

SALIENT ISSUES OF INTERNATIONAL AND EU REFUGEE LAW

**Presented by Boldizsár Nagy,
at the Kazan University,
VIII. Summer School on Human Rights "Youth
engagement for Human Rights"
1 July 2021**

THREE LEVELS OF REGULATION

- International law (1951 Geneva Convention, 1950 European Convention on Human Rights, etc.)
- European Union Law (in EU member states + Iceland, Norway, Switzerland in some cases)
- 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

Countries

- EU - Yes/Schengen - Yes
- EU - No/Schengen - Yes
- EU - Yes/Schengen - No



THE SCHENGEN AREA IN 2021

- EU - Yes/Schengen - Yes
- EU - No/Schengen - Yes

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

Greece/Turkey, Poland/Belarus, Spain/Morocco

➤ establishing a system to determine which state is **responsible for the examination of asylum** applications („Dublin”)

➤ intensive **co-operation** in **customs, police** and **criminal justice** matters

Issues at the intersection of international and EU refugee law

KEY QUESTIONS

1. **Who is a refugee** – who is entitled to international protection?
2. **Who should decide** if the person is a refugee? = which is the responsible state for the asylum procedure = Dublin
3. Can the asylum seeker be **returned to a non EU member state** (instead of applying Dublin) = safe third country
4. 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”**
5. Does the refugee have a **choice as to the country of asylum?** (see also answers to 2 and 3)
6. Can states close their borders, claiming „too many came, the country is full” = **non-refoulement**
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 states who host most refugees**

1. Who is a refugee?

Many definitions!

DEFINITIONS

OUA Convention, 1969

G51 + external aggression, occupation, foreign domination or events seriously disturbing public order

EU Qualification Directive, 2011

GC51 + „Subsidiary protection” a real risk of suffering serious harm
Harm= (a) death penalty or execution; or
(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict”

Cartagena Declaration, 1984

G51 + OAU + massive violation of human rights

Geneva Convention, 1951 / Protocol, 1967

- Outside the country
- Well founded fear (reasonable chance of p.)
- Persecution (Physical or mental harm of certain seriousness,)
- Five grounds: race, religion, nationality, political opinion, belonging to a particular social group
- Lack of protection by the state

=

national definitions, based on G51 and the regional definition

**2. 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.!).

„Coupling principles” = main 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

Onward travel and new application **of recognised applicants** =

NOT DUBLIN (e.g. Greece - Germany, 2021)

DUBLIN CRUMBLING

No transfer to a MS under Dublin if „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.

Greece, since 2011

Bulgaria, Hungary in different periods

(on relocation – see: internal solidarity)

Efforts to revamp Dublin-The New Pact on Migration and Asylum: 2020

Proposal for a regulation on **asylum and migration management** (COM /2020/ 610 Part IV) – solidarity mechanism and Proposal for a regulation addressing **crisis** and *force majeure* (COM /2020/ 613 Chapters I – III.)

Flexible solidarity -"solidarity contributions":

- 1) **Relocation of applicants** for protection
- 2) **Returning „illegally staying”** third country nationals (t.c.n.-s)
- 3) **Relocation of refugees** and beneficiaries of subsidiary protection
- 4) **Capacity building** and operational support
and, exceptionally
- 5) **Relocation of „illegally staying”** t.c.n.-s.

Three modes

A) **Search and rescue disembarkation:**

Commission determines the number of applicants to be relocated per country of destination (according to the distribution key). That is the „solidarity pool”

MS-s may instead offer capacity building or return sponsorships

For an excellent overview see: Francesco Maiani: A Fresh Start or One More Clunker? Dublin and Solidarity in the New Pact
<http://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/>

Efforts to revamp Dublin, second: 2020

B) Migratory pressure on a country = "migratory movements place a burden even on well prepared asylum and reception systems and requires immediate action" (21 factors to consider § 50)

Here **not only applicants but also beneficiaries of protection** (recognised in the last 3 years) may be relocated

C) Crisis: mass influx of irregularly arriving or disembarked t.c.n.-s of such scale and nature as to render the reception or the return system of that state non-functional and can have serious consequences for CEAS or the Common Framework (of return)

Entails the relocation of „illegally staying” t.c.n.-s and also those applicants who otherwise were not to be relocated as their case ought to be decided in a border procedure

Border procedures may entail decision on the merits in cases of countries from where $\frac{3}{4}$ or less of the applicants are recognised.

(Crisis regulation proposal, § 4)

Distribution key: **50 % weight GDP, 50 % weight population size** (§ 54)

3. 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

Is return to Libya or Turkey conceivable under the safe third country rule?!

