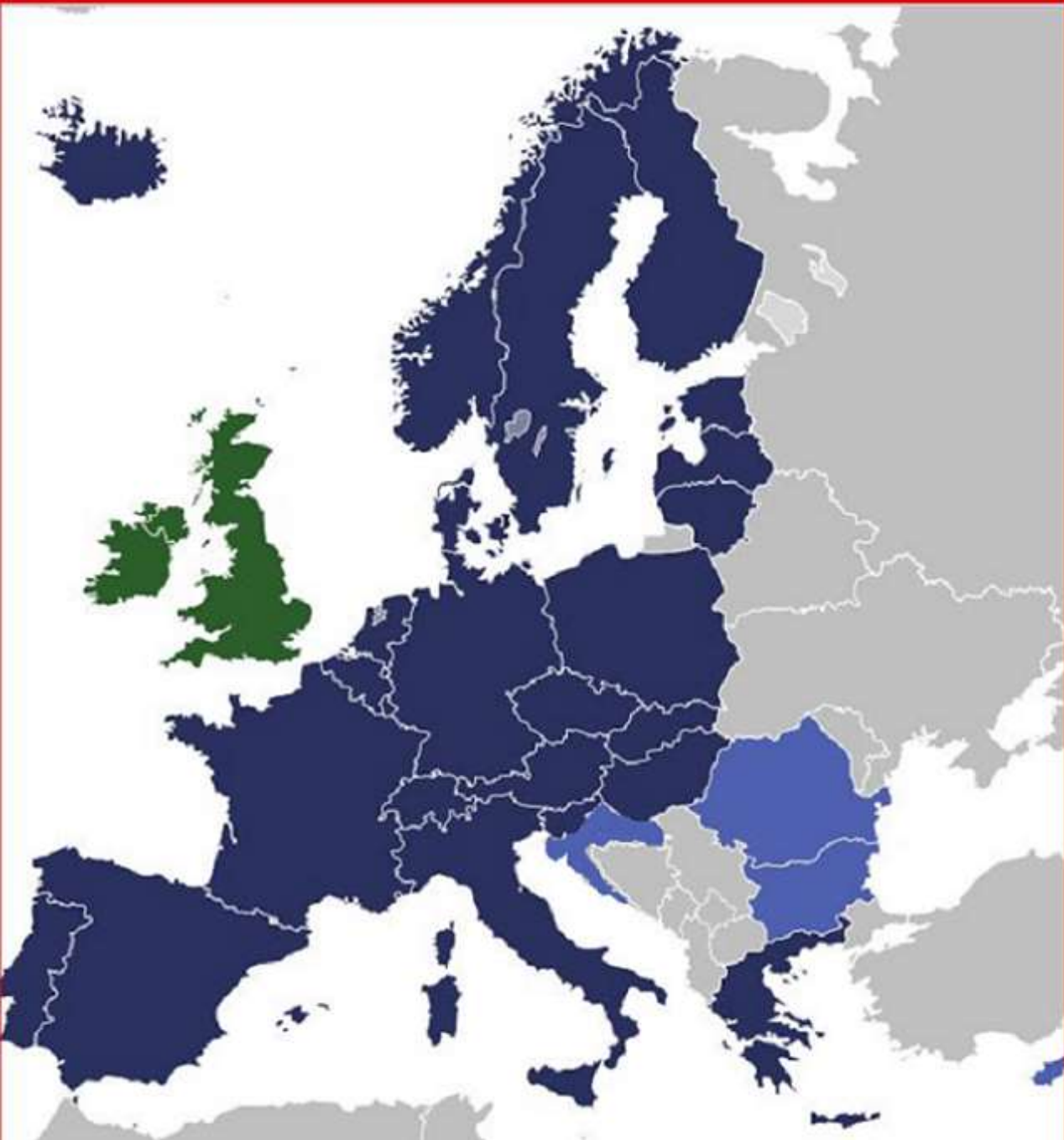
SCHENGEN

Purpose:

Abolition of controls at the internal borders

Measures logically following from the lack of border controls

- protecting the external borders with the same level of security including checks and surveillance
- intensive co-operation in customs, police and criminal justice matters
- establishing a system to determine which state is responsible for the examination of asylum applications („Dublin“)



**THE
SCHENGEN
AREA
IN
2015**

THE BASIC CONCEPTS OF EU LAW

FORMS OF DECISIONS

Article 288 TFEU

...

A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A **decision** shall be binding in its entirety upon those to whom it is addressed.

