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Hungary and the forced migration

An overview

I A reminder at the history of the migratory movements affecting Hungary

Hungary's position vis-à-vis regular and irregular migration has been changing. Although this paper will concentrate on forced migrants a few introductory words should set the frame of reference.

The Hungarian society was constantly exposed to large scale migration. The devastation caused by the Ottoman Empire which extended its jurisdiction or control to two thirds of the Hungarian Kingdom between 1526 and 1686 led to formal settlement policies of the Habsburg rulers the result of which (together with spontaneous migration) was that shortly before the year 1800 Hungarians constituted only 39% of the population of the territories which belonged to the Hungarian Crown. Out of the 9,3 million inhabitants 1,5 million were Romanians, 1,25 Slovaks, 1,1 Germans 0,8 Croats, 0,6 Serbs, 0,3 Ukrainians and Rusins, 0,3 Armenians, Greek and other nationalities and only 3,5 million were Hungarians.¹

The nineteenth century saw the regular outflow of more than 2 million Hungarian citizens, of which 1,35 million left for the US between 1873 and 1913.² After the First World War, the territory of Hungary shrunk to 1/3 of its earlier size and approximately 350 thousand persons from the territories under the new Romanian, Czecho-Slovak and Serbo-Croat rule opted to live in Hungary and resettled here. The second World War was similarly followed by inward migration: 190 thousand persons came from Romania, the Soviet Union and Yugoslavia. However, forced emigration and population exchanges also influenced the migration landscape: roughly 250 thousand Germans had to emigrate to Austria and Germany, and 70 thousand Slovaks chose to leave Hungary in the period when the same number of persons were coerced to leave Czechoslovakia.

In terms of regular migration the net balance of the small scale migration (less than 100 thousand for the whole period in both directions respectively) was approximately zero. After the second World War there was one large wave of roughly 100 thousand emigrants, and another after 1956 with double that many. Regular emigration between 1949 and 1989 was minimal (approximately 50 thousand) and the loss due to illegal departures between 1963 and 1989 is assessed as 71 thousand persons.³ The total inward migration between 1949 and 1989 was less than 100 thousand.

Summing up this brief history the following conclusions are offered:

¹ *Kosáry Domokos, Újjáépítés és polgárosodás 1711 - 1867*, (Budapest Háttér Lap- és könyvkiadó, 1990) p. 59

² Figures from: *Andorka Rudolf: Bevezetés a szociológiába*, (Budapest: Osiris, 1997) 259

³ All the data in this and the preceding paragraph from: *Andorka Rudolf: Bevezetés a szociológiába*, (Budapest: Osiris, 1997) 259

Regular migration has been a constant and important element in the life of the Hungarian society/state. It was not a society free from external impacts. Quite the contrary is true; its culture and way of life was moulded significantly by the mixture of different ethnicities migrating into the territory. Up until the last third of the 19th century immigration dominated. However, after the 1870's not only politically persecuted left but also simple peasants, farmers and skilled workers.

In contrast, migration affecting Hungary between 1918 and 1989 was rather characterised by escape from violence, political persecution and other forced population movements (such as dictated exchanges of inhabitants) than by regular migration.

Every fiftieth member of the population left within a half year after October 1956 in the aftermath of the failed revolution. Later, between 1963 and 1988, on average 2.700 Hungarian travellers refused to return to Hungary,⁴ most of whom applied for refugee status in the country of reception. Asylum seeking in Hungary was rare and not regulated by law: a few thousand Greek communists and some hundred Chilean communists were received upon Party instruction and outside of the formal legal framework.⁵ Illegal immigration was practically non-existent.

II Challenges shaping Hungary's role and policy in the last decade

There have been three major challenges affecting Hungary in the last decade. The first is the general migration pressure coming from or through Eastern and Southern Europe. The second is its specific geographic position making Hungary a neighbour to two conflict zones, Romania and former Yugoslavia. The third challenge is linked to the EU and has at least two prongs: one refers to Hungary at present being the external border of the EU and the Schengen area, the other to the requirement of legal and policy harmonisation with the EU.

A. The general migration pressure.

Central European states share the fate of Western Europe, in becoming destination countries for asylum seekers and illegal migrants coming from the CIS and the Balkan countries or further from the East and South. Since the public debate (if any) on migration regulation and control does not differentiate between regular, illegal and forced migration the usual suggestion is to control regular migration and eliminate illegal migration, without addressing forced migration according to its specifics and merits. The well known result of this is that legal and policy tools (not to speak of the physical barriers erected at borders) designed for the control of migration have counterproductive side effects on asylum seekers..

The fears evoked by the idea of 200 million Soviet citizens with a passport in hand and wishing to vote with their feet⁶ (together with the rest of the COMECON population) did not materialise, and the expected large wave of emigration from Central and Eastern Europe (implying legal departure from the country of origin and illegal entry or stay after legal entry) did not come true

⁴ *Dövényi, Zoltán: Zeitliche und räumliche Aspekte der Migrationswellen in Ungarn, 1918-1995, in: Seewann, Gerhard (ed.): Migrationen und ihre Auswirkungen Das Beispiel Ungarn 1918-1995 (München, Oldenburg, 1997) 7-33 (20)*

⁵ *Tóth Judit: Menedékjog - kérdőjelekkel (Budapest Közgazdasági és Jogi Könyvkiadó 1994) 72*

⁶ *See Larrabee, Steven: Down and Out in Warsaw and Budapest: Eastern Europe and East-West Migration, in: International Security 16 (1992 Spring) 5 - 33 (8 - 12)*

in the early nineties.⁷ This general statement is also valid in connection to Hungary. The number of legal immigrants (including simple long-term stayers like entrepreneurs) from the Soviet Union and its successor states rose only slightly in the years 1990 and 1991 and then went below the 1988 level. Their aggregate number for the years 1988 - 1994 was 8934.⁸ Immigrant numbers from other Eastern and Southern European states, as well as from the rest of the world, were also very small (15,2 % of all immigrants) if we disregard the two major countries of origin of immigration which feature so highly (Romania: 67,3 %, Yugoslavia 9,4 % in the period 1988-1994).⁹ The reasons for the high figures from these two countries are discussed below.

The total of the settled immigrants and long term stayers on 31 December 1997 was 115.953¹⁰, and three years later 114.941¹¹. Both numbers indicate a decrease from the mid-nineties.¹²

The number of illegal migrants and their trends are more difficult to assess.¹³ There are several indicators. One of the most reliable is the number of persons who were caught at the border, while trying to cross it, either wishing to come to Hungary illegally, or wishing to leave it.

Apprehensions by the Border Guards because of minor offence of illegally crossing the border in inward and outward direction

1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
inward									
8 348	5 318	2 814	2 219	2 100	1 705	3 045	2205	1978	2186
outward									
13 904	9 061	8 051	7 087	6 081	5 081	5 896	7896	4347	3472

Source: <http://www.b-m.hu/hatarorseg/hatarorizet.html> and direct communication to the author

The difference between the inward and the outward numbers is explained by the fact that many persons have a right to legally enter Hungary and therefore do not commit an offence while coming in, but do not possess the required entitlements (e.g. Schengen or national visa, means of subsistence) to enter into Austria, Slovenia or Slovakia and therefore try to leave illegally.

Interestingly enough we do possess statistical data on illegal crossings and attempts. Assuming that the majority of attempted crossers are apprehended the difference between the numbers below and above is a rough indicator of successful crossings. It can only be a rough indicator

⁷ See e.g. *Salt, John*: Current Trends in International Migration in Europe (Strasbourg Council of Europe, 1997 [CDMG (97)28]) 22 - 24 and Table 23

⁸ *Tóth Pál Péter*: Haza csak egy van? -- Menekülők, bevándorlók, új állampolgárok Magyarországon (1988 - 1994) (Budapest, Püski, 1997) 84

⁹ *Tóth Pál Péter*: Haza csak egy van? -- Menekülők, bevándorlók, új állampolgárok Magyarországon (1988 - 1994) (Budapest, Püski, 1997) 72

¹⁰ Of this Romanians (38 810) and citizens of former Yugoslavia (14 071) together make up 45,3%.

¹¹ Of this Romanians (47.515) and citizens of former Yugoslavia (12.869) together make up 52,5 % Data directly communicated to the author.

¹² The stocks of foreign population in Hungary were (on December 31):

1994	137.900
1995	139.900
1996	142.500

SOPEMI, *Trends in International Migration, Annual Report on Migration, 1998*, Continuous Reporting System on Migration (Paris, OECD, 1999)

¹³ For a recent effort see: Migrant trafficking and human smuggling in Europe A review of evidence with case studies from Hungary, Poland, and Ukraine, IOM (*Franck Laczko* and *David Thompson*, eds) Geneva, 2000, especially pp. 29-38

because some of the attempts are prevented by the police forces and those apprehensions do not show up in this table provided by the National Border Guard.

Successful border crossings and unsuccessful attempts together

1991	1992	1993	1994	1995	1996	1997	1998
29.092	20.358;	15.021	12.988	12.028	10.579	12.432	18.020

Source: <http://www.b-m.hu/hatarorseg/hatarorizet.html>

In order to prevent the need to stop people from attempting to illegally cross the border towards Austria, Slovenia and Slovakia i.e. on their route to the West, the border guards introduced a preliminary filter at the entry points examining whether those who enter fulfil the necessary conditions for staying in Hungary or entering a neighbouring country if that is their stated purpose. As the webpage of the National Border Guard describes, this practice, starting in October 1991, "was first based on a command of the head of the Border Guards and later [from 1 May 1994 -BN] on the basis of the Act on Foreigners"¹⁴ As a result of scrutinising the foreigners entering a significant number of foreigners have been denied entry:

Number of denials of entry (return at the border)

1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
236.323	855.997	723.669	268.546	328.028	252.242	54.672	32.854.	31 881	25 798

Source: <http://www.b-m.hu/hatarorseg/hatarorizet.html>
and data directly communicated to the author

These figures include all kinds of denials, including those for the bad mechanical condition of the vehicle and other causes not related to this study. Nevertheless the very high figures for 1991-1992 are a source of concern, if one bears in mind the Serbo-Croat and the Bosnian wars taking place in neighbouring (former) Yugoslavia!¹⁵

A more precise indicator of migration related offences may be the number of expulsion orders issued by the border guards.

Number of expulsion orders issued by the Border Guards

	1995	1996	1997	1998	1999	2000
Total	10053	9259	9521	15981	11673	12016
Of which						
Romanian	4725	4787	6291	3154	6679	7 621
Yugoslav	2569	2011	2309	6944	2301	767
Turkish	1034	738	270	267	172	163
Ukrainian	183	181	229	219	108	200
African	0	248	53	448	96	25
Asian	40	252	369	1244	427	144

Source: Data provided by the Border Guards to the author and <http://web.b-m.hu/> and

¹⁴ Source: <http://www.b-m.hu/hatarorseg/hatarorizet.html> visited on 9 January 2000

¹⁵ I still assume some inconsistency in the data. Probably the very large figures are based on guesses of not recorded events, whereas the smaller figures for the more recent years on the one hand indicate the learning process by potential entrants and also the disappearance of certain types of movements giving rise to frequent denials of entry (e.g. petty trade across the border, involving several crossings per day).

data directly communicated to the author

Of the nationalities not mentioned in the above table only the following groups had more than a hundred citizens/year expelled by the border guards: Afghanistan, Algeria, Bulgaria, China, Egypt, Iraq, Moldavia

The last component helping to assess the magnitude and the trend of illegal border crossings is the figure of procedures started by the border guards in cases of the smuggling of human persons.

Criminal law procedures initiated against the suspected human smugglers:

1996	227
1997	305
1998	558
1999	543
2000	588

Source: Data provided by the Border Guards to the author

The data refer to the number of procedures. Most of them include several persons and several acts of smuggling. (the number of smuggled person affected by these cases was 6467 in 1999 and 4158 in 2000.)

The increase in the number of smugglers against whom procedures have been started and the number of expulsions against non-European citizens leads to the analysis of the movement of those persons who apply for refugee status. The major challenge of the last three years has been the confrontation of the Hungarian refugee organisation¹⁶ with an unprecedented number of asylum seekers from non-European territories.

B Hungary as a country of asylum

The period since 1988 can be divided into four phases according to the origin of the persons arriving and the state of the relevant regulation. The first period lasts from 1987 until mid-1991 and is dominated by the arrival of asylum seekers from Romania. The second period covers the Serbo-Croat war and the early phases of the Bosnian conflict until the end of 1992. The third is the relatively calm half decade until 1998, dominated by the arrival of asylum seekers from Bosnia-Herzegovina and Yugoslavia. The fourth phase is the present: when the number of asylum seekers to be dealt with by the Hungarian refugee system has multiplied and the dominant groups come from non European territories.

In the first three periods two parallel systems of refugee status determination were in operation. Besides the Hungarian Government's refugee determination procedure, the Branch Office of the

¹⁶ The generic term "Hungarian refugee organisation" means the formal government entity entrusted with status determination and assistance to refugees and all other elements of the state system (from border guards to municipalities) performing legally designated roles in taking care of asylum seekers and refugees. The formal entity's name and position has changed over time. An inter-ministerial committee was first replaced by the Refugee Office of the Ministry of Interior in April 1989, renamed as the Office for Refugee and Migration Affairs in 1993. It existed as a semi-independent organisation under the aegis of the Ministry of Interior until 1 January 2000 when it became incorporated as a directorate into the Office of Immigration and Nationality Affairs of the Ministry of Interior.

UNHCR established in 1989 in Budapest ran a parallel determination system and recognised asylum seekers under the protection of UNHCR. This was necessitated by the fact that Hungary adhered to the 1951 Geneva Convention and its 1967 Protocol with the geographic reservation, restricting the Convention's application to asylum seekers fleeing European events.

1. The first phase

The entry into force of the Geneva Convention and other legislative acts, regulating the refugee procedure and status¹⁷ was preceded by the gradual involvement of the Hungarian political leadership in the matters of escapees from Romania. The Communist Party¹⁸ and the Government stepped next to, and took over responsibility from, NGOs and religious institutions ever more openly admitting intentions to support both the Hungarian asylum seekers who had arrived from Romania and the GDR citizens who were looking for an escape route to the West through Hungary. The first sign of these intentions was a Government Decree on the "Settlement Fund" allocating money from the budget for the care of asylum seekers, promulgated on 28 June 1988, which euphemistically avoided the term "refugee" and spoke instead of "foreigners staying in Hungary for longer duration".