4. WHAT TO DO IF THE REFUGEE FOUND PROTECTION IN A NON-EU COUNTRY (E.G. TURKEY, LEBANON, JORDAN, BELARUS), 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, Belarus?

**5. 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.

**6. 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 a particularly 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

**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 – OUTCOME

MEMBER STATES' SUPPORT TO EMERGENCY RELOCATION MECHANISM (AS OF 31 MAY 2018)

From Greece: 21,999

From Italy: 12,690

Total: 34,689

Member States	Relocation	
	Relocated from Italy	Relocated from Greece
Austria	43	*
Belgium	471	700
Bulgaria	10	50
Croatia	22	60
Cyprus	47	96
Czech Republic	*	12
Denmark	*	*
Estonia	6	141
Finland	778	1,202
France	635	4,394
Germany	5,434	5,391
Greece	*	*
Hungary	*	*
Ireland	*	1,022
Italy	*	*
Latvia	34	294
Lithuania	29	355
Luxembourg	249	300
Malta	67	101
Netherlands	1,020	1,755
Poland	*	*
Portugal	356	1,192
Romania	45	683
Slovakia	*	16
Slovenia	81	172
Spain	235	1,124
Sweden	1,392	1,656
United Kingdom	*	*
Norway	816	693
Switzerland	920	580
Liechtenstein	*	10
Iceland	*	*

THE STATE OF PLAY WITH THE HOTSPOTS SEPTEMBER 2020

Since 2015 Hotspot = „facilities for initial reception, identification, registration and fingerprinting of asylum-seekers and migrants arriving in the EU by sea – at the external borders of the EU in Greece and Italy...” EP Research Service

briefing Hotspots at EU external borders State of play, 2020 September

EASO - EUROPOL – EUROJUST – FRONTEX present

State of play in the EU hotspots in Greece and in Italy

Hotspots in Greece and in Italy



Moria, Lesvos

8 September 2020

1:04 18 Oct

The story of the blaze that destroyed Moria camp



BBC Newsnight looks into the origins of the fire that destroyed Europe's largest refugee camp.

THE ASYLUM AND MIGRATION AND INTEGRATION FUND

2014-2020 (seven years)

Total: 3 137 million Euros (in current prices)

Commission Proposal 2018: Asylum and Migration Fund for 2021-2027 – negotiations ongoing

Order of magnitude: 10 000 million Euros

**9. WHAT SOLIDARITY WITH THOSE STATE
WHO HOST MOST REFUGEES?**

SHIFTING RESPONSIBILITY TO THIRD STATES

PUSH - BACK

Spain - Morocco

Italy – Libya

Croatia – Bosnia-Herzegovina and Montenegro

Hungary - Serbia

Greece – Turkey

Poland - Belarus

ECtHR, 13 February 2020, Nos. 8675/15 and 8697/15, **N.D. and N.T. v. Spain** – Spain not condemned only because legal pathways available and violent access to territory

ECtHR 23 February 2012, No. 27765/09, **Hirsi Jamaa and others v Italy** Italy must not return asylum applicants from high seas to Libya

ECtHR (pending case) No. 18810/19
S.B. against Croatia

ECJ, 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU **FMS and Others v [Hungary]** The „safe transit country” rule of Hungary violates EU law

<https://www.bellingcat.com/news/2020/10/23/frontex-at-fault-european-border-force-complicit-in-illegal-pushbacks/>

ECtHR, 23 July 2020, Nos. 40503/17, 42902/17 and 43643/17, **M.K. and Others v Poland** Returning applicants without accepting their application – breach of Article 3 ECHR

EXTERNALISATION OF PROCESSING

The EU-Turkey „statement” – the deal of 18 March 2016

- „[A]ny application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR”
- „All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion.”
- „[T]emporary and extraordinary measure”
- „Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey”

EU Facility for Refugees in Turkey

2x3 billion
Euros
Projects run
till 2025

Externalisation

- Long standing efforts to create **refugee status determination centers in third states** where EU procedures would be conducted
(see. e.g. Danish bill, 2021)
- 2018 Summer: **Disembarkation and external processing** ideas floated by the Council
https://ec.europa.eu/commission/sites/beta-political/files/migration-disembarkation-june2018_en.pdf
- **5 transit centres in Niger.**

Screening

Personal scope:

Practically applies to everyone who

- crosses to **external border without authorization** (and is apprehended in connection with that crossing)
- or is **disembarked** after search and rescue.
- or is centres **found within the territory** without an indication of having crossed the external border in an authorised manner

