

Adapting to an ever changing role model

Reflections on experiences gained before and after the accession

Presented by Boldizsár Nagy,
at the conference

**„Harmonizing Turkish Asylum Policy and Accession to the EU:
Bottlenecks, Challenges and Prospects”**

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Middle East Technical University and the Ankara Branch Office of UNHCR

The structure of this talk

- Harder than the Berlin wall?
- Phases of the development of the Hungarian asylum system (1989-2006)
- The construction of a Common European Asylum Regime and its effects on the accession (new member) states
- Critical elements in the acquis and in its reception in Hungary
- Competing narratives of the past and the present
- The fate of the European tradition
Civilize? Brutalize?

The Berlin Wall 1961 – 1989 and the frontier around Europe

- During the Wall's existence there were around 5,000 successful escapes into West Berlin. Varying reports claim that either 192 or 239 people were killed trying to cross and many more injured.

http://en.wikipedia.org/wiki/Berlin_Wall
visited 25 February 2006

The NGO „UNITED for Intercultural Action, European network against nationalism, racism, fascism and in support of migrants and refugees” lists 6336 documented asylum seeker and refugee deaths among those who wanted to reach safety and remain within.

Documentation on 29-04-2005 by UNITED

www.unitedagainstracism.org

found dead number name country of origin cause of death source

4/10/05	2	N.N. Morocco	died of starvation on way to E, bodies found on a boat drifting near Algerian coast line	
4/10/05	16	N.N. Morocco	presumed drowned near Algerian coast line on way to Spain	
4/4/05	1	N.N. Mauritania	died in minefield trying to cross the Turkish-Greek border	
4/4/05	1	N.N. Tunisia	died in minefield trying to cross the Turkish-Greek border	
3/31/05	12	N.N. Sub-Saharan Africa	died after 8 days without food and water in a boat drifting near El-Hierro (E)	
3/31/05	1	N.N., man Sub-Saharan Africa	died after 8 days without food and water in a boat drifting near El-Hierro	

...

Antonio Guterres, High Commissioner in the European Parliament on 21 February 2006

- „Yes, the decline in the number of refugees reflects peace agreements and positive developments in several countries, which have enabled many refugees to return home.
- But at the same time, I fear that it also reflects the barriers which have been erected by states seeking to deter and control irregular migration.

These barriers are not necessarily aimed at refugees but they do not differentiate between them and other categories of people on the move. And the less they differentiate, the fewer genuine refugees will overcome them.

The result is that it is more and more difficult or even impossible for people fleeing danger at home to reach safety elsewhere.

Phases of the development of the Hungarian asylum system (1989-2006)

Phases of the development of the asylum system. (1989-2006)

1. Up to October 1989:

no formal rules on refugee protection
only ideological phrase in the Constitution

2. 1989-1998:

First set of rules (not Acts of Parliament) on:

Temporary and subsidiary protection developed
in practice

1993 Act on entry and stay of foreigners: detailed
non-refoulement rule;

BUT: geographic limitation – UNHCR proceeds
in case of non-European asylum seekers

3. 1998 March 1 - 2002 January 1:

New Asylum Act and implementing Government decrees

- abolishes the geographic limitation

- incorporates three major forms of protection:

* Convention status

* temporary protection in mass influx

* a weak subsidiary protection

- the restrictive techniques developed by the EU member states appear

Phases of the development of the asylum system. (1989-2005)

4. 2002 January 1 - 2004 May 1:

The amended Act brings further harmonisation with the (old) *acquis* of the mid-nineties but removes subsidiary protection to the law on foreigners.