DIRECT APPLICABILITY, DIRECT EFFECT, PRIMACY OF EU LAW

Direct applicability: a regulation „automatically forms part of the (highest) provisions of a Member State’s legal order” – without transposition Laenarts – Van Nuffel (Bray, ed), Constitutional Law of the European Union, second ed. 2005, p. 764

Direct effect: if the *regulation* is clear and precise and leaves no margin of discretion then individuals can rely on it against the state and against each-other

Directive:

- No direct applicability – needs transposition
- *May have direct effect* if unconditional and sufficiently precise – and the state fails to transpose it on time. no direct applicability (needs transposition) but

Primacy/Supremacy of EC law: In case of conflict it has primacy even over later national acts, including statutes.

After 1 November 2014

1 member – 1 vote

Qualified majority = „double majority”

On a proposal from the Commission or the High Representative

On any other proposal

55% of the ministers (countries) (15)

72 %

representing 65% of the population of the EU

representing 65 % of population of the EU

The UK and Ireland may decide whether to participate in refugee-related matters, Denmark does not participate

Blocking minimum 4 countries even if 3 represent more than 35 % of the population

ASYLUM ACQUIS

Adopted measures

1. Directive on **temporary protection**: **2001 TPD**
2. **Reception conditions** directive (2003) recast: **2013 RD**
3. **Dublin III** Regulation and its implementing rules (2003) recast: **2013**
4. Regulation on **Eurodac** (2000) recast: **2013**
5. Qualification (**Refugee definition**) directive (2004) recast: **2011 QD**
6. **Asylum procedures** directive (2005) recast: **2013 PD**
7. Establishment of an **European Asylum Support Office**: **2010**
8. Decision on the new **Asylum Migration and Integration Fund** : **2014**

