HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

Written submission of the Hungarian Helsinki Committee to the General Discussion on the preparation for a General Comment on Article 9 of the International Covenant on Civil and Political Rights

Upon the invitation by the UN Human Rights Committee (HRC) the Hungarian Helsinki Committee (HHC) respectfully submits the following written contribution on the subject of General Discussion on the preparation for a General Comment on Article 9 (Liberty and Security of Person) of the International Covenant on Civil and Political Rights (ICCPR).

The HHC considers it extremely important to develop and adopt a more detailed general comment to provide appropriate and authoritative guidance to States Parties and other actors on the measures to be adopted to ensure full compliance with their obligation concerning the rights protected under Article 9.

The HHC has been working on detention related issues for almost twenty years, it has been involved in policy developments, in monitoring activities, in lobbying and advocacy campaigns and in strategic litigation. Moreover, the HHC has long been active in promoting and defending the rights of refuges and asylum seekers. [1]

The HHC is currently working on a study which analyzes the use of pre-trail detention in 17 countries from Central and Eastern Europe and the Former Soviet Union. [2] The study looks at both legislation and practice of these countries and analyzes them in the light of applicable international standards. The study is supported by a grant from the Open Society Foundations.

Based on this professional experience the HHC, with the assistance of the Open Society Justice Initiative, would like to contribute to the ongoing debate of developing a General Comment on article 9 of the ICCPR in the present submission. We would like a set of recommendations to be considered in relation to pre-trial detention in general and we also have a set of recommendations specific to immigration detention.

[1] For a more detailed description on HCC's activities see our brief history and annual reports: http://helsinki.hu/en/about/history-of-the-hungarian-helsinki-committee and http://helsinki.hu/en/about/annual-reports

[2] The country specific research was carried out by NGO's from the respective countries : Albania (Albanian Helsinki Committee), Bulgaria (Bulgarian Helsinki Committee), the Czech Republic (League of Human Rights), Georgia (Georgian Young Lawyers' Association) Hungary (Hungarian Helsinki Committee), Kazakhstan (Penal Reform International-Central Asia Office), Kosovo (Kosovo Rehabilitation Centre For Torture Victims), Latvia (Latvian Centre for Human Rights), Lithuania (Human Rights Monitoring Institute), Moldova (Institute for Penal Reform), Montenegro (Human Rights Action), Poland (Helsinki Foundation for Human Rights in Poland), Romania (GRADO – The Romanian Group for the Defence of Human Rights), the Russian Federation (Public Verdict Foundation), Serbia (Belgrade Centre for Human Rights), Turkey (Foundation for Society and Legal Studies), Ukraine (Ukrainian Legal Aid Foundation)

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

Outline of the written observation

On pre-trial detention in general

On immigration detention

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

Recommendations on pre-trial detention in general

1. Means of last resort

According to article 9.3 of ICCPR

It shall not be the general rule that persons awaiting trial shall be detained in custody

Recommendations:

- **There should be a provision clearly stating that PTD should be considered as a means of last resort**
- **Pre-trial detention should be used only for offences which are punishable with imprisonment**
- **Alternatives to pre-trial detention should be encouraged**

The general rule according to which PTD should be used as a means of last resort is reinforced by: the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment Principle 36 (2), The Tokyo Rules (Rule 6.1), by the Council of Europe (CoE). Recommendation (2006) 13 of the Committee of Ministers on the use of remand in custody. This view is also supported by the ECtHR case-law which stressed that pre-trial detention should be considered as an exceptional measure which can be used only when it is strictly necessary.[3]

Our ongoing research on PTD shows that such a requirement is expressly mentioned in the criminal procedural law of just a few countries[4] and is absent from most of them.[5] Also, our study shows that there is still an overreliance on PTD in these countries, and courts are far more likely to order PTD than any of the alternative measures.