The refugee authority loses its independence, becomes part of the Office for Immigration and Nationality (of the Ministry of the Interior)

5. 2004 May 1 – 2006?:

Further amendments:

Dublin II incorporated

Decision levels reduced from 4 to 2 (1 admin, 1 court review)

6. 2006 ? –

Substantive harmonization due

New or amended law – transposing the qualification and the procedures directive + „leftovers” from the other elements of the *acquis*

The Transformation of Asylum In Europe

The construction of a Common European Asylum Regime and its effects on the accession (new member) states

The Transformation of Asylum In Europe

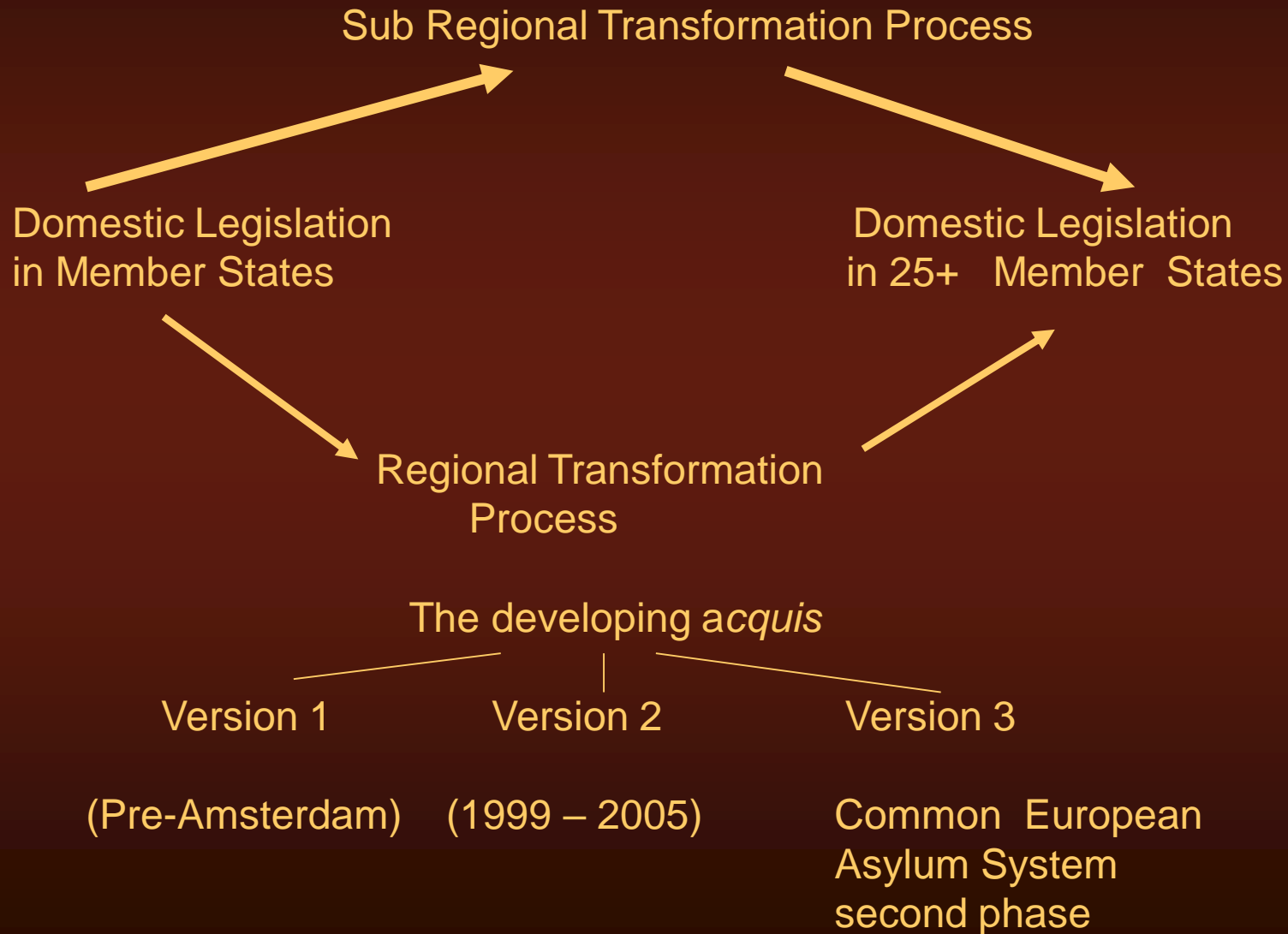
The Construction of a Common European Asylum Regime and its effects on the accession states