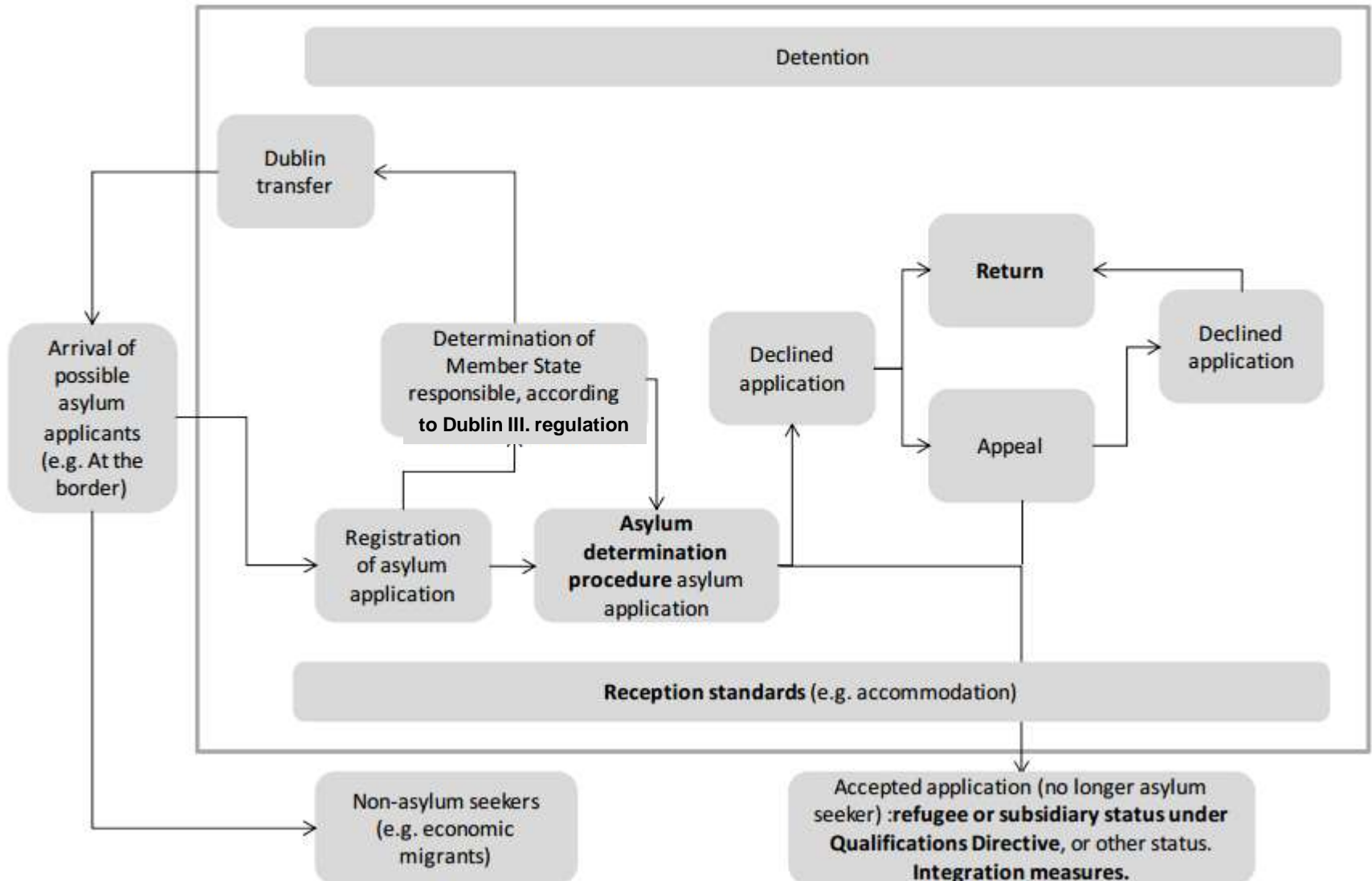
AMIF

OVERVIEW OF THE RECASTS

Secondary rule	Is there a recast?	State of play
European Refugee Fund 2007/573/EK határozat	New Fund	Regulation (EU) No 516/2014 of 20.5.2014 (OJ 2014 L 150/168) establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC
Temporary Protection Directive Council Directive 2001/55/EC	None	
Eurodac Council Regulation 2725/2000/EC	Yes	Revised Eurodac Regulation: Reg. 603/2013: (OJ 2013 L 180/1) – deadline July 2015
Dublin II regulation Council Regulation 343/2003 EC	Yes	Revised Dublin Regulation: Reg. 604/2013: (OJ 2013 L 180/31) – applicable from 1 Jan. 2014
Reception Conditions Directive Council Directive 2003/9/EC	Yes	Revised Reception Conditions Directive 2013/33 (OJ 2013 L 180/96) – deadline July 2015
Qualification directive Council Directive 2004/83/EK irányelv	Yes	Revised Qualification Directive 2011/95/EU 20 December 2011 transformation deadline Dec. 2013
Procedures directive Council Directive 2005/85/EC	Yes	Revised Procedures Directive 2013/32 (OJ 2013 L 180/60) – transformation deadline July 2015

THE ASYLUM PROCESS

Figure 1: Overview of the asylum process



KEY QUESTIONS

1. Who should decide if the person is a refugee? = which is the responsible state for the asylum procedure = Dublin
2. Can the asylum seeker be returned to a non EU member state (instead of applying Dublin) = safe third country
3. What to do if the refugee found protection in a non-EU country (e.g. Turkey, Lebanon, Jordan), but after some time moves on = first country of asylum, „secondary movement”
4. Does the refugee have a choice as to the country of asylum? (see also answers to 2 and 3)
5. Can states close their borders, claiming „too many came, the country is full” = non-refoulement
6. Why is the temporary protection directive not applied?
7. Are there persons, who can be excluded („terrorists”)? = exclusion grounds and procedure
8. What solidarity is conceivable among EU member states? = relocation, hotspots, AMIF
9. What solidarity with those state who host most refugees. (Resettlement, EU Trust Fund for Syria /”Madad Trust Fund”/), Emergency Trust Fund for Africa

**1. WHO SHOULD DECIDE WHETHER THE
PERSON IS A REFUGEE? WHICH IS THE
RESPONSIBLE STATE FOR THE ASYLUM
PROCEDURE? =
THE DUBLIN SYSTEM**

PURPOSE AND PHILOSOPHY OF DUBLIN

Every asylum seeker **should gain access** to the procedure. There must be a MS to determine the case

Only one procedure should be conducted within the Union. **A decision** by any MS be taken **in the name of others** = no parallel or subsequent application should take place

**THE PHILOSOPHY OF DUBLIN:
UNDER WHAT CONDITIONS IS TAKING CHARGE BY ANOTHER STATE –
WITHOUT INVESTIGATION OF THE MERITS IN THE FIRST STATE FAIR**

Fairness preconditions

If the **substantive law** (the refugee definition) is identical

If **procedural rules** guarantee equal level of protection at least in terms of

- legal remedies (**appeals**)
- access to **legal representation**
- **reception conditions** (support) during the procedure (detention, e.g.!))