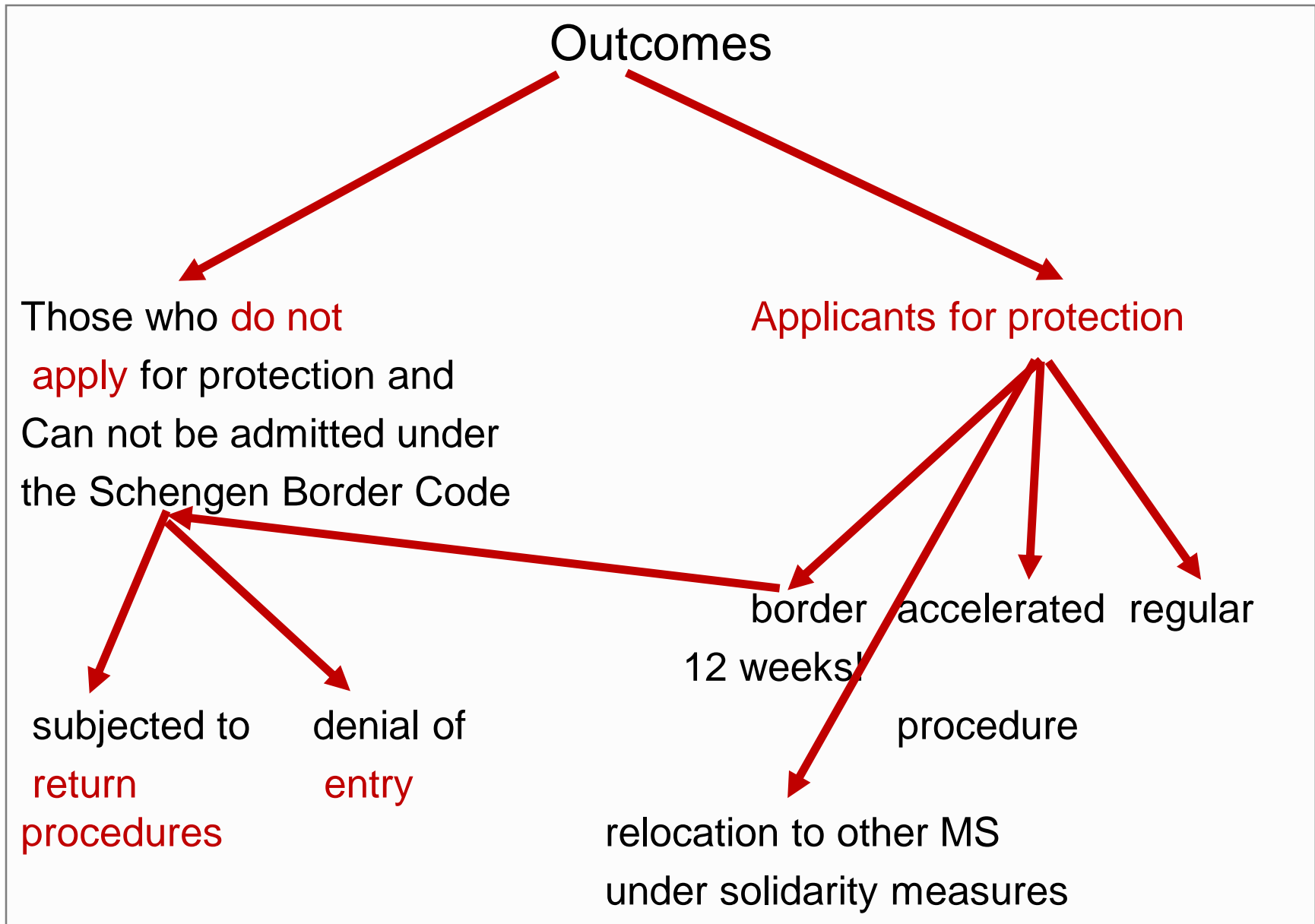
During screening: no authorisation to enter

Screening means:

- preliminary **health and vulnerability** check
- identification**;
- registration of biometric data** in the appropriate databases
- security check**;
- the filling out of a **de-briefing form**
- referral to the appropriate **procedure**

Length: 5 days at the border (**possibly +5**) **3** days inland

New Pact, 20200: Screening



CO-OPERATION AND SOLIDARITY

RESETTLEMENT FROM THIRD STATES

The **ad hoc decision** of 20 July 2015 of the „Representatives of the Governments of the Member States meeting within the Council” (EU Doc 11130 /15) = **Conclusions of the on resettling through multilateral and national schemes 20 000 persons** in clear need of international protection

EU –Turkey Statement of 18 March 2016

1 : 1 Scheme – for a Syrian taken back from greece another Syrian refugee from Turkey to be resettled to the EU