In the first period of influx until Summer 1991 (the start of the entry of Southern Slav asylum seekers) arrivals involved almost exclusively Romanian citizens, frequently illegally crossing the green border. Seventy to ninety percent of them were ethnic Hungarians who spoke the language of the receiving country, were familiar with its customs and frequently had relatives and family members here. The attitude of the Hungarian Government was also simple: it treated these people as potential immigrants, members of the Hungarian nation who had lived in a minority position in Romania but chose to join the motherland. Therefore, the priority of the authorities was to enhance their speedy integration, not to limit state action to protection and provisional solutions. Asylum seekers were granted residence and work permits without preconditions, could move freely within the country and were relieved from many administrative hurdles in terms of documentary evidence of professional qualifications or formal conditions for taking on a bank credit.

The number of asylum seekers in the first wave

		Until the end of 1988	1989	1990	1991, until June 1,	Total until June 1, 1991
Total		13,173	17,448	18,283	2,629	51,533
	From Romania	13,098	17,171	17,416	2,103	49,788
Formally recognised as refugees		0	185	2,561	149	2,895

¹⁷ The Convention and the Protocol together became Law-Decree No. 15 of 1989 (1989. évi 15. tvr.) see Magyar Közlöny (Official Gazette) 1989 No. 60, 1022 p., entering into force on 15 October, 1989. The Cabinet -Decree (101/1989. Mt. rend.) on the and the Law-Decree on the status of refugees (1989. évi 19. tvr) entered into force on 15 October 1989. The Law No. XXXI. of 1989, radically reshaping the Constitution and enacting the new rules on asylum was promulgated on 23 October 1989.

¹⁸ The Hungarian Socialist Workers Party

Source: Authors calculations based on data of the Office of Refugee and Migration Affairs¹⁹

2. The second phase

The second phase lasting from the Summer of 1991 until the end of 1992 was characterised by a totally different composition of asylum seekers. By the end of 1991, the proportion of Yugoslav citizens among the total of 54.693 asylum seekers had reached 87 % and that of Romanian citizens dropped to 10%. The arrival of Croats, Serbs, Bosnian Muslims, Albanians and Russians meant that for the first time the state organs were confronted with a real refugee flow, calling for rapid reactions and brave emergency solutions.²⁰ Contrary to the ethnic Hungarians who had come from Romania with the view of settling here, the refugees from Croatia and Bosnia did not intend to integrate, but were awaiting the end of hostilities when they could voluntarily return. The only alternative in their eyes was resettlement in the West.

The number of asylum seekers in the second wave

		June 1, 1991- December 31, 1991	1992	Total
Total		52,064	16,204	68,268
	From (former) Yugos- lavia	approx. 48,000	15,021	approx. 63,000
	From Romania	1791	844	2635
Formally recognised as refugee		285	472	757

Source: Data of the Office of Refugee and Migration Affairs

3 The third phase

As the fighting moved down to Bosnia in 1992 and the situation in Croatia stabilised, the stream of asylum seekers slowed down and a transformation in the composition could be observed. Of the 5.366 persons entering Hungary in 1993 with the aim of receiving protection and some sort of status, 4.321 were ethnic Hungarians²¹. This signalled that inhabitants of Serbia - especially in the region where most of the 450.000 ethnic Hungarians live, Vojvodina - wished to escape either individualised persecution committed or tolerated by the state authorities, or the threat of being drafted into the Yugoslav army. Those threats diminished after 1995 and only reappeared in connection to the Kosovo conflict in 1998.

The third phase in Hungary's reception of asylum seekers

	1993	1994	1995	1996	1997	total

¹⁹ Unfortunately there is a lack of consistency in the data provided by the Office of Refugee and Migration Affairs. Figures for the same period may differ in subsequent communications. Even interviews with the person compiling the statistics could not entirely clear up the inconsistencies.

²⁰ Interesting details are revealed in Ágnes Ambrus' Background Notes to Z. Hajtmanszki - B. Nagy, *Honvagyók, (Longing for Home)* Pelikán Budapest, 1993 at pp.112-113

²¹ Office of Refugee and Migration Affairs, *Menekültügyi Statisztika (Statistics on Asylum)*, Budapest, 1994, (mimeo, without page numbers)

Total		5336	3375	5912	1259	698	16580
	From Yugoslavia (Serbia and Montenegro)	4050	2016	1251	421	221	7959
	From Bosnia- Herzegovina	377	324	3610	116	86	4513
	From Romania	548	661	523	350	131	2213
From the total							
	Status recognition procedure started	468	207	130	152	177	1134
	Formally recognised as refugee	361	239	116	66	27	809
	Formally denied status	45	29	32	42	106	254

Source: Data of the Office of Refugee and Migration Affairs as compiled by the author (The number of recognitions in a given year may exceed that of the procedures, because of the pending cases from the previous year. The figures refer to individuals not to applications)

4. The role of the UNHCR until 1998

It is necessary to describe the activity of the UNHCR in addressing the issue of asylum seekers. In connection with the first two large influxes from Romania and Yugoslavia the UNHCR was very active and generous in contributing both financially and with its accumulated experience in handling such situations. During the third phase, its role in status determination became increasingly important accompanied by a changed pattern of financial support.

Statistics concerning status determination procedures and recognitions done by the UNHCR Branch Office in Budapest in relation to asylum seekers of non-European origin.

Year	Applicants	Recognised
1990	450	12
1991	380	15
1992	401	17
1993	261	35
1994	231	15
1995	460	62
1996	515	106
1997	1411	132
1998 January - March ²²	268	77
Total	4377	471

Source: UNHCR Branch Office data sheets on file with the author

As the comparison of the above tables shows, from 1994 onwards the UNHCR had more procedures conducted, and in 1996 and 1997 more persons recognised as refugees, than the whole Hungarian administration. It is worth recalling that the UNHCR Office only had one or two persons available to do the status determination whereas the Office for Migration and Refugee Affairs was operating through six "local organs" usually with more than one determination officer.

²² After March the Hungarian authorities did the determination for this group as well.

5. The fourth phase

The fourth period came about after extremely long gestation. Already in 1989 the Decree of the Government on the procedure of status determination and the very brief Decree having the force of Law concerning the rights accompanying refugee status were adopted with a view to having provisional legislation in place until the complete and final rules could be adopted in Parliament. That was expected to happen within one or two years. However, the new Act on Asylum (Act No CXXXIX) was only adopted on 9 December 1997 and entered into force on 1 March 1998 together with the two government decrees (Nos 24 and 25 of 18 February 1998) regulating details of the procedure and the conditions of support to the protected categories.²³ The challenge to be faced was implied in the growing number of asylum seekers ringing the doorbell of the UNHCR Office in Budapest. What would happen if the Government removed the geographic reservation and the state organs were made exclusively responsible for the maintenance of the asylum seekers and the timely decision on their status? Preliminary - and unpublished - analyses produced by the Ministry's staff warned against the lifting of the geographic limitation and spoke of enormous costs and insurmountable problems, e.g. related to the lack of data concerning conditions in the territory of origin.

Nevertheless the combined pressure of the UNHCR and the European Union together with the domestic NGO sector could not be resisted any longer, and the Government finally decided to submit to Parliament and adopt - with the support of the opposition - the above mentioned new regulation allowing asylum applicants from all corners of the world to turn to the Hungarian refugee institutions.²⁴ UNHCR stopped determination after March 1 1998.

As the statistics show, the fears were partly justified. Indeed both the size and the composition of the asylum seeker group has radically changed posing new, still unresolved problems.

The fourth phase in Hungary's participation of asylum seekers reception

		1998	1999	2000	total
Total		7118	11499	7801	26418
	of which				
	Yugoslavia (Serbia and Montenegro)	3306	4783	692	8781
	Afghanistan	1077	2238	2185	5500
	Iraq	542	543	889	1974
	Bangladesh	337	1314	1656	3307
	Algeria	314	179	95	588
	Sierra Leone	190	149	147	486
	Turkey	153	91	116	360
	Pakistan	127	322	220	669
	Romania	124	16	36	176

²³ The Law was published in Magyar Közlöny (Official Gazette) 1997 No. 112, at p. 8359, the two implementing Decrees in Magyar Közlöny (Official Gazette) 1998 No. 10, at p 698 and 705 respectively. Small but substantive amendments have occurred since which will be discussed in Chapter III C.

²⁴ The removal of the geographic reservation was adopted with a vote of 287 in favour 4 against, (two independent MP-s one from the /then/ coalition one from the opposition) and 6 abstentions. (2 independent, 4 opposition MP). The Law itself had 271 supporting votes, 21 against and 3 abstentions. (Opponents were 17 members of the presently governing force [FIDESZ-MPP], 3 independent MP-s and the Minister responsible for the intelligence services)

	Nigeria	102	130	94	326
	Sri Lanka	81	174	249	504
	Somalia	78	65	152	295
	Armenia	51	189	123	363
	India	61	121	235	182
	Ghana	25	90	22	137
	China	10	120	198	328
	Bosnia-Herzegovina	3	322	5	325
From the total					
	Status recognition procedure started	7118	11499	7801	26418
	Formally recognised as refugee	362	313	197	872
	Formally recognised as person authorised to stay	232	1776	680	2688
	Procedure terminated	1174	5766	4916	11856
	Formally denied status	2790	3537	2978	9305
	Ratio of protection (status+ authorisation to stay) to denial	1:4,9	1:1,7	1:3,4	1:2,6

Source: Data of the Office of Refugee and Migration Affairs as compiled by the author²⁵

The table shows those groups which had at least 80 applicants in one of the three years

In order to realistically assess the significance of the figures, it should be borne in mind that after the entry into force of the 1997 Law on asylum those who had been recognised earlier by the UNHCR in Budapest and were still in the country had a right to be recognised as a refugee under the new Law. Therefore the 362 recognitions in 1998 include 193 persons who had been mandate refugees before, which reduces "new" recognitions to 169 in 1998.

It would be hard to overestimate the importance of the challenge. If the Kosovo Albanians and the Hungarians from Voivodina and other parts of Yugoslavia, who make up practically the whole of the Yugoslav asylum seeker group, are set aside then less than 10 percent of the remaining applications came from European persons. What this reveals is that Hungary has irrevocably become a part of the global refugee scene and therefore has to seek responses which are adequate to the character of this development, i.e. there is no justification to develop an idiosyncratic national response promoting the national interest only. This is certainly a change from the early period (1988 - 1991) when the system handled a large caseload, but with very specific goals in mind.²⁶ Since the characteristics of the period will be the subject of the subsequent analysis one may stop here, not without, however, an important note concerning the use of the data.

6. Problems with the data (Where are all the new arrivals gone?)

²⁵ See also: Asylum Trends in Europe, 2000 – Part II United Nations High Commissioner for Refugees (UNHCR), 30 January 2001, Table 10 at p. 28

²⁶ Maryellen Fullerton thought that the system in essence worked as a disguised immigration regime promoting the "return" of Hungarians from the neighbouring countries, with the help of the international community. See: *Fullerton, Maryellen: Hungary, Refugees, and the Law of Return*, in: *International Journal of Refugee Law*, vol. 8. (1996) No. 4. 499 - 531

There are enormous problems with the reliability of data. It should suffice to look at the statistical overview published by the UNHCR in July 1998²⁷ which shows no asylum applicants in Hungary before the year 1995 and even for the years afterwards uses figures which are much smaller than in those in use within Hungary. The problem is not Hungary-specific. John Salt, a leading expert on European migration issues bitterly complained in 1997 about the patchy availability of migration data in Europe, their ambiguity and inconsistency and the specific Central and East European difficulties with the statistical systems.²⁸

Caution is especially due with data related to the early phases. Undoubtedly they are largely inflated. In the early years whoever got into contact with the refugee authorities immediately appeared as a unit in the "new arrival" rubric.

A look at the break-down of the fate of the new arrivals confirms this assumption.

What happened to the new arrivals between 1987 - 1997 December 31?

Total	135 077	%
Refugee status determination started	6069	4,49
Temporary protection granted	73 985	54,7
No trace of any further move:	55 023	40,7

Source: Data of the Office of Refugee and Migration Affairs Yearly statistics for 1997 (in Hungarian, mimeo) p. 5

Another indication of the inflated character of the figures used in the new arrival rubric is the stock data. Noting the major ways of leaving the asylum statistical rubrics helps assess the magnitude of distortions.

Most of the asylum seekers from Romania (showing up in the "new arrivals") never entered any procedure but went through an (informal) immigration route. Therefore by late 1991 very few were still supported by the refugee system. Practically all of those who remained in Hungary have in the meantime achieved permanent immigrant status or naturalised themselves.

The asylum seekers from the Serbo-Croat war either returned home in 1991 - 1992 or managed (legally or illegally) to get to the West. By the end of 1992 there were 3.800 persons living in reception centers, and a further 19.100 were living in private accommodation but received a regular allowance from the Refugee Office through the local administration.²⁹ In December 1993 of those who had come from Yugoslavia and possessed a certificate on temporary protection,

²⁷ UNHCR 1998 Refugees and Others of Concern to UNHCR Statistical Unit, UNHCR, Geneva, July 1998, at p. 89 (Table 17) (The 1997-78 State of the World's Refugees' statistical annex does not even list Hungary (or Poland) among the industrialised states which received applications in the period 1987-1997!)

²⁸ *Salt, John: Current Trends in International Migration in Europe* (Strasbourg Council of Europe, 1997 [CDMG (97)28]). (5-6)

²⁹ "Összefoglaló adatok" Mimeo by the Refugee Office of the Ministry for Interior, 20 January 1993

2.327 lived in reception centers and 7211 outside.³⁰ By the end of the next year those figures dropped to 1.693 and 6.045 respectively.³¹

Although there are no precise figures on voluntary return and resettlement of those temporarily protected from the Bosnian war, it is fair to assume that the majority who came managed to return (even if not to home, but to Bosnia-Herzegovina), and a smaller segment either resettled within the organised framework to the West, for example in Canada or Australia or simply crossed the (Western) border illegally. Several hundreds of the Bosnians entered the immigration route in Hungary and have since achieved long-term or permanent immigrant status. Weeks before the entry into force of the new regulation, in January 1998, there were 428 persons living in the reception centers³² and another 2573 persons were still carrying the identity card of the temporarily protected. Of these 1567 were of Hungarian ethnic origin, 520 of Croat, 760 Bosnian, 113 Serb, and 41 other.³³

Recent years, especially since 1998 have reinforced another pattern of "leaving the statistics": The person is caught by the border guards or the police as a foreigner without the right to stay or as someone attempting an illegal border crossing. (S)he is then subject to an alien's police procedure sanctioning the minor offence of attempted illegal border crossing or staying within Hungary without legal grounds. That procedure usually leads to expulsion. During that procedure the foreigner applies for refugee status and while the determination procedure is in process (s)he disappears, presumably across a border leading to Western Europe. It was precisely this phenomenon which was a major source of concern; first in Austria, then as Austria became a member of the European Union and later the Schengen area, the concern spread to other participating EU member states.