As a further guarantee we would also encourage the HRC to urge states to use PTD only in respect of persons suspected of committing offences which are punishable with imprisonment. This has also been echoed by the CoE.[6]

We further encourage the HRC to urge states to make wider use of alternatives to PTD. In this respect a useful tool might be the United Nations Handbook of basic principles and promising practices on Alternatives to Imprisonment[7]

[3] ECtHR, *Lelièvre v. Belgium*, Application number 11287/03 , 8 November 2007, para 89
[4] Georgia, Lithuania, Poland, Serbia, Romania
[5] Bulgaria, Czech Republic, Hungary, Moldova, Montenegro, Russia, Turkey, Ukraine
[6] Recommendation (2006) 13 of the Committee of Ministers to member states on the use of remand in custody, article 6
[7] United Nations Handbook of basic principles and promising practices on Alternatives to Imprisonment; Criminal Justice Handbook Series, United Nations Office on Drugs and Crime Vienna, 2007, page 19, 20, available at: http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf. It lists possible alternatives:
- to appear in court on a specified day or as ordered to by the court in the future;
- to refrain from:
- interfering with the course of justice,
- engaging in particular conduct,

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

In certain cases the ECtHR expressly emphasized that part of the violation was the courts' failure to look into the possibility of using alternatives to detention.[8]

The HHC, as a member of a consortium of NGO's had previously shown that alternatives to pre-trial detention are hardly relied upon, even when they are provided for in law, and that there are highly divergent practices on the matter within Europe.[9]

In Hungary, in 2011 only 168 suspects were subjected to home curfew, 104 to house arrest and 205 to restraining order.[10] Comparatively, the number of pre-trial detainees in the Hungarian penitentiary system on any given day is above 5,000 out of a total prison population of about 17,000.

2. Requirement that deprivation be "on such grounds … as are established by law"

Article 9.1 of the ICCPR provides that:

> *No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law*

Recommendations:

- **There should be a more detailed provision on the acceptable grounds for PTD**
- **There should be a general requirement that PTD can only be ordered when there is a general suspicion of having committed a crime. This general requirement should be coupled by a set of recommended grounds on which PTD can be ordered.**
- **After the lapse of a certain amount of time the interests of the investigation should not serve as the basis for prolonging the detention**

The HRC in its jurisprudence[11] suggested that PTD should be ordered only when there is a probability that the accused

- would abscond or tamper with evidence
- influence witnesses or other parties of the proceedings

- leaving or going to specified places or districts, or
- approaching or meeting specified persons;
- to remain at a specific address;
- to report on a daily or periodic basis to a court, the police, or other authority;
- to surrender passports or other identification papers; to accept supervision by an agency appointed by the court;
- to submit to electronic monitoring; or
- to pledge financial or other forms of property as security to assure attendance at trial or conduct pending trial.

[8] Application no. 19547/07, § 29

[9] Please see: European Commission Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention, 25 November 2011, Submission to the Public Consultation on the Green Paper by: Czech Helsinki Committee, Helsinki Foundation for Human Rights Poland, Human Rights Monitoring Institute Lithuania, Hungarian Helsinki Committee, The League of Human Rights Czech Republic, Open Society Justice Initiative, available at: link

[10] Source: Annual Statistics of the Public Prosecution Service 2011., (2011. évi Ügyészségi Statisztikai Tájékoztató), pp 46-48, available at http://www.mklu.hu/cgi-bin/index.pl?lang=hu.

[11] HRC, Communication No. 526/1993, *Hill v. Spain*, Views adopted on 2 April 1997, paragraph 12.3.

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

- flee from the jurisdiction of the State party.

Another ground considered by the HRC is the mere fact of being a **foreigner**, which is thought of as indicating a higher risk of fleeing the country. However, ordering PTD solely on this ground has been found to be in contradiction with Article 9 (3) of the ICCPR.[12]

We suggest that it must be clearly stated that first of all there needs to be a reasonable suspicion of having committed a crime[13] before placement in PTD can be even considered. This should be a general precondition which **should be coupled with a set of specific grounds** based on which placing someone on PTD can be considered. This approach was adopted by several countries of HHC's ongoing research on PTD, which will consider along with the general suspicion of having committed a crime the following grounds:

- Risk of non-appearance at trial[14]
- The risk that the detainee will interfere with the course of justice[15]
- The risk the detainee will commit further offences[16]

Also, there needs to be a clear obligation that after a lapse of a predetermined time limit PTD cannot be prolonged based solely on a reasonable suspicion of having committed a crime, other grounds need to be adduced. In this respect we would recommend to have a provision **prescribing that after a certain amount of time (between 6 months and 1 year), the interests of the investigation may not serve as the basis for prolonging the detention**. This rule could be further refined by prescribing that **even before this final deadline the prosecution (or other responsible authority) shall expressly outline those investigative acts that it wishes to carry out and the prospect of which underline the necessity of maintaining the suspect's detention**. **If not accomplished** (and the responsible authority does not provide a reasonable explanation for the omission), **the prolongation of the detention may not be based on the interests of the investigation**.