Union Resettlement Framework – Commission Proposal of 13 July 2016 (COM (2016) 468 final)

Council – in „Annual Union resettlement Plan”- sets

- Annual maximum total number

- Number of persons to be taken by each MS (based on their offers)

- Geographic priorities

Commission - in „Targeted Union resettlement schemes” – sets

- The actual number to be resettled by each state

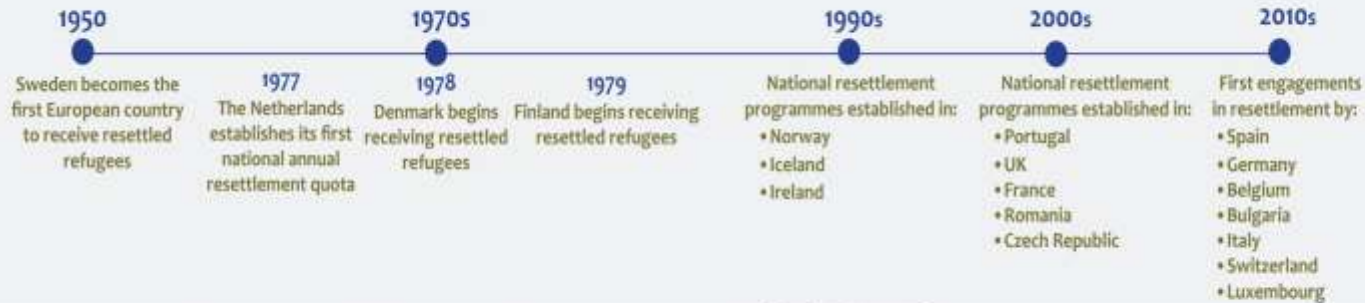
- Details of regions, specificities of co-operation

MS choose the actual persons, who have to consent to the resettlement

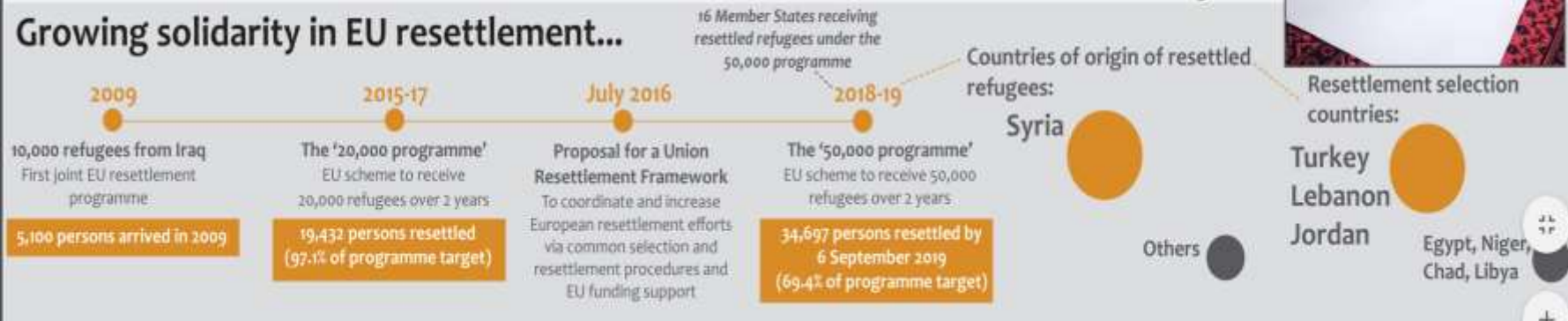
Commission **Recommendation of 27.9.2017** on enhancing legal pathways for persons in need of international protection –resettlement of **50 000 persons**, mainly from Africa based on voluntary pledges

Actual resettlement

A progressive engagement of European countries...



Growing solidarity in EU resettlement...



Source: <http://resettlement.eu/sites/icmc/files/MASTER%20DISPLAY.pdf> (20210630)

Financial assistance – Africa Fund

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

Goals:

- foster stability in the regions;
- contribute to better migration management.
 - ✓ by addressing the root causes of destabilisation, forced displacement and irregular migration, by
 - ✓ promoting economic and equal opportunities, security and development.

4,9 billion Euros pledged



**NORTH
OF AFRICA**

**€ 900
MILLION**

ELIGIBLE COUNTRIES:

Morocco, Algeria, Tunisia, Libya and Egypt.



**SAHEL /
LAKE CHAD**

**€ 2,145
MILLION**

ELIGIBLE COUNTRIES:

Burkina Faso, Cameroon, Chad, Côte d'Ivoire, the Gambia, Ghana, Guinea, Mali, Mauritania, Niger, Nigeria and Senegal.