C. The challenge posed by the EU

1. Bordering Austria and the European Union

During the last decade the perception of Hungary and her refugee related activities has changed. Letting the East German escapees through the Hungarian-Austrian border in 1989 and not returning to Romania tens of thousands of Romanian citizens in 1988-1989 was seen as a brave move of a socialist state breaking away from the discipline of the camp. The only problem posed by the brave move was that many of the saved souls tried to move into Austria, which was quick to introduce visa requirement for Romanian citizens on 14 March 1990³⁴ thereby forcing on Hungary to be the hero.

³⁰ "Menekültügyi Statisztika" Data of the Office of Refugee and Migration Affairs Yearly statistics for 1993 (in Hungarian, mimeo) unnumbered page

³¹ "Menekültügyi Statisztika" Data of the Office of Refugee and Migration Affairs Yearly statistics for 1994 (in Hungarian, mimeo) unnumbered page

³² Debrecen, Békéscsaba and Bicske. In a small village in Southern Hungary called Vése there was also a facility hosting temporarily protected persons, although formally not qualifying as a reception centre.

³³ " Data of the Office of Refugee and Migration Affairs in a mimeo dated 4 February 1998.

³⁴ *International Helsinki Federation for Human rights / Österreichisches Helsinki Komitee: Asylland Österreich: Zutritt Verboten?* Wien, Juni 1990

So far these were national decisions, not affecting the European Community, member states of which were happy to note that in fact Hungary does not produce asylum seekers any longer, which was the only direct effect for them.³⁵

The Serbo-Croat war starting in 1991 was the first event which produced a situation in which the interests of the Western European states were directly affected by Hungary's action. It was in the interests of the European Community as well as the non-member Western European states, such as Austria, that Hungary take in as many asylum seekers as possible and offer a level of protection and maintenance that would ensure that only a few of those who arrived in Hungary would migrate further, whether legally or in an irregular fashion. There was a fortunate coincidence of the intentions, because in those years Hungary's priority was to prove that it deserved to be accepted as a democratic, human rights respecting, developed nation.³⁶ The objective of the majority of the asylum seekers harmonised with this goal: they insisted on staying in reception facilities in the south of Hungary, next to Croatia, so that voluntary return could be easy and informal.

The impact of the Western European practice of not recognising asylum seekers from the Yugoslav conflicts as Convention refugees, or even securing them access to the determination procedure, was that the Hungarian government followed suit. In a fully extra-legal manner most of the asylum seekers from the Serbo-Croat war, and later from the Bosnian inferno were de facto prevented from launching a Convention status claim. They received instead a legally non-existent status, that of the temporarily protected. In terms of policy, Hungary gave up independent policy making in relation to the incoming persecuted and adjusted to the Western European pattern without scrutinising its conformity with international law, or Hungary's own legal requirements.

The fact that Hungary has a 356 km long border with Austria increasingly became a source of concern in Austria after the 1988 removal of the technical devices preventing the illegal crossing of the border. Austria wished to return persons who had crossed the border in an irregular fashion. Whereas Hungary was obviously ready to take its citizens back and Austria did not hesitate to send them back, the issue at stake was the problem of third country citizens, primarily Romanians, who after the introduction of the visa requirement had no other choice but to cross through the green border or try other methods of entering unnoticed. The Austrian pressure led to the conclusion of the readmission agreement to be discussed below, but that did not enter into force until the readmission agreement with Romania was also operational.

With Austria becoming the member state of the European Union on 1 January 1995 and later starting to apply the Schengen Implementing Convention of 1990³⁷ on 1 December 1997, the border between the two countries became the object of the relationship between the European Union and Hungary and between implementing states of the Schengen system and Hungary.

2. Legal and policy harmonisation with the EU

³⁵ Salt, John, Singleton, Anne., Hogarth, Jennifer. Europe's International Migrants, Data, Sources, Patterns and Trends, London: HMSO1994, 213, Figure 10.20

³⁶ For further details see e.g. Nagy, Boldizsár: Changing Trends, Enduring Questions Regarding Refugee Law in Central Europe in: Pogany, Istvan ed Human Rights in Eastern Europe Edward Elgar, Aldershot, 1995, 192 - 194

³⁷ International Legal Materials, vol. 30, (1991), (84 - 147).

The currency of the day in Hungary for the last decade undoubtedly was the wish or need to harmonise law and policy with that of the European Union.³⁸ As the Commission recalled in Agenda 2000, published in 1997:

"As stated in the April 1994 Memorandum accompanying Hungary's application for EU membership,

'Since the formation of an independent Hungarian State 1,000 years ago, this country has been closely linked to Western cultures and values ... Within the newly established democratic institutional framework the political conditions for reintegration into the main trend of European development are now fulfilled. For Hungary, joining this process and using the achievements of European integration to carry out fully its social and economic modernisation is a historical necessity. It is also a unique possibility, for which there is no real alternative.'

Successive Governments since 1990 have maintained this as the essential objective of Hungary's foreign and domestic policy."³⁹

The early contacts with the EU did not involve matters of justice and home affairs. Those issues, especially the issue of controlling illegal migration, were left to other fora, such as the Budapest Group and bilateral cooperation.⁴⁰ The Europe Agreement concluded between Hungary and the European Communities and its member states in 1991⁴¹ related to the first pillar and did not directly regulate issues under the third pillar. Only at the Essen European Council held on 9 - 10 December 1994 was it decided that the structured dialogue between the EU and the associated countries should cover the second and third pillar as well. The fairly unsuccessful structured dialogue was replaced with the accession partnership. At its meeting in Luxembourg in December 1997 the European Council decided that the Accession Partnerships would be the key feature of the enhanced pre-accession strategy. The Hungarian Accession Partnership⁴² called for "more effective border management systems, especially on the future borders of the European union. ... Attention needs to be paid to visa policy. The fight against organised crime, including drug trafficking, trafficking in human beings, money laundering, counterfeiting, false documents and fraud must be intensified"⁴³ The revised version⁴⁴ repeated these priorities and stressed the need to increase the capacity of the asylum system. In addition to the accession partnerships there is the European Conference which is intended to be a forum for discussions in the areas covered by justice and home affairs.

The pressure to harmonise law and practice is constant. Already Agenda 2000 - incorporating the Commission's view on Hungary's accession - called for the lifting of the geographic reservation and stressed the need to ensure that sufficient provision is made for support to refugees of non-Hungarian origin. It also called for substantive capacity building.

³⁸ See e.g. Zellner Wolfgang/Dunay Pál: Ungarns Außenpolitik 1990-1997 -- Zwischen Westintegration, Nachbarschafts- und Minderheitenpolitik, Baden-Baden, Nomos, 1998 129-137

³⁹ Commission Opinion on Hungary's Application for Membership of the European Union Brussels 15 July, 1997 Doc /97/13

⁴⁰ Nagy Boldizsár: Migration between the European Union and Hungary and the Regulating Law: A Case Study in: European Public Law 3 (1997) Issue 3, at 381 - 386 describes this cooperation in more detail

⁴¹ Done on 16 December 1991, entered into force on 1 February 1994, OJ 1993 L 347/2

⁴² 29 June 1998 O.J. C 202/33

⁴³ Accession Partnership, (29 June 1998 O.J. C 202/33) point 3.7 at p. 41

⁴⁴ http://europa.eu.int/comm/enlargement/report_10_99/download_1999.htm, visited 3 March 2001

The same "Leitmotiv" penetrate other documents. The Protocol incorporating the Schengen acquis into the framework of the European Union⁴⁵ adopted in 1997 together with the Amsterdam Treaty in its Article 8 uses plain language:

"For the purposes of the negotiations for the admission of new Member States into the European Union, the Schengen acquis and further measures taken by the institutions within its scope shall be regarded as *an acquis which must be accepted in full by all States candidates for admission.*" (Emphasis added -BN)

The Joint Action Plan of the Commission and the Council, adopted on 3 December 1998 in Vienna⁴⁶ reminds countries applying for membership, that "Justice and Home Affairs will have a special significance for their application" even if the JHA acquis is prone to change "over the pre-accession years".⁴⁷

The negotiation on the Justice and home affairs chapter in the framework of the accession negotiations were opened on 26 May 2000⁴⁸ and at the time of writing this paper were still pending. The Hungarian negotiating position⁴⁹ does not include the word "derogation", but in soft terms expresses the wish to introduce a special visa regime for Romania if by the time of accession that country would still appear on the list of countries, whose citizens need a visa to enter the Union's territory.

"Historical necessity and unique possibility" argued the Hungarian application for membership and this remained the prevailing view of what awaits Hungary. The question is how heavily that burden of historic necessity falls and will fall on the shoulders of the nation and the incomers, what it means in relation to the refugee scene.

III The practice in its changing form

Keeping in mind that this is not a historic study⁵⁰ I will only briefly refer to past activities of the actors forming Hungarian refugee policy and will rather focus on the developments leading to the adoption of the current regulation and accompanying practice.

⁴⁵ *Duff Andrew* (ed.) *The Treaty of Amsterdam Text and Commentary*, (Federal Trust, London 1997) 280 - 284

⁴⁶ OJ C 19/1 23.1. 1999

⁴⁷ *Ibid*, point 21. at p. 5. This footnote should also pay tribute to the bureaucratic poets who invent such horrifying gems as this "pre-accession years".

⁴⁸ <http://www.mfa.gov.hu/euanyag/szi/eu/csatlstrategesz.htm>

⁴⁹ <http://www.mfa.gov.hu/euanyag/szi/eu/csatlstrategesz.htm>

⁵⁰ For descriptions of the early period see: *Nagy, Boldizsár* Before or After the Wave. Thoughts about the Adequacy of the Hungarian Refugee Law, in: *International Journal of Refugee Law*, Special Issue, 3 (1991) No. 3; *Baehr Peter R/Tessenyi Géza* (eds): *The New Refugee Hosting Countries: Call for Experience - Space for Innovation* (Utrecht SIM Special No. 11, 1991); *Fullerton, Maryellen*: Hungary, Refugees, and the Law of Return, in: *International Journal of Refugee Law*, 8. (1996) No. 4. 499 - 531; *Adelman, Howard/Sik Endre/Tessényi Géza* (eds.), *The Genesis of a Domestic Regime: The Case of Hungary* (Toronto, York Lanes Press, 1994); *Szabó Máté*: From "Catacomb" to "Civic" Activism: Transformation of Civil Right Movements in Hungary after 1989 in: *Fullerton, Maryellen/Sik Endre/Tóth Judit*: *From Improvisation toward Awareness? Contemporary Migration politics in Hungary* Yearbook of the Research Group on International Migration of the Institute for Political Science of the Hungarian Academy of Sciences, 1997, Budapest, 1997, pp 40 - 54; A thoughtful and well informed retrospective is offered by: *Piotr Kazmierkiewicz*: *Integration of Hungary into the European Migration and Asylum Policy Framework: Actors and*

A. Impact of the non-domestic actors including Western European states and the European Union

The international element in the formation of the Hungarian policy and practice relating to refugees in the early period was mainly free of the restrictive tendencies of the Western European states, let alone of the European Union. Back in 1988-89 those systems themselves were much more liberal, it was still before the London Resolutions⁵¹. However, I think that the more important reason was that the dominant players in the early "imprinting" period were UNHCR and the Council of Europe.

UNHCR brought posture, standards, money and experience to Hungary. UNHCR's message was clearly formulated: dealing with refugees should not be subject to socialist state politics within the bloc, but a non-political, humanitarian action. Of course, that was politics proper, since it entailed the deterioration of the bilateral relationships with Romania, the breach of (unpublished) bilateral agreements, according to which Hungary ought to have forcibly returned Romanian citizens unwilling to return to the oppressive regime and also ought to have stopped them when trying to cross into Austria. UNHCR gave moral, political and financial support⁵² to break away from the past cooperation in supporting other oppressive regimes.

Material support by the UNHCR had three priorities: assistance to help victims of the Yugoslav crisis;⁵³ settlement (integration) of protected persons,⁵⁴ and care and maintenance provided by implementing agencies to non-European refugees.⁵⁵

Money is not all. The intellectual, political and moral impact of UNHCR was and still is equally important. The four representatives succeeding each other⁵⁶ had different agendas, but the last three certainly acted as important actors in the political field, pressing the Government to lift the geographic reservation and adopt a new asylum system. UNHCR decided to contradict the Hungarian government's policy of keeping temporarily protected persons in a limbo during Mr. Philippe Labreux's term in 1994 and set up its own "small business" program to help people start on the road to integration.⁵⁷ He also acted as catalyst and spiritual mentor of the affected Hungarian non-governmental sector. Since 1995 UNHCR has provided substantial grants enabling the operation of a nation-wide free legal aid service and also to a refugee counselling and integrating project of social workers.