This approach is also supported by the ECtHR jurisprudence which stated that after a certain amount of time lapsed national courts should consider other grounds that may justify PTD.[17]

3. Judicial Control over PTD

According to article 9 of ICCPR:

> *3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release [...]*

[12] Communication No. 526/1993, *Hill* v. Spain, Views adopted on 2 April 1997, paragraph 12.3
[13] In: Bulgaria, Hungary, Kosovo, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Turkey
[14] In: Bulgaria, the Czech Republic, Georgia, Hungary, Kosovo, Lithuania, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Turkey, Ukraine
[15] In: Bulgaria, the Czech Republic, Georgia, Hungary, Kosovo, Lithuania, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Turkey, Ukraine
[16] In: Bulgaria, the Czech Republic, Georgia, Hungary, Kosovo, Lithuania, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Turkey, Ukraine
[17] ECtHR, *Punzelt v. the Czech Republic*, Application no. 31315/96, 25 April 2000, para. 73

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Recommendations:

It is paramount that PTD be placed under judicial control and that such control respects a number of criteria such as:

- **it must be exercised by an authority which is independent and impartial;**
- **it must be prompt;**
- **it must be effective and not just formal**
- **it should result in a reasoned judicial decision**

a) Independence and impartiality

The HHC is of the view that there should be more clarity on this point and the HRC should elaborate on the principles it has already set forth in its jurisprudence. In the case of Sultanova v. Uzbekistan[18] the HRC explained that the decision to place someone in PTD should be brought under judicial control and it added that "it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with"; in that case it was found that the prosecutor does not satisfy that criteria and consequently cannot be considered to be an "officer authorized to exercise judicial power".

The same approach is taken by the ECtHR which has repeatedly explained that such an officer cannot be a prosecutor, because it fails to meet the impartiality and independence requirement.[19]

Our study shows that in all the countries analyzed, motions to place someone in PTD can be decided only by a judge.

b) Promptness

The HRC stipulated that the delay to bring someone before a judicial authority cannot be more than a few days; in the same case it found a violation of Article 9 (3) because there was a 33 days delay before the author was brought before a judicial authority.[20] The HRC reached the same conclusion for a delay of 23 days.[21] In a case against Hungary the HRC found a violation of article 9.3 in a case in which the author "was detained for **three days** before being brought before a judicial officer"[22]

The ECtHR also does not set a clear time limit but in Brogdan and others v. United Kingdom it explained that the "scope for flexibility in interpreting and applying the notion of *promptness* is very limited", and in that case it found that a delay of 4 days and 6 hours from the moment a person is

[18] HRC, *Mrs. Darmon Sultanova v Uzbekistan*, Communication No. 915/2000, 30 March 2006, para. 7.7
[19] Directorate General of Human Rights, Council of Europe, The right to liberty and security of the person *A guide to the implementation of Article 5 of the European Convention on Human Rights*, Monica Macovei, Human rights handbooks, No. 5, 2002, available at: http://echr.coe.int/NR/rdonlyres/D7297F8F-88DB-42B0-A831-FB4D1223164A/0/DG2ENHRHAND052004.pdf , page 50-52
[20] HRC, *Louisa Bousroual v. Algeria*, Communication No. 992/2001, 30 March 2006, para 9.6
[21] HRC, *Yuri Bandajevsky v. Belarus,* Communication No. 1100/2002, 28 March 2006, para 10.3
[22] HRC, *Mr. Rostislav Borisenko v. Hungary*, Communication No. 852/1999, 14 October 2002, para 7.4

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

detained to when he/she is brought before a judge does not comply with the "promptness" requirement.[23]

In our study most of the countries had time limits until when someone taken into custody needed to be brought before a judge, however these time limits ranged from 24 hours[24], 48 hours[25] or 72 hours[26] while some just required that a person be brought before a judge "as soon as possible"[27]

c) Effectiveness

The judicial supervision should be effective, as mentioned in the jurisprudence of the HRC. The HRC explained that judicial review of the lawfulness of detention under Article 9.4 must include the possibility of ordering release and should not be "limited to mere compliance of the detention with domestic law". [28] Such review must be "real and not merely formal", accordingly "the court [must] be empowered to order release, if the detention is incompatible with the requirements in article 9.1, or in other provisions of the Covenant"[29]

In Hungary some investigation judges hold that they are not entitled to examine whether there is a reasonable suspicion that the accused has committed a crime, they can only accept the prosecutor's comments on this point, saying that the power and task of the judge is limited to deciding on the merits of the case. To prevent such interpretation it must be expressly recommended that judges deciding upon PTD should have full power to assess the lawfulness of detention, including the general and specific conditions of the lawfulness of PTD.