**HORN
OF AFRICA**

**€ 1,808
MILLION**

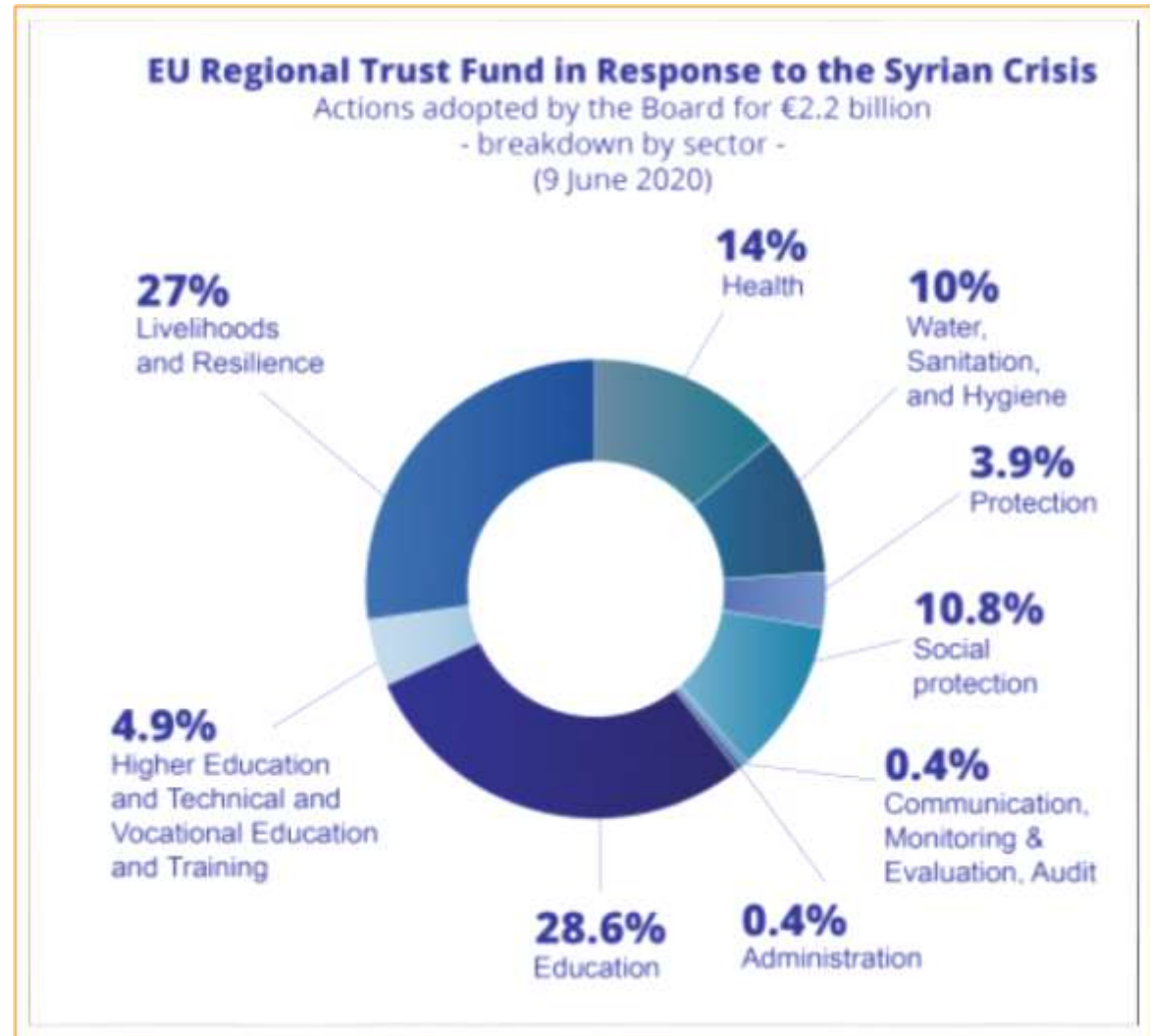
ELIGIBLE COUNTRIES:

Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan, Tanzania and Uganda.

EU Regional Trust Fund in Response to the Syrian Crisis

Countries covered:
Egypt, Iraq, Jordan,
Lebanon, Turkey, but
also some Western
Balkan states

Goals:
Improving **education,**
livelihoods and
health



For details check: https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/syria/madad_en

THANKS!

BOLDIZSÁR NAGY

E-mail: nagyb@ceu.hu

www.nagyboldizsar.hu

CEU International Relations and Legal Departments