Strategies, presentation at the conference: Between the Bloc and The Hard Place: Moving towards Europe in Post-Communist States? 5-7 November 1999 School of Slavonic and East European Studies, University of London (unpublished manuscript)

⁵¹ Adopted at the London meeting of Ministers responsible for Immigration, 30 November and 1 December 1992. Reproduced in UNHCR: Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons Volume II. Regional Instruments, Geneva, 1995, at p. 455

⁵² In the first four years (1989-1993) UNHCR has spent 1 752 million HUF in Hungary which at that time corresponded roughly to 10 million USD

⁵³ The amount spent in this program between 1991 and 1997 was above 2,2 billion Hungarian Forints. See UNHCR Branch Office Workshop With Hungarian Delegation (sic) Geneva, 17-18 February 1997, UNHCR Programmes in Hungary

⁵⁴ Spending approximately 500 million HUF between 1989 and 1993. *ibid.*

⁵⁵ Amounting to 170 million Forints between 1991 and 1997. *ibid.*

⁵⁶ Mr. Huang (1989 - 1991) Mr Thomas Birath (1991 - 1994), Mr Philippe Labreux (1994 - 1997) Mr Stefan Berglund (1998 -)

⁵⁷ Philippe Labreux: Jegyzetek a kisvállalkozói támogatási programról, avagy hogyan lehet az önállóvá válást elősegíteni. in: *Sik, Endre/Tóth, Judit: Migráció és Politika, Az MTA Politikai Tudományok Intézete Nemzetközi Migráció Kutatócsoport évkönyve, 1996, Budapest, 1997 11-16.*

UNHCR has been the authentic interpreter of the 1951 Geneva Convention in three contexts: one was its own practice in status determination cases, pursued until 1998. This may have been the less impressive side, since decisions of the office, whether according or denying protection were extremely short, not incorporating a reasoning, and the procedure itself (especially the fact that appeals were handled by the same office) could not serve as pattern-setting. However, the fact that almost 500 non-European asylum seekers have been recognised as refugees under the UNHCR mandate⁵⁸ and the unceasing efforts of UNHCR to enhance their chances to find private accommodation and work had the important educational impact of preparing the Hungarian bureaucracy (and to a small extent the society) for a substantive, non-exclusionary response to the arrival of asylum seekers from the developing world. The second context was the interpretation of the Convention in formal educational settings. The third was legislation. UNHCR has been involved intensively and successfully in legislation concerning the stay and immigration of foreigners,⁵⁹ and in the long process leading to the adoption of the Asylum Law.⁶⁰

The Council of Europe was the first "Western European" institution which opened its doors to Hungary.⁶¹ The mutual interest in each other was sincere and keen. The membership in the Council of Europe, was soon followed by the entry into force in Hungary of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms,⁶² which had twofold impacts. First: human rights became alive from their nominal existence under the 1966 UN International Covenants of Human Rights which have not been implemented in practice before, although they were part of domestic law since 1976. Second: Hungarian presence in the Parliamentary Assembly and in the CDMG and CAHAR since 1992 contributed to the non-parochial approach of those who regularly attended these meetings.⁶³

The basic facts of the impact of the European Union up until the screening and the accession negotiations have been outlined above.⁶⁴ Here a few general remarks are due. The Union as such (distinct from its member states) had little direct impact on the Hungarian refugee policy. No serious negotiations on Justice and Home Affairs were held until 1996, and even afterwards attention concentrated on preventing illegal border crossings, cooperation against organised crime, harmonisation of visa policies.⁶⁵ A non-reciprocal cooperation with CIREA may have been the most intensive interaction on proper asylum issues. However, the shadow of the Union and its *acquis* started to loom large after prospects for accession had become realistic. The image was distorted: it concentrated on the restrictive techniques, on host third country concepts and safe country of origin approaches, on carrier sanctions and enhanced physical controls at borders. Schengen frequently slipped in, as if it embodied Union requirements. The 1995 Resolution on minimum guarantees of asylum procedures⁶⁶ or the argumentation of the Commission suggesting a fairly liberal regime for the temporary protected were practically never quoted beyond liberal

⁵⁸ see Table with detailed figures above

⁵⁹ Act No LXXXVI of 1993

⁶⁰ Act No. CXXXIX of 1997

⁶¹ 6 November 1990

⁶² 5 November 1992

⁶³ One might think (for example) of Ms Zsuzsa Szelényi who presented a report (Doc 6633, 12 June 1992) in the Parliamentary Assembly on migratory flows in Czechoslovakia, Hungary and Poland and was instrumental in securing the inclusion of a proper non-refoulement clause into the Hungarian Aliens' Law, or Ms. Judith Tóth, a long time-member of CAHAR and leading expert on the Hungarian refugee scene.

⁶⁴ See II.C.2.

⁶⁵ *Masyka, Edit/Harmati, Gergely (eds): Egységes belbiztonsági és jogi térség Európában* (Budapest, ISM, 1999) 359-360

⁶⁶ 19. 9. 1996, OJ C 274/13

NGO circles. The EU's role in the formulation of the new Hungarian refugee policy was that of the threatening and exacting aunt, whose words and intentions are carefully watched by the family members. Seeking her goodwill and approval is the paramount goal, conforming to her customs, values and unspoken desires is the precondition of enjoying the benefits her wealth may bestow on the poor relative. Without ever pointing to the precise source of restriction in the norms formally adopted within the Union or identifying how a proposed Hungarian norm would correspond with the loose, divergent and inconsistent practice of the EU member states which were frequently presented as if they were consistent and settled, government officials and MP-s repeatedly referred to the "EU practice" and the requirements of accession as justification of the proposed move.⁶⁷

The impact of single states such as Germany and Austria can not be overestimated. In the eyes of many Hungarian politicians who emerged from the non-political world in 1989-1990 Germany has been and remained the standard -setting nation, the practice of which ought to be emulated.⁶⁸ Even seasoned politicians, like Prime Minister Horn, who led the government between 1994-1998 had "special relationships" with their German counterparts after the opening of the border between Austria and Hungary for the GDR citizens escaping to the FRG in 1989. The state bureaucracy incorporated many (elderly) persons who spoke German but not English and therefore promoted official links with German speaking countries. The 1993 amendment of the German Constitution and the 1996 judgement of the Constitutional Court on the legality of the introduction of the restrictive categories and the practice of their application⁶⁹ were closely followed in Hungary and seen as a confirmed licence to introduce safe country rules. It is remarkable that, way before the new asylum law containing references to the third countries became adopted (let alone entered into force), the Hungarian Constitution was changed and Art 65 on asylum was augmented with an exclusion clause denying protection from those who either in their country of origin or in "another country" enjoy protection.⁷⁰ Germany (being the major target of those transiting Hungary) was also ready to offer education, technical tools, and visits by those officials who are involved in controlling migration. Recently the EU and the German involvement became more closely related: Germany is the lead twinning partner (together with Denmark and the Netherlands) in asylum related issues. The project, which started in October 1999 with a cost factor of 0,47 Million Euros aims at adapting the Hungarian substantive law, the procedure and the institutions to the EU *acquis* and developing comparable standards, linking the technological and legal capacities and training the trainers.

Another broad project, envisages the language training of 1620 trainees with a budget of 0,85 million Euros.⁷¹

The role of foreign NGOs and professional organisations in shaping the mentality of the Hungarian actors can not be overestimated. The 1991 conference on the New refugee hosting countries including such eminent speakers as Howard Adelman, Guy Goodwin-Gill, Leon

⁶⁷ See e.g. the speech of Mr Pozsgai Member of Parliament, rapporteur of the commission on self-government and police issues on 21 September (Records of the House, 21 September 1997 - in Hungarian)

⁶⁸ In fact there have always been strong links to the "German" law and legal institutions, going back the Holy Roman Empire of which Hungary was a part.

⁶⁹ BVerfGE 94, 49 - Sichere Drittstaaten at: <http://www.uni-wuerzburg.de/rechtsphilosophie/glaw/bv094049.html> (visited: 27 February 2000)

⁷⁰ See footnote 99 *infra*.

⁷¹ The source of information on the current PHARE projects in the field was a communication from the Commissions Delegation in Hungary

Gordenker and James Hathaway serves as an example.⁷² Such leading figures of the academia and practice⁷³ together with ECRE, Interights and AIRE as experienced organisations not only had access to their counterparts in the NGO and academic sector, but were and still are frequently invited by state organs to become part of formal training sessions or conferences.⁷⁴

Charitas, the Maltese Charity Service, Interchurch Aid and foreign Red Cross organisations also shaped the mentality of the policy makers in an indirect way. Their Hungarian branches' field work (which sometimes included running of reception centers on their own) showed how assistance and integration can be promoted in a more tactful, less bureaucratic way, with the efficient use of much smaller resources.

B. The effect of bilateral treaties

Hungary was active in building a network of re-admission agreements. Although the pressure from Austria to conclude one was fairly palpable it had to wait until the continuity of the chain in the direction of the countries of origin was assured, and the re-admission agreement with Romania, was signed. At present Hungary has re-admission agreements and in some cases executive agreements for their implementation with all of its neighbours, except for Yugoslavia, and also with several non-neighbouring states.

Table of re-admission agreements concluded by Hungary in the order of their entry into force (As of 1 January 2001)

Partner	Date of signature	Entry into force / start of application	Law No.
Romania	1 September 1992	30 October 1994	1995 XXV.
Austria original	22 October 1992	20 April 1995	1996 V.
extended	17 April 1997	12 February 1998	1998 LIII
Slovenia old	20 October 1992	22 May 1996	1996 LXXIII
new	5 February 1999	29 July 1999	1999 LXXXI
Ukraine	26 February 1993	5 June 1994	1995 XXIV
Switzerland	4 February 1994	8 July 1995	1996 IV
Slovakia	5 August 1994	20 April 1995	1996 VIII
Czech Republic	2 November 1994	5 August 1995	1996 VII
Poland	25 November 1994	5 August 1995	1996 IX
Croatia	9 December 1992	20 November 1996	1998 LII
Bosnia-Herzegovina	21 April 1996	not yet	
France	16 December 1996	30 December 1998	No promulgation yet
Italy	20 May 1997	9 April 1999	1999 LXXIX
Moldova	4 June 1997	2 January 1998	2000 XXIV
Germany	1 December 1997	1 January 1999	1999. LXXVIII
Bulgaria	11 November 1998	16 July 1999	1999 LXXVII

Source: Ministry of the Interior, and collection of Hungarian laws in force

⁷² See their contributions and further details on the conference in: *Baehr Peter R/Tessenyi Géza (eds): The New Refugee Hosting Countries: Call for Experience - Space for Innovation* (Utrecht SIM Special No. 11, 1991);

⁷³ Other eminent scholars and activists whose imprint on the patterns of the Hungarian system is visible include Elspeth Guild, Arthur Helton, Danièle Joly, Nuala Mole and some authors of the present volume.

⁷⁴ See e.g. *3rd International Symposium on the Protection of refugees in Central Europe, Report and Proceedings* UNHCR, European Series, Volume 3 No. 2, Geneva. 1997,

Further re-admission agreements are sought by the Hungarian Government with Belgium, Greece, Luxembourg, Pakistan, Portugal, Spain, Russia, Turkey and Yugoslavia.⁷⁵ In February 2001 the agreement with Portugal was already signed, the expert negotiations with Greece concluded, the negotiations with the Benelux countries, aimed at a single agreement under way and with Albania the agreement was ready to be signed. After the landslide political changes in Yugoslavia late 2000 negotiations on a readmission agreement with that country could finally start in March 2001. The theoretical implications of the re-admission agreements are well known.⁷⁶ They may serve two purposes in the asylum context: either to enable the application of the safe (host) third country rule and transfer the asylum seeker (and the responsibility for the status determination) to another country, or to enable the return of the rejected asylum seeker to the country of origin. In the EU - Central European context re-admission agreements have a more specific but not less important function. They are tools to avoid the application of the Dublin Convention by relieving the responsible other EU state from the task of the determination procedure. The Dublin Convention in Article 3 para 5 granted the right to the Parties to "send an applicant for asylum to a third State" and the London resolution on host third countries clearly instructed them (in point 3 (a)) "to examine whether or not the principle of host third country can be applied. If that State decides to apply the principle, it will set in train the procedures necessary for sending the asylum applicant to the host third country, before considering whether or not to transfer responsibility...pursuant to the Dublin Convention".

The idea of subsuming asylum seekers under the broader group of illegal migrants who can be returned to another country met criticism. UNHCR clearly articulated its requirements:

"To ensure that one of the State parties will give the asylum application due consideration within its own status determination procedure, the provisions of such agreements should, furthermore, explicitly relate to the responsibility of that country to examine asylum requests and of the sending State to advise the authorities of that country of the basis of removal decisions. The latter responsibility is intended to avoid the possibility that the receiving state believes the application to have been rejected on the merits."⁷⁷

Neither the "first generation" of the readmission agreements concluded by Hungary, nor the newer ones took note of this requirement. The change which can be observed after the EU Council recommendation on specimen bilateral re-admission agreements to be used between EU member states and third states was adopted on 30 November 1994 and published in 1996⁷⁸ was an explicit effort to reflect the desires of the EU member states in opening the re-admission gates as wide as only they wish, even at the price of creating a bottleneck within Hungary, where the narrower channel is the one pointing to the East, letting through much less numbers than the inroads from the West.

The Austrian-Hungarian re-admission agreement is a case in point. Article 3 of the 1992 text only required the re-admission of those third country nationals, who had
- illegally crossed the Austrian-Hungarian border *and*

⁷⁵ *4th International Symposium on the Protection of Refugees in the Central European and the Baltic states, Report and Proceedings* Vienna, UNHCR 1999,

⁷⁶ In the Central and Eastern European Context see e.g. *Sandra Lavenex: Safe Third Countries Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, Budapest, CEU Press, 1999, 78-82 pp.

⁷⁷ "Re-Admission Agreements", "Protection Elsewhere" and Asylum Policy", August 1994, reproduced in: *3rd International Symposium on the Protection of refugees in Central Europe, Report and Proceedings* UNHCR, European Series, Volume 3 No. 2, Geneva, 1997, quote from p 467.

⁷⁸ OJ No. C 274, 19.09.1996, p. 20

- either had a legal title to enter the readmitting country (visa free regime, visa, stay permit or refugee status) or could be sent further to a third state on the basis of a treaty in force.

The amendment of 1997 only affected this article. It only retained the requirement of illegal crossing of the border and dropped all the others, expressly stating that it was immaterial, whether the third country national was legally or illegally on the territory of the Contracting State before illegally crossing the border. The new text also declares that even an entry ban (usually following an expulsion order) is no obstacle to re-admission! No need to stress (as the numbers will show) that the formal symmetry hides a grave asymmetry: it is Hungary who re-admits the third country nationals and Austria, who sends.⁷⁹

Why this generosity? The explanatory memorandum submitted by the Hungarian government to the Parliament when suggesting the ratification of the amendment was clear enough:

After referring to the 1994 November Recommendation of the Council concerning the specimen agreement and the EU Member States' efforts to conclude agreements corresponding to its content, the memorandum recalls that the 1992 agreement set "serious constraints to the re-admission of third country nationals who had illegally crossed the state border." Then comes the plain confession: "Since Hungary has declared its intention to become a full member of the European Union as soon as possible, it was necessary to amend the [1992 agreement] in order to bring it into harmony with the EU recommendation."⁸⁰ This necessity pervades a Government Resolution of April 1997⁸¹ which uses a strange language when it declares that

"The Government agrees to the amendment of the treaties on return and re-admission of persons who have crossed the state border illegally or who stay illegally within the state territory, concluded between the Government of the Hungarian Republic and governments of the European states [sic!] in accordance with the rules of the European Union."