Our study show that in all of the countries we looked at the courts have the power to order release.

d) Reasoned decision

In the context of PTD, the ECtHR has repeatedly stated that when courts are considering to apply or prolong pre-trial detention they "must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence" and they must **"set them out in their decisions."**[30]

Consequently, there needs to be a reasoned decision for any deprivation of liberty. Justifications need to be provided irrespective of the length of detention.[31] Such justification cannot be abstract and general.[32] Moreover, according to the ECtHR jurisprudence, information must cover the "legal and factual grounds" for the arrest.[33] In case of several concurring investigations, the ECtHR expects the

[23] ECtHR, *Brogan and others v. The United Kingdom*, Application no. 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, para. 62
[24] Bulgaria, Czech Republic, Romania
[25] Georgia, Lithuania, Poland, Russia
[26] Hungary
[27] Moldova, Kosovo
[28] HRC, *A v. Australia,* Communication No. 560/1993, 3 April 1997, para. 9.5
[29] HRC, *A v. Australia,* Communication No. 560/1993, 3 April 1997, para. 9.5
[30] ECtHR, *Labita v. Italy* [GC], 6 April 2000, Application no. 26772/95, para 152
[31]ECtHR, *Belchev v. Bulgaria*, 8 April 2004, Application no. 39270/98, para 82
[32] ECtHR, *Clooth v. Belgium*, 12 December 1991, Series A no 225, para 44
[33] *Fox, Campbell and Hartley v the UK,* ECtHR, Judgment of 30 August 1990, para. 40.

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

authorities to provide the person with at least a minimum of information about each of them, if the materials from those investigations can serve as a basis for his detention.[34]

Our study shows that the requirement for a reasoned decision appears in the legislation of the countries covered by us.

4. Duration of PTD

In its previous General Comment the HRC stated that:

3. [...]. Pre-trial detention should be an exception and as short as possible.

Recommendations:

- **There should be more clear indications of what is too long for the time a person is held in PTD. We would recommend the ECtHR criteria in determining the reasonableness of the PTD duration.**
- **Countries should generally be encouraged to use a fast track procedure for cases in which the defendant is held in PTD**

The HHC urges the HRC to give clearer guidance on this point. Currently, the duration of pre-trial detention is assessed on a case by case basis and the HRC can take into account some "special circumstances justifying delay, such as [the fact] that there were, or had been, impediments to the investigations attributable to the accused or to his representative"[35]. In the past the HRC has found a violation of Article 9 (3) of the ICCPR in cases where the author was held in pre-trial detention for 9 years[36], or for 4 years and 4 month[37]

The HRC could draw inspiration from the ECtHR [38]which also did not establish clear limits but has indicated a number of factors that it will take into consideration when determining the length of PTD, such as:

- The complexity of the investigation;
- The number of co-defendants;
- Whether there are international elements;
- The nature and complexity of the legal issues; and
- The conduct of the accused

Nonetheless, applying this test the ECtHR found in some instances periods of 1 year to be excessive and periods or 3 years to be acceptable, while period of over 5 years are generally considered unacceptable.[39]

[34] *Leva v. Moldova,* ECtHR, Judgment of 15 December 2009, para. 61.
[35] HRC, *Famara* Koné v. Senegal, Communication No. 386/1989, 21 October 1994, para 8.6, 8.7
[36] HRC, *Geniuval Cagas, Wilson Butin and Julio Astillero v. Phillipines*, Communication No. 788/1997, 23 October 2004, para 7.4
[37]HRC, *Famara Konév. Senegal*, Communication No. 386/1989, 21 October 1994, para 8.7
[38] INTERIGHTS Manual for Lawyers – Right to Liberty and Security under the ECHR (Article 5), September 2007, page 39,40 available at: http://www.interights.org/document/105/index.html
[39] Council of Europe, Human Rights Handbook no. 5: *The right to liberty and security of the person, A guide to the implementation of Article 5 of the European Convention on Human Rights*, Monica Macovei, 2002, page 35,

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

Our study found that countries do place limits on maximum time a person can be placed in PTD but the practice is highly diverging. Most countries established a system by which they have different time limits depending on the gravity of the allegedly committed offence, while some other countries have a general limit, and most of them have different time limits for juvenile and adult offenders.