**REGULATION 604/2013/EU (DUBLIN III) CRITERIA 8 – 15. §
(SIMPLIFIED)**

„Coupling principles” = criteria identifying the responsible state

1. Family (narrowly defined)
2. Visa or residence permit
3. External border crossed in irregular fashion
4. Place of submission

BURDEN SHIFTING

**NOT BURDEN
SHARING !**

DUBLIN

Taking charge: no application in the responsible state

Taking back: departure after application

Eurodac not decisive, but shorter deadlines

(2 instead of 3 months to request take back)

No response – acceptance of responsibility

THE LESSON TAUGHT BY GREECE'S NON-PERFORMANCE ARTICLE 3 (2)

Where it is impossible to transfer an applicant to the responsible Member State „because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in that Member State resulting in risk of inhuman or degrading treatment” the determining Member State may search for another responsible state or must proceed itself.

Particular pressure on a member state or systemic failure: Commission to call for a preventive action plan

Serious risk of crisis – compulsory crisis management action plan upon invitation of the Commission

Last resort: instead of Dublin resort to Art 78 (3) of TFEU:

„In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.”

Two decisions on relocation of September 2015 moving from Italy and Greece 40 + 120 thousand persons

2. CAN THE ASLYUM SEEKER BE RETURNED TO A NON EU MEMBER STATE (INSTEAD OF APPLYING DUBLIN) = SAFE THIRD COUNTRY

THE NOTION OF THE SAFE THIRD COUNTRY (§ 38 PD)

- **Life and liberty are not threatened** on account of the 5 Geneva Convention grounds (race, religion, political views, nationality, belonging to a particular social group) and there is no risk of torture, inhuman or degrading treatment or punishment, or threat because of indiscriminate violence in armed conflict; and
- the principle of **non-refoulement** is respected; and
- the **prohibition of removal** in breach of the right to freedom from **torture and cruel, inhuman or degrading treatment and punishment** as laid down in international law is respected; and
- the **possibility** exists to **request refugee status** and, if found to be a refugee, to **receive protection** in accordance with the Geneva Convention.

THE NOTION OF THE SAFE THIRD COUNTRY

- **meaningful link** between applicant and s.t.c.
- **investigation if a particular country is safe** for the particular asylum seeker
- **a right of the a.s. to challenge the safety** at least when torture and inhuman or degrading treatment or punishment is threatening the a.s.

If inadmissible because of s.t.c. :

- inform a.s. accordingly,
- provide a.s. with document informing the s.t.c. that the application has not been examined in substance

3. WHAT TO DO IF THE REFUGEE FOUND PROTECTION IN A NON-EU COUNTRY (E.G. TURKEY, LEBANON, JORDAN), BUT AFTER SOME TIME MOVES ON = FIRST COUNTRY OF ASYLUM, „SECONDARY MOVEMENT”

FIRST COUNTRY OF ASYLUM

The application is **inadmissible** (no examination of the merits) if there is a **first country of asylum** (§ 35 PD).

Definition

If the asylum seeker has been **recognised** in that country as a refugee and he/she can **still avail** himself/herself of that protection,

or

he/she enjoys **otherwise sufficient protection** in that country, including benefiting from the principle of non-refoulement,

provided

that he/she **will be re-admitted** to that country.

Applicant has a right to challenge inadmissibility on the basis of c. f.a.

Turkey, Lebanon, Jordan?

**4. DOES THE REFUGEE HAVE A CHOICE AS
TO THE COUNTRY OF ASYLUM? (SEE
ALSO ANSWERS TO 2 AND 3)**

THE CHOICE OF THE REFUGEE

- Family, friends, acquaintances (own diaspora)
- Language
- Past time spent
- Labour market, right to establish a venture (self-employment)
- Reception conditions
- Integration assistance
- Vicinity / distance to country of persecution (fast return / distance from danger, less competition with other refugees)

The **more the refugee chooses** the **less social assistance** (s)he will need.

**5. CAN STATES CLOSE THEIR BORDERS,
CLAIMING „TOO MANY CAME, THE
COUNTRY IS FULL” = NON-REFOULEMENT**

NON - REFOULEMENT

Narrow meaning: Geneva Convention Article 33

„No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Exception: national security danger or final sentence for serious crime in country of asylum

Broad meaning: Art 3 of the European Convention of Human Rights:

- ground irrelevant
- applies to any person, not just to refugees
- prohibition is absolute.