Who elicited that approval by the Government? - one may ask, but would look in vain for the answer in the text of the resolution.⁸²

Nevertheless the momentum is there, as the replacement of the old Hungarian Slovene re-admission agreement of 1992 with the new of 1999 confirms. The pattern is identical: the old agreement had the same double requirement as the old Austrian (illegal entry into the requesting country plus either a right to stay or a treaty entitling to further removal in the readmitting country), the new reduces it to illegal entry.⁸³

⁷⁹ Ironically this was envisaged by the Austrian Government's explanatory memorandum when submitting the amendment to the Nationalrat. In relation to costs incurred by the legislative proposal the Austrian government assured the members of Parliament that "It is expected that expenditures of the Federation will be saved through the agreement." Regierungsvorlage, 895 der Beilagen zu den Stenographischen Protokollen des Nationalrates XX GP http://www.parlinkom.gv.at/pd/pm/XX/I/texte/008/I00895_.html

⁸⁰ The text of the explanatory memorandum is available in the electronic collection of the Hungarian laws KJK-Kerszöv, monthly publication on CD ROM

⁸¹ 2094/1997. (IV. 18.) Korm. határozat on the amendment of readmission agreements concluded with the governments of the European states.

⁸² Note that the reference to "European states" embraces agreements concluded with non-EU member states, which means that the Government binds itself to enforce EU norms in a fully non-EU context!

⁸³ See Art 2 of the old and the new agreement as identified in the table of the main text

At the same time the re-admission agreements with Romania and Ukraine are restrictive. They do not provide for the re-admission of the third country national unless the national is a permanent resident in the country (Ukraine) or legally stayed in the country (Romania).

A quick look at the statistical data confirms the expectations:

Persons re-admitted back from and returned to neighbouring countries under re-admission agreements in 1998- 2000

Relation		Re-admitted back from neighbouring country under re-admission agreement			Returned to neighbouring country under re-admission agreement		
		Total	Citizen of Hungary	3 rd country national	Total	Citizen of the partner country	3 rd country national
Austria,	1998	3764	72	3692	28	14	14
	1999	3261	104	3157	13	2	11
	2000	3490	60	3430	31	2	29
Slovenia	1998	1163	0	1163	4	3	1
	1999	926	0	926	4	1	3
	2000	1115	0	1115	18	0	18
Croatia	1998	27	0	27	37	31	6
	1999	57	0	57	5	1	4
	2000	23	1	22	9	6	3
Romania	1998	1	0	1	784	769	15
	1999	0	0	0	1546	1539	7
	2000	2	2	0	2163	2098	65
Ukraine	1998	4	2	2	566	27	539
	1999	0	0	0	734	67	667
	2000	0	0	0	394	46	348
Slovakia	1998	602	17	585	33	14	19
	1999	112	10	102	25	8	17
	2000	238	14	224	27	18	9
Germany		0	0	0	0	0	0
	2000	5	5	0	0	0	0
Total		14790	287	14503	6421	4646	1775

*Source: The Return of Irregular Migrants: The Challenge for Central and Eastern Europe IOM, 30 September 1999, at p. 66. (for 1998) and direct communication to the author (for 1999 and 2000)*⁸⁴

It is striking that whereas from Austria and Slovenia most of the re-admitted persons are third country nationals, those returned to Romania are 97 % Romanian citizens but Ukraine seems to

⁸⁴ There was no movement at all on the basis of the other agreements in force.

be a gateway for sending persons. Since the re-admission agreement with Ukraine has several limitations those returned there must have been persons entitled to visa free entry into Ukraine or having entitlement to stay there.

A more detailed look sheds some light on these procedures:

Table on re-admissions from Austria within the competence of the Győr Border Guard Directorate⁸⁵:

	1995	1996	1997	1998	1999	2000
Number of re-admitted persons	123	1158	1658	2790	2210	2164
Denial of re-admittance	18	115	948	213	58	25

Breakdown of the group of re-admitted persons by nationalities. Groups which were represented with at least 10 persons⁸⁶:

	1997	1998	1999
Total	1658	2790	2210
Of which country of nationality			
Romania	1124	1200	1231
Yugoslavia	378	1190	570
FYROM	25	37	47
Turkey	21	39	40
Bulgaria	20	32	23
Bosnia-Herzegovina	13	10	16
China	11	52	75
Iraq	2	49	28
Moldavia	7	29	21
Algeria	9	29	18
Afghanistan	0	21	38
Iran	2	16	17
Ukraine	6	14	8
Syria	0	10	5
Bangladesh	0	3	35
The Philippines	1	0	10
Other	64	62	28

Source: Communication of the Border Guard Directorate to this author⁸⁷

Comparing the above data leads to the following observations.

⁸⁵ These data were specifically collected by the directorate for this analysis. There are no comparable data available covering the whole Austrian-Hungarian border section. Nevertheless they are typical because the Directorate in Győr handles the majority of the cases being competent in respect of the major transit routes, including the Budapest-Vienna connection.

⁸⁶ Detailed statistics are only available for the period 1997-1999

⁸⁷ Data include those, who were returned in the "short procedure" which is a practice developed upon non-published agreements of Border Guard Commanders and probably rely on Article 3 paragraph (3) of the Hungarian-Austrian readmission Agreement which envisages "readmission without any specific formalities" if requested within 7 days from the illegal border crossing.

Romanians returned from Austria are probably not asylum seekers, which is confirmed by the fact that the same directorate has not registered a single application for refugee status by a Romanian citizen in 1998. However, in connection with the other groups one may wonder, how many of them were seeking - in vain - protection in Austria. There are no statistics reflecting the number of those who either managed to launch an asylum procedure in Austria but were nevertheless removed, or were denied access to procedure on the basis of the safe third country rule. Interviews with employees of the refugee directorate's local department and activists of the Hungarian Helsinki Committee working with those who are detained in the community shelters of the border guards - where most of those returned persons, who can not be transferred to a third country end up - suggest that a high proportion (probably the majority) of them have tried or would have tried to seek protection in Austria.

With respect to the figures one drastic change calls for explanation: whereas in 1997 Hungary successfully resisted the Austrian request for re-admission in 948 cases within the area of the Győr Directorate that figure went down to 58 by 1999 and to 25 by 2000. The reason for that is that six days after the entry into force of the extended re-admission agreement a meeting took place in Vienna on 18 February 1998, leading to an unpublished aide memoire which entitled the Austrian authorities to return persons on the basis of their personal observation at the border crossing. So the earlier requirement of substantiating with evidence the claim that the person has in fact illegally crossed the Hungarian - Austrian border has been relaxed to a mere statement of the Austrian authorities. According to anecdotal - but reliable - evidence those authorities sometimes were inclined to assume arrival from Hungary even in cases in which later interviews - for example during the asylum procedure in Hungary - clearly revealed that the person "re-admitted" to Hungary had never set foot on this soil before, but came to Austria through Italy.⁸⁸

It is interesting to compare these data with those related to Slovenia a non-EU country. In that relation Hungary refused the Slovenian request in relation to 2 249 persons in 1999 and 1 224 persons a year later, which is almost two order of magnitudes higher than the refusals in the Austrian relation and means that around every second person offered by Slovenia for readmission is not taken back to Hungary whereas with Austria one of a hundred offered persons is not taken back.⁸⁹

Summarising the conclusions on the re-admission agreements the following picture emerges: Both the extended Hungarian - Austrian and the new Hungarian - Slovenian re-admission agreement open the gate to large scale re-admission of third country nationals, and indeed out of all re-admissions to Hungary of third country nationals, 99% occurred from these two countries in 2000. Since neither of the re-admission agreements contain the guarantees called for by the UNHCR, it is justified to assume that they are used for the removal of asylum seekers to a safe third country⁹⁰ without a clearly established responsibility of that country to proceed with the refugee status determination procedure. That is why the most recent warning of UNHCR should guide those, implementing the re-admission agreements:

⁸⁸ Since return to Italy entails no guarantee against the reappearance of the removed person Austrian authorities prefer to remove the undesired foreigner through an external -guarded- Schengen border.

⁸⁹ In 2000: 3490 persons were readmitted whereas in 17 cases the readmission of 34 persons was denied. (Data provided by the Border Guards to this author)

⁹⁰ Whether Hungary was/is indeed safe is subject to debate. See Ulrike Brandl's contribution in this volume, or UNHCR Background information on the situation in the Republic of Hungary in the context of the return of asylum-seekers, UNHCR Geneva, 31 December 1999

"UNHCR is of the opinion that re-admission of an asylum-seeker based on his/her transit through Hungary should only be carried out in cases where, be it under bilateral re-admission agreements or any other return arrangement:

the concerned person possesses documentary evidence of his/her identity; formal assurances from the Hungarian authorities have been obtained that they agree to re-admit the persons in question and allow them access to the refugee status determination procedure ... and that, for non recidivist (repeated illegal exits) and non-criminal cases, confinement into Border Guard Community Shelters will not be applied.

In addition to informing the Hungarian authorities that the returnee is an asylum-seeker, whose claim has not been heard, returning countries should inform the claimant of his/her right to apply for asylum in Hungary should he/she so wish and of his/her obligation to do so at the time of arrival back in Hungary. UNHCR would caution against indiscriminate return of asylum-seekers pending a satisfactory solution to the problems detailed above, particularly those concerning conditions of accommodation, as it is felt that a significant number of return would overburden a still fragile asylum system."⁹¹

C. Unique features of the Hungarian law and practice

This chapter will not provide a description of the refugee law as it existed before the entry into force of the new Asylum Act on 1 March 1998,⁹² but will concentrate on the specific critical elements of the old system which together with the overall European pressure led to the new regulation and then will turn to those points which are critical at present.

1. The road to the new Act

As described above the law in force became largely irrelevant fairly soon after its adoption in 1989. There were two major shortcomings to be cured - besides the abstract aspiration to emulate the Western trends. The first was the lack of status regulation for "temporarily protected" victims of the Southern Slav conflict. There was no such legal category in the Hungarian law books, therefore there was no set procedure for granting or revoking the status either. Government regulations fixed the material support forms and the conditions of staying within the reception centers⁹³, but any practical problem accompanying a human's life (birth, death, job, marriage, acquiring real estate, education) led to almost insurmountable difficulties. Treating refugees from the Serbo-Croat war or the Bosnian conflict as "normal" foreigners was obviously not an option, but offering to the temporarily protected persons a more favourable treatment was not available due to the lack of legal foundation. However, as we saw, 73 985 persons enjoyed temporary protection between 1991 and 1996 when - following the Dayton accords - the

⁹¹ UNHCR Background information on the situation in the Republic of Hungary

in the context of the return of asylum-seekers, UNHCR Geneva, 31 December 1999 (Mimeo), p. 9

⁹² For a description of the old regime see: Nagy, Boldizsár "Hungarian Refugee Law" in: Howard Adelman/Endre Sik/Géza Tessényi (eds.), *The Genesis of a Domestic Regime: The Case of Hungary* Toronto, York Lanes Press, 1994, 49-64 and articles listed in footnote 42 above.

⁹³ See especially Government Decree 129/1996. (VII. 31.) and the Decree of the Minister for Interior 19/1996 (VII.31)

possibility to recognize someone as temporarily protected was abolished by an *oral* instruction⁹⁴. All in all, the issue of the temporary protection/subsidiary form of protection had to be regulated by a statute.

The other shortcoming was the maintenance of the geographic limitation. Although legally probably never valid,⁹⁵ it was tolerated for a while in exchange for the mere fact that after Yugoslavia, Hungary was the second state from the socialist bloc to become a party to the 1951 Convention and its 1967 Protocol. However, the constant pressure from UNHCR, the Council of Europe and from the Hungarian NGO sector, reinforced by the Government's desire to impress the European Union⁹⁶ finally led to the abolition of the geographic limitation.⁹⁷ It was more than due in light of the fact that the branch office of the UNHCR - which carried out the status determination in respect of the asylum seekers fleeing from non-European events - in 1997 had a larger caseload than the Hungarian authorities.⁹⁸

More than two dozen "conceptual drafts" preceded the one of 1996 which then became the spine of the bill submitted to Parliament in 1997. The debates leading to the formulation of the Bill and the adoption of the Act included a heavy involvement of the UNHCR, the Alliance of the Free Democrats⁹⁹, the Hungarian Helsinki Committee and "Menedék" Hungarian Association for Migrants and Refugees. Let us look at the critical elements of the outcome!

2. Critical elements of the new Hungarian legislation concerning asylum seekers and refugees

Besides Article 65 of the Constitution¹⁰⁰ five legislative items are especially relevant. The Aliens Act and its implementing Government Decree¹⁰¹ and the Asylum Act of 1997 with the two implementing Government Decrees of 1998¹⁰² as amended in 1999 by Act LXXV on the fight

⁹⁴ The final revocation of the protected status of those who had been granted it before 1996 came in 1999 with Government Resolution 2153/1999. (VII. 8.) terminating the protection and inviting the protected persons to regularise their position according to the general rules on foreigners by 1 July 1999.

⁹⁵ See : Nagy, Boldizsár "Hungarian Refugee Law" in: Howard Adelman/Endre Sik/Géza Tessényi (eds.), *The Genesis of a Domestic Regime: The Case of Hungary* Toronto, York Lanes Press, 1994, p. 52

⁹⁶ See the Hungarian response to the questionnaire sent by the Commission in 1996 laying the foundation of the *avis*.

⁹⁷ Parliament's Resolution 113/1997 (XII.17)

⁹⁸ See chapter II B *supra*

⁹⁹ The Alliance of Free Democrats was the smaller member of the then ruling biparty coalition led by the Hungarian Socialist Party. The Minister for Interior, Mr. Kuncze was representing the Alliance as well as the most active speaker in the debate, Mr. Kőszeg who is also chairman of the Hungarian Helsinki Committee.

¹⁰⁰ Act XX of 1949 as amended by Act LIX of 1997. In force since 30 July 1997. "Article 65.

(1)The Republic of Hungary, in accordance with conditions determined by law, - if neither their country of origin, nor any other country provides protection - shall grant the right of asylum to those non-Hungarian nationals, who in their home country or at their usual place of residence, are persecuted on account of their race, nationality, membership in a particular social group, religion, or political opinion, or have a well founded fear from such persecution.

(2) The adoption of the act on the right of asylum requires the vote of two-thirds of the Members of Parliament present." (Translation by the author)

¹⁰¹ Act LXXXVI of 1993 on "The entry, stay in Hungary and Immigration of Foreigners" (Aliens Act) as amended by act LXXV of 1999, regulates confinement in a detention-like situation of illegal aliens, including asylum-seekers, into Border Guard Community Shelters. Government decree 64/1994 (IV.30) as amended describes the details.