While the Hungarian Code of Criminal Procedure requires that cases of defendants in pre-trial detention shall be adjudicated in a fast track procedure, in practice, this provision is not always respected. Both the number and the proportion of pre-trial detentions lasting for more than a year has been on the rise according to the Chief Public Prosecutor's Office's data.

Year	**Total number**	**Pre-trial detentions lasting for more than a year**	**Percentage of long detentions compared to the total number**
2008	5115	137	2.6%
2009	5665	172	3%
2010	6188	243	3.9%
2011	5915	274	4.6 %

These numbers cover only pre-trial detainees whose case is in the investigative phase. **If we add to that the number of pre-trial detainees in the court phase, the total number of pre-trial detention lasting longer than one years is almost four times higher, i.e. 1150 of 4875 pre-trial detainees or 23.7%.**

5. Procedural safeguards.

Recommendations:

We would argue for the application of fair trial standards (art 14 ICCPR) to the procedure in which someone's detention order is reviewed by a judge. We would lay special emphasis on the following rights:

- **Access to a lawyer**
- **Equality of arms**
- **Right to be informed in a language one understands**

a) Access to a lawyer

According to article 14. 3 of ICCPR:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

*(b) To have adequate time and facilities for the preparation of his defence and to **communicate with counsel** of his own choosing;*

available at: http://echr.coe.int/NR/rdonlyres/D7297F8F-88DB-42B0-A831-FB4D1223164A/0/DG2ENHRHAND052004.pdf

> *(d) To be tried in his presence, and to defend himself in person or through **legal assistance of his own choosing**; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*

The HRC stated in a case against Hungary that "legal assistance should be available at all stages of criminal proceedings" and in applying this principle it found a violation of Article 14. 3 (d) because the author was not granted effective access to a lawyer during PTD[40] It similarly found a violation of article 14.3 (b) in a case the author asked to talk to his lawyer while in PTD and was denied this right[41]

Moreover, the HRC has previously stated that the right to a lawyer is enshrined in Article 9.3 of the ICCPR and found a violation of this article when the author was not provided with legal representation during pre-trial detention.[42]

The right to access to a lawyer during PTD is also supported by the ECtHR which emphasizes the right of an accused to „be able to obtain legal assistance as soon as he they are placed in custody or pre-trial detention" [43] This has been the position of the ECtHR for many years and from 2008 a series of decisions have developed on this requirement and added that a person must have access to legal assistance when they are placed in custody or their position is significantly affected by the circumstances (which may even be before a formal arrest takes place) and that nobody should be interrogated or required or invited to participate in investigative or procedural acts without the right to access legal assistance. [44]

In the countries that participated in our study the right to access a lawyer during PTD is guaranteed according to the law, but there are a number of issues that come up in practice, mostly relating to lack of funding and lack of quality assessment mechanism.

b) Access to case files

According to the well-established case law of the ECtHR, the proceedings in which a decision on detention is taken "must be adversarial and must always ensure 'equality of arms' between the parties, the prosecutor and the detained person. [...] Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention"[45]

[40] HRC, *Mr. Rostislav Borisenko v. Hungary*, Communication No. 852/1999, para 7.4 – In this case the state party assigned a lawyer to the author but the lawyer failed to appear at the interrogation or at the detention hearing
[41] HRC, *Gridin v. Russian Federation*, CCPR/C/69/D/770/1997, para 8.5
[42] HRC, *Umarova v. Uzbekistan*, CCPR/C/100/D/1449/2006, para. 8.5
[43] ECtHR, *Dayanan v. Turkey*, Application no. 7377/03, 13 October 2009 para 31; see also: Brusco v. France, Application no 1466/07, 14 October 2010, para 45
[44] For more information on the right to a lawyer please see: Template Brief Issue #1, Early Access to Legal Assistance
Legal Brief prepared by Open Society Justice Initiative, available at:
http://www.soros.org/sites/default/files/legal-tools-early-access-20120424.pdf
[45] see, among other authorities, ECtHR, *Nikolova v. Bulgaria*, Application no. 31195/96, para. 58;