Stages of Transformation

- **Formative Stage**
central norms, notions and principles
conceived on the national level
- **Transformative Stage**
regionalisation of national norms and
practices
- **Reformative Stage**
regionalised legal instruments reconsidered

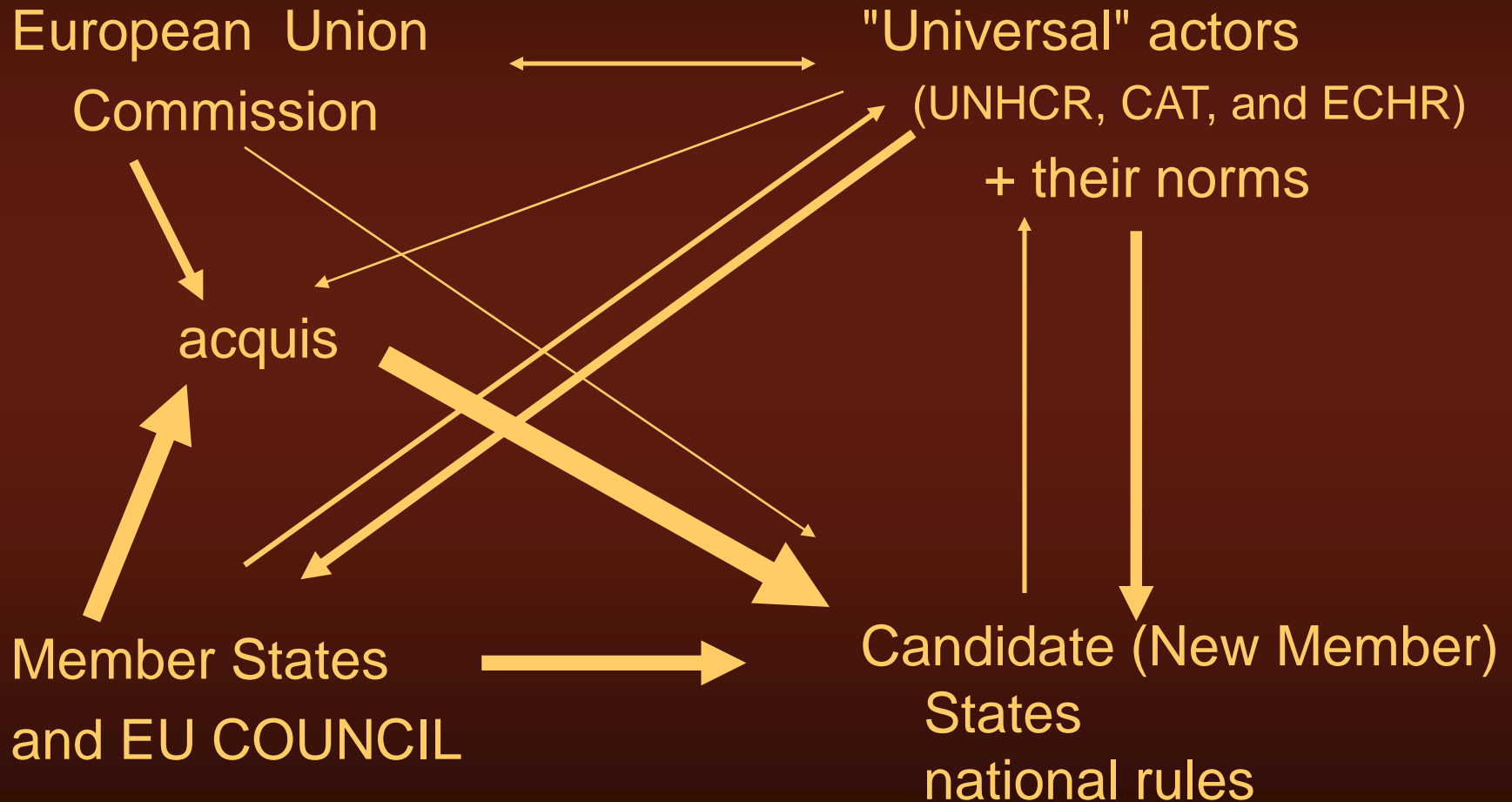
These considerations rely heavily on ideas developed by R. Byrne, G. Noll and J. Vedsted-Hansen as an outcome of our common research