¹⁰² See the details about their availability in IIB4 above. Obviously there are many other (approximately 200) regulations from the Act on Nationality through customs rules to those governing education or health care which incorporate specific provisions for asylum seekers and refugees, but they are not subject of this study. A good description of the legal and social conditions is offered by: *Fabricie Liebaut (ed.): Legal and Social Conditions for*

against organised crime. The norms themselves as well as the practice which has emerged in the first three years of their application have triggered criticism and "second thoughts" which will be reviewed below.

(i) *Substantive law: protection categories, restrictive tools*

Protection categories

There are three fundamental categories of protection and one auxiliary form of it. The *refugee* definition for all practical purposes is identical with that of the Geneva Convention.¹⁰³ *A temporarily protected person is "a foreigner who arrived from an area, from where flight en masse took place due to foreign occupation, war, civil war or ethnic clashes, or the massive and large scale violation of human rights and members of the group fleeing from that country were granted temporary protection in the Republic of Hungary on the basis of the decision of the Government, and were recognized as temporarily protected persons/asylees by the refugee authority"*¹⁰⁴ *A person authorized to stay is "a foreigner who temporarily cannot be sent back to his country because there he would be exposed to capital punishment, torture, inhuman or degrading treatment, provided that the person concerned has been recognized as a person authorized to stay by the refugee authority"*¹⁰⁵ In the law is a fourth, auxiliary form of recognition: the Minister of the Interior is entitled to exercise special consideration of equity for humanitarian reasons leading to convention status in individual cases.¹⁰⁶ The Minister never exercised this right even though requests to this effect were made.¹⁰⁷

The introduction of the temporarily protected status regulated by a statute (and not by circulars or government decrees as in several EU states) is certainly a great leap forward, which the EU has been agonising over, for half a decade by now, without success.¹⁰⁸ The rights of the temporarily protected are significant: they have residence rights and the right to be employed without any restriction. Accommodation and maintenance/care must be provided to them from state sources if they can not sustain themselves. Further they are entitled to a travel document permitting the departure and return to Hungary,¹⁰⁹ which is important in "visit and see before return" situations. The temporarily protected person is not barred from starting a convention refugee status determination procedure or entering the road leading to immigration. There is no time limit set to this type of protection: it terminates when the Government decides that the reasons triggering the

Asylum Seekers and Refugees in Central and eastern European Countries Copenhagen, Danish refugee Council, 1999, 79 - 101

¹⁰³ Although for the purposes of the implementation of the Act someone is only a refugee if recognised as such by the authority. This is not extraordinary, Art 2 of the Austrian Law on Asylum (BGBl Nr. 76, 14 Juli 1997) provides in the same way.

¹⁰⁴ This translation is provided by the author. Translations normally used are correct, but seem to make no sense. (The text used by UNHCR is the following: "a foreigner who arrived from an area, from where the members of the group fleeing en masse due to foreign occupation, war, civil war or ethnic clashes, or the massive and large scale violation of human rights going on in their country, were granted temporary protection in the Republic of Hungary on the basis of the decision of the Government and were recognized as temporarily protected persons/asylees by the refugee authority.) That is because the text of the Act in Hungarian is simply grammatically and logically wrong. The translation offered here reflects the intended content removing the original mistake.

¹⁰⁵ All the three definitions appear in Art. 2 of the Act.

¹⁰⁶ Art 3 para 3

¹⁰⁷ Personal communication of Mr. Erdélyi, Deputy Director of the Refugee Directorate of OIN, 23 February 2001.

¹⁰⁸ See the repeated proposals of the Commission, COM(98)372 final, OJ C 268, 27. 08. 1998 and COM (2000) 303 final, 24 May 2000

¹⁰⁹ Article 20

flight ceased to exist.¹¹⁰ Certainly all this represents a huge positive change compared with the previous practice according to which victims of the Southern Slav conflict - up until 1997 - had no right to work and were mainly in an *ex lex* situation.

There is one snag, though: this provision has never been applied, the Government has not yet designated a single group as subject to temporary protection. Obviously at least during the Kosovo conflict (1998-1999) this rule should have been made use of, as demanded by several Hungarian NGO-s and hinted at by UNHCR.

The status, "authorised to stay" was meant to be a *non-refoulement* status with more rights than generally accorded to those who are denied recognition as a refugee but can not be returned to their country for the threat of torture or inhuman or degrading treatment or punishment. It entails a right to accommodation and care. However the person authorized to stay is only allowed to work according to the conditions generally applicable to foreigners and must live in the reception center or any other place designated by the refugee authority. The entitlement to the status is subject to a compulsory annual review.

Two practical problems emerged in the implementation of the law.

First: the status became used as a subsidiary form of "protection", as a kind of "small asylum" for those whom the authorities did not want to recognize as (convention) refugees. The following small table tells the story:

Number of those who got one kind of protection in 1999 and 2000

Country of origin	refugee		Authorised to stay	
	1999	2000	1999	2000
Afghanistan	127	82	223	176
Iraq	60	37	52	47
Yugoslavia	37	10	1408	357
Somalia	17	2	12	16
Total	241	131	1695	596

Source: Office of Immigration and Nationality Affairs

Second: A tricky and much criticised expression of the implementing decree regulating the procedure of recognition refers to the decision of the authority to recognize a person as authorised to stay in relation to the foreigner "whose identity has been clarified".¹¹¹ This was interpreted as excluding those whose documents have been withheld by the smugglers, because "clarified identity" was understood to be an identity to be proven by written evidence, preferably by official documents of identity. As a consequence of the repeated actions of the Hungarian NGO-s representing asylum seekers and others in need of protection¹¹² the rigour has been relaxed somewhat and now driver's licence, military identity papers and witness testimony of close relatives are also accepted.¹¹³ This notwithstanding, still most of those who should enjoy the

¹¹⁰ Article 10

¹¹¹ Article 29, paragraph (1) of Government Decree 24/1998 (II.18)

¹¹² In a recent decision the Metropolitan Court has challenged this approach of the authority. (Case No. 2 Kpk. 45963/1999 1-1 unreported, on file with the author).

¹¹³ Letter of the Director of the Refugee directorate of OIN to the Hungarian Helsinki Committee, dated 4 December 2000, on file with the author.

benefit of the 'authorised to stay' status have to put up with the mere 'protection from expulsion and deportation' as guaranteed by Article 32 of the Aliens' Act.

Restrictive tools

Safe third country, safe country of origin regulation

As already mentioned¹¹⁴ the asylum rule of the Constitution was modified in 1997 to limit asylum to situations when "neither their country of origin nor another country provides protection". This came as part of a comprehensive amendment of the Constitution and the explanatory memorandum which the Government submitted to the Parliament did not indicate the reason for introducing the safe country rule. Shocking as it may appear, none of the lead-speakers of the parties in the general debate mentioned the appearance of the safe country rule! They all noted approvingly the explanation of the Government, which only referred to the removal from the causes of persecution harassment based on language, thereby bringing the Constitution and the Geneva Convention into line. One would expect that at least the parliamentary debate in the fall of 1997 leading to the adoption of the new Act on Asylum reflected upon the rules concerning safe countries, now appearing in the refugee law itself. Nothing of that sort happened. It remained a total non-issue.

So the present regulation includes both the safe country of origin and the safe third country rule.¹¹⁵ Comparison of the Hungarian regulation with that of Austria, Germany and the London resolutions reveals, that not the EU norms but the two states' laws served as "Leitbild", as the pattern to be followed. With respect to the safe third country both national laws refer to the 1950 Rome Convention for the Protection of Human Rights and Fundamental Freedoms and so does the Hungarian Act thereby excluding any non-European country from qualifying as a safe third. This was certainly *not* the intention of the London Resolution on host third countries which does not mention the European Convention on Human Rights. Moreover the Act demands that the third country be as safe as the safe country of origin, which is an unusually high demand as the next paragraph will show.

The ill-conceived zeal to overdo the great idols shows itself in full size in the definition of the safe country of origin. The Austrian legislation does not use that category, the German requires the adoption of an Act designating countries "where the legal situation, the application of the law

¹¹⁴ See III A supra (text accompanying footnote 70)

¹¹⁵ Art 2 d) safe country of origin:

"the presumption relating to the country of nationality, or in the case of a stateless person, to the habitual residence, of the person seeking recognition as refugee, according to which presumption that country observes/implements the International Covenant on Civil and Political Rights, the Geneva Convention, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Protection of Human Rights and Fundamental Freedom signed in Rome on 4 November, 1950, and where because of the characteristics of the legal order and the guarantees of legality there may not exist a threat of persecution for reasons of nationality, membership of a particular social group, political opinion, race, religion; or torture, inhumane or degrading treatment and which country allows independent national and international organisations to control and supervise the enforcement of human rights;

e) safe third country:

a country which satisfies the conditions of a safe country of origin with regard to the applicant and where, prior to arrival at the territory of the Republic of Hungary, the foreigner had already stayed, resided, transited or resumed travelling in such manner that the applicability of the Geneva Convention for his claim had been recognised in respect of him, or he had had the chance to lodge a claim for the recognition of the applicability, but did not take advantage of that; provided that according to the rules and regulation of that country the foreigner cannot be sent back to the country where he would be exposed to persecution, torture, inhuman or degrading treatment;"

and the general political circumstances justify the assumption that neither political persecution nor inhumane or degrading punishment of treatment takes place there" As it is well-known the London Conclusion on Countries in Which There is Generally no Serious Risk of Persecution recommended four elements to be considered before arriving at the conclusion that the country from where the asylum seeker came was safe, namely: previous number of refugees and recognition rates, observance of human rights, democratic institutions and stability. So how does the Hungarian Act determine a safe country of origin? It is more comprehensive than any of the above mentioned. It not only requires the implementation of the European Convention of Human Rights together with the International Covenant on Civil and Political Rights but also that there may not be persecution on Geneva Convention grounds and that independent national and international organisations are allowed to control and supervise the enforcement of human rights. It logically follows that none of the non-European states may qualify as safe according to the Hungarian law, and the exclusion of the possibility of persecution ("there may not exist a threat of persecution") excludes many of the European states from the potential safe countries of origin.

The conclusion from this analysis may be painful for the law-enforcer, but hardly deniable. The safe country of origin rule will not have a role and will not ease the pressure on refugee authorities, because practically it is inapplicable, since only those European countries qualify from which asylum seekers never come to Hungary. Since the safe third country must meet the same criteria as the safe country of origin, it shares its fate of being without any practical use.¹¹⁶

This is reinforced by the fact that the safe country rules are *not* linked with the accelerated procedure, so they can not contribute to the reduction of the docket. The fact that the asylum seeker comes from a safe country (third or origin) leads to the denial of refugee status according to the Act. However, the safety of the country is only a rebuttable presumption -which is a laudable solution of the law - and therefore must be investigated in a non-accelerated procedure. Consequently a denial of the refugee status on the basis of the safety of the country transited or of the country of origin can only emerge from a normal, full procedure, which entails the investigation of the safety in respect of the specific claim. The difference between the ordinary status determination procedure and the one entailing the rebuttal of the presumption of safety is in the burden of proof. In the ordinary procedure the asylum seeker does not have to prove that s/he has a well founded fear of persecution, it is enough if the person can substantiate (in Hungarian: make it plausible) that the Geneva Convention must be applied in her/his respect. However, in the rebuttal of the safety debate the asylum seeker must *prove* that the presumption of the safety does not apply.

As a general remark I have to note that it is hard to pronounce anything on the Hungarian practice of decisions because they are not in the public domain. First instance (administrative) decisions never get to the public and out of the thousands of court decisions less than a dozen decisions have been published in summarised form in the collections of judicial decisions. Therefore statements concerning the practice of interpretation or use of terms have to be seen with caution. My remarks rely on my own interviews with the decision makers of the refugee authority, the wealth of experience of the Hungarian Helsinki Committee's legal service and on observations of the UNHCR Branch Office in Budapest, which receives all of the first instance decisions.¹¹⁷

¹¹⁶ The lesson seems to be learned, See Section III C 3 *infra*

¹¹⁷ The deputy director of the Refugee Directorate has recently remarked that they intentionally do not provide reasoning in the (few) recognizing decisions, because when they gave explanation soon the same facts showed up in other applications. One fears to draw the consequences of this argument because too many words related to Kafka, abuse, maze etc. would come to mind.

These sources confirm the UNHCR's conclusion on this issue, according to which: "In practice this [the safe third country] concept has not frequently been applied."¹¹⁸ The only significant exception may be the airport procedure which by definition presupposes arrival from or through a safe country *and* the lack of adequate document of identification.¹¹⁹ In 2000 there were 30 cases in which application was refused in an airport procedure (in 1999 37 a year before 66).

Exclusion and cessation grounds

As in many other countries in the region,¹²⁰ the Hungarian Act contains exclusion and cessation clauses which do not harmonise with the Geneva Convention. UNHCR has repeatedly reminded that the Convention is taxative and no additional grounds should be invoked.¹²¹ Nevertheless departure from the designated place of stay, non-cooperation with the authority or non-submission to health screening or compulsory treatment are grounds upon which the authority may deny refugee status.¹²²

In practice this has had relevance in cases when the asylum seeker tried to enter another country illegally while the procedure in Hungary was in progress. Her absence led to the denial of the status until Summer 1999 when this practice has been changed and now the procedure is only suspended in case of those, who have not been interviewed. However, unjustified departure after the interview still leads to a denial of status.

The potential cessation grounds (status recognition *may be revoked*) include elements which go beyond the Geneva Convention. The status may be revoked if recognition has been granted while facts material for the decision were withheld.¹²³

(ii) Procedural rules and practice

Access to territory

Since, according to the Hungarian law, no application for refugee status may be submitted to Hungarian representations abroad, access to the Hungarian territory is the precondition to access to procedure. However, tools of "non-arrival" policy applied in the aliens' law context are utilised in an expanding manner.

Visa policy

Already in 1995 the Hungarian Government has adopted a resolution on visa policy,¹²⁴ which called upon the government to reinstall visa obligation for all the CIS states except for Belarus

¹¹⁸ UNHCR Background information on the situation in the Republic of Hungary in the context of the return of asylum-seekers, UNHCR Geneva, 31 December 1999, point 16.

¹¹⁹ Art 42 (see further infra)

¹²⁰ Nagy, *Boldizsár*: The Acquis of the European Union Concerning Refugees and the Law of the Associated States, 3rd International Symposium on the Protection of refugees in Central Europe, Report and Proceedings Geneva, UNHCR, European Series, Volume 3 No. 2., 1997, p 69

¹²¹ See e.g. PHP National Action Plan of the Republic of Hungary in the Field of Asylum, 21-22 June 1999, point 2. or Remarks on the new asylum amendment bill, 22 February 2001, mimeo, on file with the author

¹²² See Art 4 para(2) b (together with Article 16)

¹²³ Act on Asylum Art 7 para a.