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

The right to access case files is guaranteed by law in all of the countries analyzed in our study; however it is also possible to restrict this right in respect of information that is classified[46] and in some instances, in practice this right is hardly observed[47]

In Hungary defendants are deprived of important parts of right to access the case file during the investigative phase of the criminal proceedings, even if their PTD is reasoned on the basis of information contained by such a document, therefore they are essentially deprived of their possibility to challenge the standpoint of the prosecution, which is a clear violation of the principle of equality of arms.

c) A language one understands

Article 9.2 of the ICCPR talking about the right to be informed of the reasons for arrest and charges brought against someone does not explicitly provide that such information should be provided "in a language that he understands". However, this requirement does appear in article 14. 3 (a)

The HHC feels it is important to reaffirm this right in the context of Article 9, especially since the HRC has repeatedly seen situations when this right is not observed during various phases of criminal proceedings and how this in turn affects the defendant's rights.[48] Such a right is of paramount significance for monolingual indigenous people[49], minors[50] and socially vulnerable groups.

Moreover, even people that may speak the language used in the context of criminal proceedings may still have problems understanding complicated terminology. The HHC deems it extremely important to use a language that is **simple to understand for a lay person who does not have legal training.**

This requirement is reflected in the ECtHR jurisprudence as well, which states that the right to information should be observed using "simple, non-technical language."[51] The overriding consideration is that the person affected must understand what is happening to him or her and therefore there will always be a need to take into account the specific capacities of an individual.[52]

This is also the position of the European Union which, when considering the obligation of Member States to inform criminal suspects of their rights, it stresses out that such information should "be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons"[53]

[46] As is the case in Bulgaria
[47] As is the case in Lithuania
[48] HRC, *Sobhraj v. Nepal*, CCPR/C/99/D/1870/2009 (2010),
[49] Peru, CERD, A/54/18 (1999) 21 at para. 152; Guatemala, CERD, A/52/18 (1997) 14 at paras. 79 and 89.
[50] Guatemala, CRC, CRC/C/108 (2001) 47 at para. 283.
[51] ECtHR *Fox, Campbell and Hartley v the UK,* Judgment of 30 August 1990, para. 40.
[52] Monica Macovei, *A guide to the implementation of Article 5 of the European Convention on Human Rights* (Council of Europe, 2002), p. 47, available at <http://echr.coe.int/NR/rdonlyres/D7297F8F-88DB-42B0-A831-FB4D1223164A/0/DG2ENHRHAND052004.pdf> last accessed 10-04-2012.
[53] Directive 2012/13/EU of the European Parliament and of the Council, of 22 May 2012; *on the right to information in criminal proceedings*, art. 3.2

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

6. Detention conditions

Recommendations:

- **We would recommend that there needs to be a specific reference to the applicable standards concerning detention conditions for people held in PTD. These standards are the ones reflected in the HRC's jurisprudence on Article 10 as well as in a number of international legal instruments.**

Our study indicates that one of the most problematic issues relating to PTD is the conditions of detention which most often do not comply with international standards. Particularly problematic is the treatment of people which are at higher risk of being vulnerable, such as LGBTQI, juvenile and people with disabilities.

The HRC stated in its jurisprudence that

> *[...] persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. [...]*
> *The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.*[54]

Also, the HRC found a number of times that during PTD detainees may be subjected to torture or cruel and inhumane treatment.[55]

This is why we feel it is important to emphasize the requirement that detention upholds the standards enshrined in article 10 of the ICCPR and in other international conventions such as:

- The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988
- The Standard Minimum Rules for the Treatment of Prisoners, 1955

Also, we feel it is particularly important to make reference to international standards which are applicable particularly to groups which are more at risk of being vulnerable, such as:

- LGBTQI – a good resource on international standards which should be applied for this group would be: The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, particularly article 9 on *The Right to Treatment with Humanity while in Detention*
- juveniles – we would recommend making a clear reference to the applicability of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)
- persons with disabilities – we would recommend making a clear reference to the applicability of the Convention on the Rights of Persons with Disabilities