Processes of Transformation



Universalism – regionalism – bilateralism

A scheme on influences in the asylum field in the accession period



The role of the new member states in the formation of the EU asylum acquis

- Until accession: the urge to submit to the EU expectations and conditions
- Transitory phase: 2003 April – 2004 May (?)
Comments on the two key directives (definition, procedure) invited, without voting rights
- After accession:
 - Majority voting after adoption of the „common rules and basic principles” of the Common European Asylum System i.e. 1 December 2005.
 - what alliances will form? (Border states vs. core states? The Salzburg group /A, Cs, H, Pl, Sk, Sl/)
 - Will there be a true sharing of cases or their consequences – beyond Dublin II?
 - Will the new member states reproduce the same pressure on the external neighbours as they had to endure?

Where are the CEEs heading?

Types of a (Democratic) Community

Responsibility for one's own fate

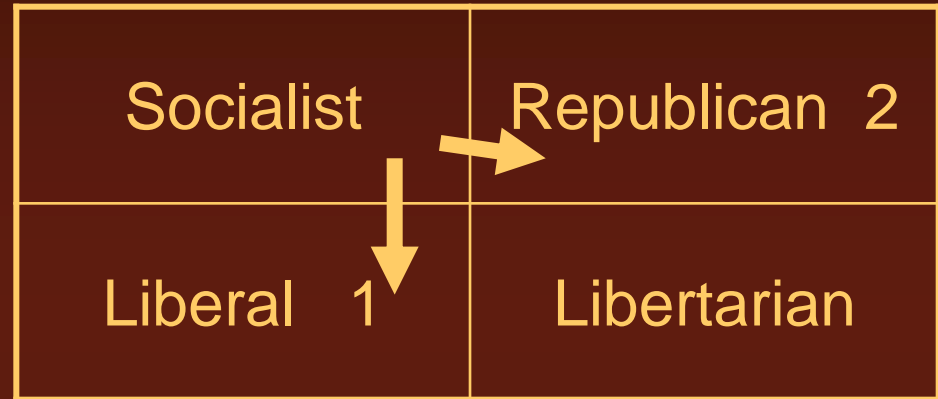
State

Self

Solidarity

Competitive

Relationship
with others



- 1: = Liberal, non-restrictive welfare state
- 2: = Nationalist, welfare chauvinist, exclusionist

*Figure adapted from and developed after
Dieter Fuchs- Hans Dieter Klingemann
Eastward Enlargement of the European
Union and the Identity of Europe, Figure 2*

Critical elements in the acquis and in its reception in Hungary

Critical elements in the present situation in the Hungarian Law – as an example

- Legal
 - Substantive law
 - Concepts, e.g.
 - Subsidiary protection
 - Safe third country
 - Detention for 12 months
 - Interpretation of terms
 - Procedural law
 - Access to lawyer
 - Appeal decision time limit (should be 30 days, was 1 year in 2004)
 - Lack of admissibility procedures (Safe third, Dublin II)
 - Repeated (subsequent) applications
- Practical
 - Disappearance of applicants
 - Lack of integration
 - Xenophobia

An example: subsidiary protection in the EU Qualification directive (2004/83/EC) and in Hungarian law

- **The EU approach**
- Subsidiary protection is a full protection status intended to extend protection to further categories of persons in need of it. It is part of refugee/asylum law.
- Unless otherwise requested by the applicant the claim to subsidiary protection is investigated in a single asylum procedure.
- The guiding principle is the approximation of the rights of refugees and the rights of those enjoying subsidiary protection.
- The freedom of movement is unlimited
- **The Hungarian legislator's approach**
- Humanitarian residence permit (authorized to stay status) is the exception to be granted to those who otherwise should leave the territory. It is an aliens' law measure
- The authorised to stay status may not be requested, but is established as a side product of the refugee status determination or of the aliens' law procedure (aimed at expulsion e.g.).
- There are substantive differences in the rights, for example in the field of employment or family unification.
- The person usually has to live in a designated place and not permitted departure leads to alien policing detention.