¹²⁴ 2259/1995 (IX.8) Korm hat.

Russia, and Ukraine.¹²⁵ That meant a radical change from the times of the Soviet Union when all the citizens of the federation could - in principle - visit Hungary without a visa.¹²⁶ Roughly 75 million citizens of nine countries (some of them in fact producing refugees) were excluded from access during the last ten years.¹²⁷ In 2000 even Russia could not avoid its fate. A "provisional auxiliary protocol"¹²⁸ which in its preamble speaks of the parties effort to "perfect the mutual conditions of travel for the citizens of the two states" abolishes visa-free travel in most contexts and limits it to a maximum of 30 days, made dependent on the most stringent conditions of either having a letter of invitation issued (approved) by the police or another state agency or having a confirmed reservation in a hotel. Transit is only allowed if the traveller can prove that entry conditions in the destination country are met. Other countries shared this fate. China and Albania comes to mind, which lost their preferred status during the nineties¹²⁹. It also contained a remarkably lenient provision towards the EU, when it declared that the Government intended to establish completely visa-free travel with Indonesia and Thailand "provided that this would not contradict the visa policy of the European Union"¹³⁰

Since then visa policy has been a recurrent theme in Hungarian politics. The EU's expectation is more than clear cut: "The Commission underlined the necessity of adopting a new law on foreigners and a visa policy suited to the requirements of the EU" - said the Regular Report in October 1999.¹³¹ The report a year later was no less explicit: "Additional efforts are needed to align with the *visa acquis*, in particular as concerns the visa exemption for citizens of Belarus, Cuba, FRY, Moldova, Russia and Ukraine. The agreements on simplified formalities for border crossing signed with Ukraine and FRY will also need to be amended as they exempt citizens living permanently near the border from the obligation to carry passports. The regulation on a uniform visa format and the rules of the Common Consular Instructions also need to be further aligned. There is a need to strengthen the Consular System and Hungary's capacity to detect falsified documents."¹³²

The Hungarian dilemmas are not less unequivocal. Fulfilment of the expectations entails giving up one of the most important foreign policy priorities, the smooth and friendly connection with the neighbouring countries, especially with regard to the Hungarian minorities who live there. Resisting them hinders the accession process and may be futile, anyhow. There are two hopes from the Government's point of view: Romania and Slovakia may become members together or (relatively) soon after Hungary and/or they may be removed from the visa-list adopted under

¹²⁵ As it is known the Baltic states are not CIS states. With them the visa-free travel has been retained.

¹²⁶ Most ironically the Hungarian-Soviet treaty on visa-free travel *has never been published* in the official journal! Millions of comrades travelled year by year, without individually knowing how that could happen!

¹²⁷ The significance of this may be assessed knowing that asylum applications submitted by citizens of these countries in Europe were rising between 1999 and 2000 (except for Armenia and Azerbaijan). UNHCR data showed the following increase: Moldova: 37 %, Kazakstan: 131% Uzbekistan: 98 % See: Asylum applications submitted in Europe, 2000, Geneva, 25 January 2001, mimeo, Table 4.

¹²⁸ Published as 135/2000 (VIII.3.) Government decree

¹²⁹ Four years after its introduction in 1988, the visa-free travel for ordinary citizens was abolished with China in an agreement signed in Beijing on 28 April 1992 which in its preamble refers to the purpose of "enhancing mutual interaction between their citizens" and then restricts visa free travel to diplomats, their family members and others travelling on an official duty passport. See Government Decree 128/1992 (IX.1). The latest shape of the (unpublished) Hungarian-Albanian visa-agreement was formed by a note-verbale, which in turn was published and reveals that visa-free travel only extends to diplomats and others on duty. See 1993/24 Szerződés a Külügyminisztertől (Treaty made public by the Minister for Foreign Affairs)

¹³⁰ Government resolution 2259/1995 (IX.8), point 5

¹³¹ http://www.mfa.gov.hu/euanyag/Hungary_201.html. See also Accession Partnership OJ C 202 29.. 1998 at p. 35: on justice and home affairs priorities: "to align visa policy with that of the European Union"

¹³² Regular Report From the Commission on Hungary's Progress towards Accession, 8 November 2000 see e.g. http://www.mfa.gov.hu/euanyag/hu_en.html

Amsterdam as proposed by the Commission early January 2000.¹³³ That would solve the visa-dilemma with respect to the largest Hungarian minority group (comprising together approximately 2,6 million persons). The other "hope" might be that accession to the EU will not immediately lead to the lifting of the border control with Austria. If that happens at the request of the EU, then Hungary in exchange may demand derogations from the EU visa regime.¹³⁴ However, the most recent formal position¹³⁵ indirectly hints at such derogation "[t]he Hungarian Government believes that maintaining the visa requirement to a country cannot be compatible for long with that country's status as a partner negotiating accession. If nationals of Romania remain subject to a visa requirement at the end of year 2000, the Hungarian Government would like to revert to this issue at the final stage of the accession negotiations of Hungary. Should this happen, the Hungarian Government will propose a solution which will not constitute a security risk to the Member States of the European Union." To alleviate the fears that Hungary may request too much it swiftly adds that "In the period up to accession Hungary will continue to align its visa policy with that of the European Union and the Schengen States. ... If nationals of neighbouring countries and Bulgaria are subject to a visa requirement in the year preceding accession, full alignment will be effected on the date of accession."¹³⁶ A further facet of the Hungarian visa policy was the introduction of airport transit visas in 1998.¹³⁷

Carrier sanctions

The obligation of the air carriers to return persons to the place of departure according to Annex 9 of the Chicago Convention on International Civil Aviation of 1944 has been part of the Hungarian law since 1969-70,¹³⁸ but no specific penalties were applied before 1999 when the amendment of the Aliens' Act introduced the rule¹³⁹ according to which not only lodging and meals plus return of the undocumented passenger is the liability of the air carrier, but also paying the penalty of maximum 1 Million Ft. (approximately 3500 US\$) per flight with undocumented passengers - irrespective of their number.¹⁴⁰ It is hard to assess how many asylum seekers are prevented from reaching Hungary as a potential country of asylum, but beyond doubt the general considerations apply¹⁴¹, especially in light of the fact that the Hungarian airline does maintain connections with countries which are the source of or en route of refugees, like China, Egypt, Lebanon, Russia, Syria, Turkey.

Crossing of the border

¹³³ Proposal for a council regulation listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Document 500PC0027)

¹³⁴ This option is hinted at in an interview with the Hungarian prime Minister, Mr. Orbán, given to the Polish Weekly Wprost (1999.08.12.) and reproduced in Hungarian at www.meh.hu (visited in September 1999)

¹³⁵ The Negotiating Position of the Government of the Hungarian Republic (CONF-H 61/99) available at www.mfa.gov.hu

¹³⁶ *ibid*

¹³⁷ 82/1998 (IV.30) Government decree amending 46/1994 (IV.30) Government Decree on the implementation of the Aliens' Act

¹³⁸ The Convention since 1969, the amendments since 1970, see Law-Decree 25 of 1971, remarkably Annex 9 on "facilitation" was only published in 1997, and even then not in the Official journal, but in the Bulletin of the competent Ministry.

¹³⁹ Act LXXV of 1999 on organised crime amending Article 60 of the Aliens Act (LXXXVI of 19993)

¹⁴⁰ The speaker of the Border Guards in an interview published in Magyar Hirlap on 20 November 1998 spoke of "problems with papers" in 10-15 cases weekly at Ferihegy (the only international airport in Hungary).

¹⁴¹ See e.g. The effects of carrier sanctions on the Asylum System *Danish Refugee Council, The Danish Centre of Human Rights*, Copenhagen, 1991

Most of the asylum seekers cross the border illegally. Therefore the efficiency of the border control has immense importance. Reinforcing the border control with Romania and Ukraine leads to deterring illegal crossers or rejecting them before entry. Enhancing surveillance capacities at the Austrian border relieves the EU from the responsibility and shifts it to Hungary. The EU's preference is clear: "Hungary *must* develop more effective border management systems, *especially on the future external borders of the European Union*" (emphasis added)¹⁴² The implied meaning obviously is that until accession this reinforcement must go to the present external border of the EU. One may only wonder where the seventy night vision appliances donated by the German Ministry of Interior to the Hungarian Ministry will be operated.¹⁴³

There is a specifically worrisome element in connection with the physical denial of entry. The Parliamentary Commissioner for Human Rights (the ombudsperson) has published a report in December 1999¹⁴⁴ in which the practice of the border guards operating at the only international airport with regular flights is described. According to that report if undocumented foreigners arrive on board of a non-Hungarian air carrier, they are not even allowed to leave the plane which obviously entails the danger of refoulement. Connections affected by this practice are those coming from: Cairo, Damascus, Istanbul Moscow, Prague, Saint Petersburg, Sarajevo, Skopje, Tirana, Tunis.¹⁴⁵

Access to a fair and efficient procedure meeting the minimum standards

Having overcome all the above hurdles the asylum seeker may concentrate on the status determination procedure. The time limit for submission the application has been abolished by the new Act.¹⁴⁶ That good news is accompanied, however, with a lot of bad ones.

Detention of asylum seekers

The most vehemently criticised element of the new asylum regime as developed by the interaction of the Aliens' Act and the Refugee Act (together with the implementing rules) is the detention of asylum seekers at so-called community shelters¹⁴⁷ of the border guards or in other closed institutions.¹⁴⁸ Contrary to the designation, no community element is present in these

¹⁴² Accession Partnership OJ C 202 29.. 1998 at p. 41. Indeed, if off-road cars of the border guards can only drive 30 km-s *per day* (1,3 per hour) because of the lack of finances to purchase gasoline, as reported by the (then) head of the border-guards in 1998 July, (Népszabadság, 22 July 1998), then the EU must feel forced to stress that point.

¹⁴³ Népszabadság, 14 January 2000

¹⁴⁴ Az állampolgári jogok országgyűlési biztosának jelentése az OBH 1222/1998 számú ügyben...mimeo

¹⁴⁵ Ibid, at p. 15

¹⁴⁶ Earlier the asylum seeker ought to have indicated the intention to apply for status recognition within 72 hours after crossing the border, and another three days was given to formulate the application.

¹⁴⁷ See eg. UNHCR Background information on the situation in the Republic of Hungary in the context of the return of asylum-seekers, UNHCR Geneva, 31 December 1999 or repeated appeals of the Hungarian Helsinki Committee (on file with the author). Even the EU Commission found that in "some community shelters, hygiene and living conditions are sub-standard" and noted that "[r]ecommendations made by the Ombudsman for Civic Rights led to the closure or up-grading of a number of community shelters." 1999 Regular report from the Commission on Hungary's progress towards Accession, October 1999 at <http://www.mfa.gov.hu/euanyag/Hungary%201.html>. The report published in October 2000 after referring to hunger strikes which took place at these shelters observed that in those shelters "living conditions are often quite difficult".

¹⁴⁸ So called "aliens policing detention" can be imposed upon those repeatedly violating aliens' law. They are forced to stay at police detention cells or at a state penitentiary institution. (In the latter separated from criminals).

institutions¹⁴⁹ which are specifically built or refurbished buildings on the compounds of the border guard directorates enabling the accommodation of illegal foreigners, including asylum seekers in circumstances which have the same level of security against unauthorised departure as a police detention facility. (Fences, locks, barriers within the building, continuous surveillance by TV cameras). However, asylum seekers who can not meet the criteria for the legal stay in Hungary do not necessarily end up in those prison-like institutions. If after their (legal or illegal) arrival they approach the police or the border guards formally applying for status recognition, then they will be sent or transported to a refugee reception center. These centers are open institutions and the asylum seeker may leave them after the medical quarantine period. However if the foreigner is caught when crossing in an outward direction or in connection with regular aliens' police checks and only applies while the aliens police procedure had been set into motion, then the person is transferred to one of these community shelters.

Before 1 September 1999 this could mean a limitation or deprivation of liberty of unlimited duration, after that date a maximum of eighteen months! This is certainly exceeding any conceivable maximum justifiable in light of the European Convention of Human Rights. The role of Austria and the EU here is obvious: before August 1998 foreigners at the community shelters had a right to leave during day-time which led to the disappearance of a very high proportion of them. Since the efficiency of the border guards in catching them at their exit points was limited - and could only lead to a replay until the successful crossing - the political pressure led to the adoption of a joint instruction of the border guards and the national police headquarters¹⁵⁰ which practically terminated the possibility to leave the community shelter. However there was no limit set to the maximum time of detention which in cases of persons who were under asylum procedure - or simply could not get a travel document from uncooperating representations - threatened with years-long detention. This detention practice has been challenged - in some instances with success - in court and was replaced now with a rule incorporated in the Aliens' Act itself, which - no doubt - will also be challenged ending at the European Court of Human Rights after the exhaustion of all local remedies.

Criticism of the shelter conditions does not mean that the asylum seeker has no access to the procedure. Although there were reports according to which persons were removed from these before the interview on the merits with the asylum seeker took place¹⁵¹ this is not a substantive danger. Far more worrisome is the difficult access of the asylum seeker to professional assistance in those shelters which are closed not only in the outward direction, but also inwardly.¹⁵² There the lawyers of NGO-s offering free legal consultation can not get into the rooms of the community shelters and therefore can meet potential clients only with the help of other inmates who inform the newcomers about the possibility to demand that they contact the shelter visiting lawyer.

Airport procedure

As already mentioned this procedure so far had little practical importance but it affects a very vulnerable group which is threatened with direct removal and therefore refoulement. One of the significant achievements of the concentrated criticism against the 1997 asylum regulation was that the otherwise more restrictive 1999 by the Act on organised crime in this respect brought

¹⁴⁹ As of February 2001 the community shelters were in operation in the following towns: Szombathely, Nagykánizsa, Győr, Pécs, Budapest, Kiskunhalas Balassagyarmat Orosháza, Nyirbátor with the simultaneous capacity was 862.

¹⁵⁰ 46/1998 együttes intézkedés (joint measure) issued on 12 August 1998

¹⁵¹ See e.g. UNHCR Background information on the situation in the Republic of Hungary, point 19

¹⁵² Practice varies among different shelters and over time. Much depends on the personal relationship of the lawyer and the commander.

improvement. Before 1 September 1999 appeal in the airport procedure (involving and undocumented foreigner who came from a safe third country) had no suspensive effect on the removal after rejection of the refugee status. Since that date the appeal, which must be submitted within three days does have a suspensive effect.