But, what if extremely large number of refugees come („mass influx”)
- prevailing view: still applies

6. WHY IS THE TEMPORARY PROTECTION DIRECTIVE NOT APPLIED?

**2001/55 EC Directive on Giving Temporary Protection in
the Event of a Mass Influx of Displaced Persons and on
Measures Promoting a Balance of Efforts Between
Member States in Receiving Such Persons and Bearing the
Consequences Thereof
2001 July 20, OJ L 212/12**

TEMPORARY PROTECTION DIRECTIVE

Beneficiaries = 'displaced persons'

who

have **had to leave** their country or region of origin,

or have been **evacuated**,

and are unable to return in safe and durable conditions

in particular:

(i) persons who have fled areas of **armed conflict or endemic violence**;

(ii) persons at **serious risk of**, or who have been the victims of, **systematic or generalised violations** of their **human rights**;

TEMPORARY PROTECTION DIRECTIVE

Mass influx means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area

The **Council decides by qualified majority** the start and end of T.P.

Duration

1 year + max **two times 6 months**
= total max: **2 years**

Council may end it earlier, but must not exceed two years'

Not applied until October 2015

Why?

- The Member States ought to **assist the obtaining of the necessary visas**, including transit visas. Formalities ought to be reduced to a minimum. Visas should be free of charge or their cost reduced to a minimum (§ 8 /3/ TPD)
- The Temporary Protection Directive includes **a solidarity mechanism** (even if voluntary) on the relocation of refugees
- **Right to work**, self-employment and **to family unification** are recognised

**7. ARE THERE PERSONS, WHO CAN BE
EXCLUDED („TERRORISTS“)? =
EXCLUSION GROUNDS AND PROCEDURE**

EXCLUSION OF TERRORISTS

- Terrorists are **unlikely to come as refugees**, as they have to be photographed, give 10 fingerprints and give detailed account about their life
- Terrorists **can be excluded from protection** (and returned, unless Art. 3 of the ECHR would be violated)

Exclusion grounds: crimes against peace, war crimes, crimes against humanity, serious non-political crimes, acts contrary to the principles and purposes of the UN.

See QD Preamble, para 31 „**Acts contrary to the purposes and principles of the United Nations are ... embodied in the United Nations resolutions relating to measures combating terrorism, which declare that ‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations...’**”

**8. WHAT SOLIDARITY IS CONCEIVABLE
AMONG EU MEMBER STATES? =
RELOCATION, HOTSPOTS, AMIF**

RELOCATION DECISIONS

Relocation: distributing among Member States those asylum seekers who are already within the EU and have a good chance of being recognised – i.e. members of groups with 75% recognition rate in the previous quarter (Syrians, Iraqis and Eritreans)

2 decisions:

- COUNCIL DECISION (EU) 2015/1523 of **14 September** 2015
40 000 persons **24,000 from Italy, 16,000 from Greece**
- COUNCIL DECISION (EU) 2015/1601 of **22 September** 2015
120 000 persons First year: **15,600 from Italy and 50,400 from Greece** Second year: 54,000 either from the same two or from other Member States.

No relocation to Denmark, Ireland, UK, Greece and Italy – 23 MS take up the 40 plus 120 thousand

HOTSPOTS, AMIF

Hotspots = in Italy and Greece: **complex sites** where experts from different EU MS work together in receiving and screening the applications and organising the return of those not in need of international protection. **6 planned for Italy, 5 for Greece.**

AMIF: Asylum, Migration and Integration Fund 2014-2020: 2,6 billion Euros!

To support the reception of asylum seekers and the integration of refugees and beneficiaries of subsidiary protection



Source:
Brussels, 14.10.2015 COM(2015) 510 final
ANNEX 5

**9. WHAT SOLIDARITY WITH THOSE STATE
WHO HOST MOST REFUGEES?
RESETTLEMENT, EU TRUST FUND FOR SYRIA
/“MADAD TRUST FUND”/, EMERGENCY
TRUST FUND FOR AFRICA**

SOLIDARITY WITH THOSE HOSTING REFUGEES AND SUPPORT FOR OTHER AFFECTED STATES

- **Resettlement of 22 thousand** refugees from outside of the EU in the next two years finally decided on 1 October 2015.

- **Madad Fund to support Syrian refugee hosting countries** (500 million Euros from the budget of the EU in 2015, to be matched by another 500 million donated directly by the MS)

- **Emergency Trust Fund for stability** and addressing **the root causes** of irregular migration and displaced persons **in Africa.**

„The Commission considers that national contributions should match the €1.8 billion EU funding.”

COM(2015) 510 final COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL Managing the refugee crisis: State of Play of the Implementation of the Priority Actions under the European Agenda on Migration, p. 10.)

THANKS!

BOLDIZSÁR NAGY

E-mail: nagyb@ceu.hu

www.nagyboldizsar.hu

**CEU International Relations and Legal Departments
Eötvös Loránd University, International Law Department**