Another example: the reception conditions directive (2003/9/EC) transposal deadline: 6 February 2005.

The EU approach

- Provide information in writing within 15 days
- Issue document certifying name and status within 3 days
- Main rule: freedom of movement, confinement: exceptional, „when necessary” for legal reasons or reasons of public order

Bare minimum

- Medical examination possible
- Vocational training not obligatory

The Hungarian legislator's approach

- Oral info, no time limit
- Not everyone gets the document (detainees don't), time limit is not observed
- Those caught at illegal crossing or stay: detained = (at times: majority); severe limitations also on those at community shelters

Exploiting bare minimum

- Obligatory, even for HIV/Aids
- Vocational training not accessible

This is not an exhaustive list of lack of harmonization, just illustrations

Competing narratives of the past and the present

Competing narratives of the Hungarian past (and present)

The positive

- Effective protection was given to those fleeing from Romania, (former) Yugoslavia, *non-refoulement* is generally observed
- A comprehensive, human rights respecting and functioning legal and institutional system has emerged
- Universal standards and expectations are not rejected
- A professional ethos is developing both at the administrative and at the court level

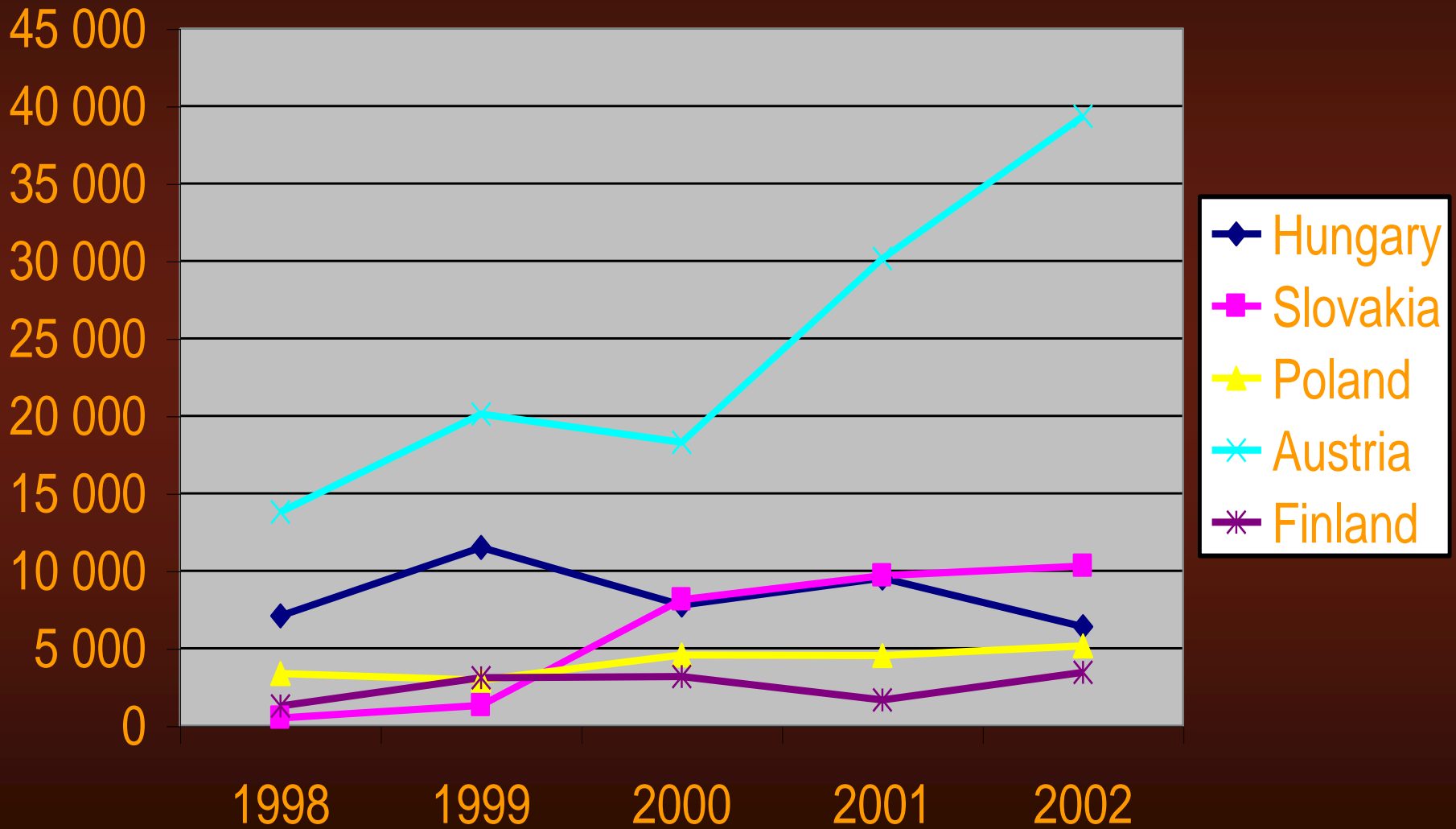
The negative

- In the early years (1989-1998) most of those qualifying as Convention refugees had other (ill-described) forms of protection with less rights
- Fear from becoming a target country led to questionable restrictive techniques
- Incongruity in self-perception and hypocrisy prevail – there is no (political) intention to meet global responsibilities
- The gap between the EU *acquis* and the law in force has not disappeared, the harmonization is still ongoing

The „waves of (unfounded) fear” narrative

- | | |
|--|--|
| 1) 1988-89: Socialist comrades must not be offended - return Romanian and GDR nationals | 1) Finally letting the Germans to escape to Austria and recognizing that those escaping Ceaucescu are refugees generated respect of the country |
| 2) – 1998: Lifting the geographic limitation would lead to dramatic upsurge in the number of applicants | 2) Indeed an increase in the number of arrivals, but <ul style="list-style-type: none">- Partly justified by new conflicts (Kosovo, Afghanistan)- Interrupted growth till 2001, last five years: constant decrease- Same pattern in other Central European states, which had no geographic reservation |