Accelerated procedure

According to the Act an applicant's application for recognition as a refugee shall be assessed in accelerated procedure if the application is manifestly unfounded.¹⁵³ It is not surprising that the definition of manifestly unfounded application resembles that of the London Resolutions but differs to that extent that it makes it almost useless,¹⁵⁴ since the following cases qualify as manifestly unfounded:

"if the applicant:

- a) makes no reference in his application to persecution or fear of persecution in his country;
- b) refuses to make a statement regarding his identity or citizenship and the reason for seeking asylum in the course of the proceedings;
- c) intentionally supplies false or misleading details regarding his identity and citizenship: intentionally uses a false or forged document and insists on the unreal contents thereof"

Non-genuine refugees, who should be screened out by the accelerated application hardly ever commit the mistakes under a) and b). Version c) does occur but it is very difficult to prove. In 1998, 138 persons' cases were decided in accelerated procedure (of which 100 were Romanian), in 1999, 52 and in 2000, 48.

The manifestly unfounded nature of the application is rebuttable which enables return to normal procedure. In any case the difference only is that the procedure should be completed in seven days (compared with the normal sixty days) and the appeal period is three days instead of the usual five.

The procedure itself and the quality of the first instance decision.

On 1 March 1998 the new system of refugee status determination was set up with all civilian staff and one central office determining all the cases through its departments located next to the three reception centers plus in Nyiregyháza, Szeged, Győr and Budapest. Most of the interviewers were new and not trained in law, which showed itself in the early decisions. Since then an improvement can be observed, but still decisions are grossly simplifying, not exceeding two pages or even less, essentially arguing that the applicant has not "substantiated" the claim, usually because her/his credibility was not accepted, but without factually defying the statements of the asylum seeker. An unpublished report¹⁵⁵ reviewing all the decisions taken in the first six months has found innumerable inconsistencies and minor or major violations of procedural rules.¹⁵⁶ The establishment of a pool of interpreters who speak the required (frequently in Hungary hardly

¹⁵³ Art 43

¹⁵⁴ *Bíró, Csaba*: "A nemzetközi helyzet egyre fokozódik" menekültügy Magyarországon. LLM thesis, ELTE University, Budapest, 1999 at p. 29 of the manuscript.

¹⁵⁵ Written by Imre Papp, on file with this author

¹⁵⁶ E.g. one can frequently not establish the time spent between arrival and the first hearing.

known) languages is a yet a not fully accomplished task, which again influences the quality of the decisions.¹⁵⁷

In order to draft a realistic picture, the merits should also be very briefly mentioned: UNHCR has unhindered access both to procedure and decisions, lawyers representing asylum seekers face no obstacles erected by the refugee authorities, they have access to clients who have already appointed them. Great efforts are being made to improve the country of origin data-base of the system: both the German and the Swiss authorities provide substantive informal assistance in that respect. Many of the interviewers are very open to discussions and are willing to engage into professional debates with the NGO sector in academic/training set-up. representatives of the refugee department regularly attend training sessions of NGO lawyers at which substantive discussions take place on the various potential interpretations of the law, and not infrequently the agreement reached there informs later practice of the authorities.¹⁵⁸

Appeal rights

One of the major setbacks of the new regime is the curtailment of the appeal procedure. Before 1998 two levels of administrative proceedings were followed by two levels of court procedure. The new Refugee Act has abolished the administrative review. This means that after the 60+30 days available for the refugee authority to decide appeal must be submitted to the Metropolitan Court in Budapest.¹⁵⁹ The Act envisages that the court would decide within fifteen days after the submission of the appeal for which five days are provided. It was known that this would be unrealistic and practice confirms. Even though a hearing is not compulsory (and the court hardly ever holds one), the non-litigious procedure frequently lasts for several months which is unfortunate enough, especially in case of those who have to endure in the closed community shelters. However the major flaw of the system hides in the next phase. An appeal against the order of the court is possible to the Supreme Court of Hungary and the Supreme Court must review the legality of the first instance decision, it can not decide whether or not to allow the appeal. That is obviously an anomaly, since this most prestigious court is not prepared to deal with hundreds of individual cases. There are no time limits set for its procedure, which protracts recognition procedures to unbearable length and threatens with the collapse of the system.¹⁶⁰

3. The bill of 2001: the EU *acquis* as a pretext or as a guiding tool?

After a relatively short preparatory period and half-hearted consultations with the parliamentary parties but with total exclusion of the civil sector, the Ministry of Interior prepared a bill on amending the asylum law.¹⁶¹ It formed part of a package consisting of altogether four proposals, the other three related to the aliens' law, the border guard's law and the law on nationality. This

¹⁵⁷ MENEDÉK has developed a curriculum with UNHCR for the training of interpreters which has been officially recognized by the refugee authority.

¹⁵⁸ One might think of the extension of the means to prove one's identity for example.

¹⁵⁹ The Metropolitan Court usually acts as a second level court (of appeal). However for legal technical reasons in refugee cases it is the solely competent first instance court.

¹⁶⁰ The fact which prevented it from total implosion is that asylum seekers still manage somehow to irregularly depart before the final decision comes. In 1999 from the open reception centre in Debrecen approximately 80-85 % of the applicants departed before the final decision has arrived. The case of community shelters is more complicated, but it seems that many of the exceptional leaves granted for a visit in the town are frequently used to contact the helpers and not return.

¹⁶¹ Bill No T/3708 submitted on 2 February 2001.

exclusion of the academic and NGO sector was in sharp contrast with the preparation of earlier acts when those players of the refugee theater could see and comment the drafts at such stage when substantive changes were still conceivable, i.e. before the draft was approved by the Government. It is not easy to tell whether this new seclusion is simply the attitude of the new administration which came to power in 1998 or the impact of the close co-operation with the EU and the wish of the drafters not to be subject to pressure from two opposing sides.

The brief justification accompanying the bill had one theme: the need to harmonise with the EU acquis. The bill itself listed eight documents with which it (according to the drafters) established harmony.¹⁶² Critical voices were quickly raised: some claimed that harmonisation was premature in light of the hardly formed Single European Asylum system and reminded on the scoreboard¹⁶³ with its long list of tasks to be accomplished in the coming years and also proved that the rules suggested in fact were neither in harmony with the existing acquis nor with the one taking shape in the form of existing or planned Commission proposals made public by early 2001.¹⁶⁴ Others noted that under the claim of harmonisation probably an aspiration to maximise the power in the domestic arena of the Office of Immigration and Nationality appears.¹⁶⁵

The most important amendments incorporated in the bill in relation to the above mentioned critical elements¹⁶⁶ of the asylum system were the following:

- The removal of the "authorized to stay" status from the Asylum law and introducing it - with a more limited level of protection - as a humanitarian stay permit in the aliens law.
- The reformulation of the temporary protected category, to mean:
" a foreigner who is a member of such a group of people arriving en mass in the territory of the Republic of Hungary, which group has been designated to be eligible for temporary protection by the Government or by the competent institution of the European Union, because the foreigner was forced to escape from his/her country due to armed conflict, civil war, ethnic clashes going on there or due to the general, systematic or brutal violation of human rights - in particular torture, inhuman or degrading treatment - causing en masse flight,;"
- The entitlement to maximise the number of those who can enjoy the benefit of temporary protection.
- The reformulation of the definition of the safe third country to mean a country where:
"prior to arrival at the territory of the Republic of Hungary a foreigner had stayed, travelled through or wherefrom s/he continued to travel so that the applicability of the Geneva Convention had been recognised at his/her request, or he/she had the chance, but did not take advantage of submitting an application for recognition; provided that the legal rules and the actual practice of this country guarantee the examination_of the merit of the asylum claims and the foreigner is not

¹⁶² These were: the Dublin Convention, (OJ No C 254 19 08 1997) the three London decisions of 1992, (WGI 1281, WGI 1282 Rev 1, WGI 1283) the 1995 Council resolution on the minimum guarantees of the procedure, ((OJ No C 274 19 09 1996) and on the "burden sharing" with regard to the admission and residence of displaced persons on a temporary basis (OJ No C 262 07 10 1995, the joint position on the harmonised application of the definition of the term refugee in Article 1 of the Geneva Convention (OJ No L 63 13 03 1996) and the 1997 joint position on unaccompanied minors

¹⁶³ COM (2000) 782 final, Brussels 30 November 2000.

¹⁶⁴ For details see: Nagy, *Boldizsár*: Utoléri-e a magyar Akhilleusz az Unió technóbékáját? Megfigyelések a menekültügyi jogharmonizáció körében, *Magyar Jog 2001 April* forthcoming

¹⁶⁵ *Kőszeg, Ferenc* Az ember attól ember, Népszabadság (Forthcoming in March 2001)

¹⁶⁶ See section II C 2

exposed to persecution, torture, inhuman or degrading treatment there and may not be returned to such a country"¹⁶⁷

- The changes in the regime of detention of the asylum seekers appear in the bill on the new law relating to the entry and residence of foreigners.¹⁶⁸ They are beneficial, since community shelters will be open institutions once again and the maximum duration of detention of those asylum seekers who do not commit any violation against the rules (like an illegal crossing of the Western border) must not be detained for longer than a month.

- The extension of the airport procedure to everyone who arrives at the airport and applies for the recognition of her status, even if the applicant does possess identity documents and does not arrive from a safe third country.

- The reformulation of the criteria of the manifestly unfounded applications and the deadlines in the accelerated procedure. There are for reasons envisaged as grounds for manifestly unfounded applications:

"a) there is clearly no substance to the applicant's claim of persecution in the country of origin or to the well founded fear thereof;

b) the application is based on deliberate deception or on the abuse of the asylum procedure;

c) there is a safe third country, which is obliged to readmit the applicant;

d) the applicant is the citizen of a member state of the European Union."

- The appeal rights and the whole system of the asylum system is subject to fundamental change if the bill will be adopted. The one level administrative procedure will be replaced by a two level one, with genuine appeal concerning facts and law between the two levels, having suspensive effect. That presupposes that the Office of Immigration and Nationality will acquire local organs to decide at first level and the Office itself would be the appeal authority the decision of which would be subject to judicial review, starting at the local court with one appeal to the county court.

Without going into the details¹⁶⁹ one may note¹⁷⁰ that most of the new rules are neither in precise conformity with the -mainly soft law - documents of the present *acquis*, nor with those proposals of the Commission which try to learn the lessons from the (mal)functioning of this *acquis*. Although the abolition of the Supreme Court's involvement in every appeal procedure and the limitation of detention of innocent asylum seekers would certainly constitute positive moves as the new rules on family unification and unaccompanied minors, the general tendency is in the direction of tightening and expanding the regime and its institutions, getting a stronger grip on any irregularity of migration and conforming to whatever is thought to be the EU *acquis*, at least

¹⁶⁷ The bill did not affect the definition of the safe country of origin which is not in harmony either with the London conclusion or with the 2000 Commission proposal. The valid Hungarian definition is: "the presumption relating to the country of nationality, or in the case of a stateless person, to the habitual residence, of the person seeking recognition as refugee, according to which presumption that country observes/implements the International Covenant on Civil and Political Rights, the Geneva Convention, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Protection of Human Rights and Fundamental Freedom signed in Rome on 4 November, 1950, and where because of the characteristics of the legal order and the guarantees of legality there may not exist a threat of persecution for reasons of nationality, membership of a particular social group, political opinion, race, religion; or torture, inhumane or degrading treatment and which country allows independent national and international organisations to control and supervise the enforcement of human rights."

¹⁶⁸ Bill submitted on 2 February 2001

¹⁶⁹ At the time of writing this footnote the bill is lying at the Parliament's desk awaiting the general debate and the proposals for its modification. Since its approval requires a 2/3 vote of the MP-s present it can not occur without the votes of the opposition. Therefore one can not guess yet, whether it will be adopted and with what changes.

¹⁷⁰ For detailed comments see this authors article identified in fn. 164 supra.

to the extent it promotes bureaucratic aspirations of the Ministry of Interior, and its Office for immigration and Nationality Affairs¹⁷¹.

Conclusion

There are two narratives describing the past decade of forced migration affecting Hungary. The optimistic refers to the elements to be appreciated:

- The country indeed offered protection for the victims of the regimes in Romania and the former Yugoslavia and has in essence observed the command of non-refoulement with respect to all asylum seekers, including the non-Europeans.
- A comprehensive, human-rights respecting legal system was built up, with a well defined asylum segment including functioning institutions both in the governmental and the non-governmental sector.
- The country does not resist influence from the outside calling for higher standards both in the legislative field and in the implementation. This is exemplified - among others - by the revocation of the geographic limitation to the Geneva Convention in 1998.

The pessimistic reminds us to the shortcomings and dangers:

- Most of those who would have qualified practically had no access to Convention status, and the asylum seekers from the Serbo-Croat, the Bosnian and the Kosovo war were denied access to a clearly defined temporary protection status.
- The fear from becoming the responsible state for the recognition and integration of too many refugees led to the introduction of the same restrictive techniques in substantive and procedural law as introduced by the much criticised West European states.
- The incongruence in the self perception and the hypocrisy prevails: political forces in Hungary are reluctant to realise that presenting Hungary as a developed European state, member of OECD and NATO which qualifies to be full member of the European Union soon is incompatible with refraining from taking its share in the global and the regional forced migration movements and their consequences.¹⁷²
- .- The present asylum system - elaborate as it is - does not function well: the detention practice, the extreme length of the procedure, the inappropriate adaptation of the European Union principles relating to accelerated procedures and minimum guarantees must be corrected.

The fate of the Hungarian system will within less than a decade be coupled with that of the European Union. One should hope that by that time the Union will indeed strive at what it promised itself in Tampere in 1999¹⁷³:

" The aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity.

¹⁷¹ Limitations of space do not permit and the uncertainty of the fate of the bill make it inadvisable to comment on the aliens' law changes, taking the form of a brand new statute, and seriously curtailing rights and possibilities of foreigners in general, all by alleging that Schengen and the EU acquis requires that.

¹⁷² One might see this tendency e.g. in the country's *non-participation* in the effort of receiving air-lifted Kosovo Albanians during the height of the conflict in 1999.

¹⁷³ DOC/99/14 Presidency Conclusions, Tampere European Council, 18 October 1999

A common approach must also be developed to ensure the integration into our societies of those third country nationals who are lawfully resident in the Union."