| 3) 2004: EU accession will lead to „flood” of refugees | 3) 2004 and 2005: years with the absolute minimum since 1989 |
| 4) Because of the Dublin regulations (+Eurodac) and Hungary’s geographic position, H. Will have to take back many asylum seekers | 4) - readmission agreements and safe third country rules could have had the same impact (albeit no Eurodac, yet) <ul style="list-style-type: none">- 2005: 159 effective taking over and taking back |

Lifting the geographic reservation - any impact? - comparative statistical data



The Fate of the European Tradition

Civilize? Brutalize?

Harmonization – key concepts and the impact of the acquis

Civilize?

- Extended protection categories (subsidiary, temporary)
- Gender and culture sensitive procedural minimum standards
- Substantive requirements and standards on the reception of asylum seekers
- Considerable support by way of pre-accession strategy tools (Phare, etc.) and after accession through the Refugee Fund
- Solidarity with certain vulnerable groups – especially in European context
- Regional Protection Programmes – orderly resettlement schemes

Brutalize?

- A generally restrictive, exclusionist approach, based on the presumption of non-genuine claims
- Restrictive interpretation of the definitions pushing to categories with less rights
- Heavily criticized „minimum standards” of procedure
- Non-access, non-entry techniques (visas, carrier sanctions, interception, border surveillance, detention)
- Efforts to shift responsibility for status determination and care (safe third country rules, readmission agreements, processing in the region of origin, regional protection programme)

EU membership – the impact of the institutions

Civilize?

- Commission, Council, Parliament: exposure to the international, forging professional allies, ammunition to fight domestic retrogrades
- European Court of Justice control
- Increased technical cooperation – improved access to COI info, trend-analysis, etc

Brutalize?

- Routine, remote from field, peer pressure for restrictions, inadequate preparation
- Guaranteed free hand in matters of national security, access to the ECJ limited to highest domestic court
- The vision of the security continuum – threats to data protection and privacy

Thanks!

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