In general we think that states should be encouraged to closely follow the principles and standards summarised in the UNODC Handbook on prisoners with special needs[56]

[54] HRC, *Corey Brough v Australia*, Communication No. 1184/2003, 17 March 2006, para9.2
[55] HRC, *Yuri Bandajevsky v. Belarus*, Communication No. 1100/2002, 28 March 2006, para. 10.6; HRC, *Albert Wilson v. Philippines*, Communication No. 868/1999, 30 October 2003, para. 7.3; HRC, *Fongum Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, 17 March 2005, para. 5.3
[56] UNODC Handbook on prisoners with special needs, Criminal Justice Handbook Series, New York, 2009

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

7. Immigration detention as a last resort, the application of alternatives to detention

It can be deducted from the relevant provisions of the ICCPR and the ECHR that by principle any form of deprivation of liberty should be a measure of a last resort or exceptionally applied, which is only applicable in accordance with international standards. [57]

Recommendation 1

The Human rights Committee should consider to emphasize in a clear and specific provision that immigration detention for the purpose of securing the execution of a removal order should only be applied as a measure of last resort, in case other, less coercive measures are found to be insufficient.

Recommendation 2

Immigration detention should not be automatically ordered or prolonged and individual needs and vulnerabilities should be considered in each case.

Recommendation 3

Clear guidance should be provided that persons that applied for asylum do not fall under that same category as other irregularly staying migrants on the territory of the country. Detention should not be ordered with a view to deportation until the asylum application of the person in consideration is duly examined by a final and executable decision.

In order to substantiate the above recommendations the HHC submits its observations derived from its practice and legal assistance programs for asylum seekers and migrants in two main topics concerning the legality of immigration detention as applied in Hungary:

1. the unlawfulness and arbitrariness of immigration detention
2. the lack of an effective judicial review of detention.

a) The unlawfulness and arbitrariness of the detention of asylum-seekers

It has to be noted that neither the ECHR nor the ICCPR exclude the detention of asylum-seekers. In fact Article 5 (f) of the ECHR explicitly authorizes the: "Lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". [58]

No such specific authorization can be found in article 9 of the ICCPR, though the HRC in its view clearly applies such an interpretation[59]. Similarly, General Comment No. 8[60] of the Human Rights Committee has established that article 9(1) is applicable to 'all deprivations of liberty' including cases attached to immigration control[61].

---

[57] Júlia Mink: *Detention of asylum seekers in Hungary*, Hungarian Helsinki Committee, Budapest, 2007. p. 16. Available at: http://helsinki.hu/wp-content/uploads/Detention_of_Asylum-Seekers_in_Hungary.pdf

[58] Article 5(1), ECHR

[59] See e.g. A. v. Australia Communication No. 560/1993 3 April 1997 CCPR/C/59/D/560/1993 Available at: http://www.unhchr.ch/tbs/doc.nsf/921031496436dab880256880003bb402/9dbcb136a858ebc5c12571cc00532f41?OpenDocument, Accession: 5 March 2005

[60] Right to liberty and security of persons (Art. 9) : . 30/06/82. CCPR General Comment No. 8. Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument. Accessed: 5 March 2002.

[61] See also cases: Torres v. Finland Communication No. 291/1988 2 April 1990 CCPR/C/38/D/291/1988, Available at: www.refugeelawreader.org/324/Torres_v._Finland.pdf, Accessed: 5 March 2005
A. v. Australia Communication No. 560/1993 3 April 1997 CCPR/C/59/D/560/1993

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

Besides other sources of universal and regional human rights instruments, the EU law on asylum and immigration – by which Hungary is also bound – only foresees that asylum seekers cannot be detained merely for the reason of seeking asylum in an EU member state[62], while in the Returns Directive the detention of irregular migrants facing return or repatriation is only allowed under certain conditions (see Recital 16 of the Returns Directive). [63] The proportional application of detention is also a basic principle in EU law on migration, since Article 15 of the Returns Directive foresees detention in case other, less coercive measures were found insufficient.

Unlawful detention as a result of systemic protection gaps

Contrary to the safeguards prescribed in the above regulatory framework, according to the experience of the HHC, the Hungarian practice on the immigration (or according to the Hungarian terminology *alien policing*) detention of asylum seekers systematically fails to observe the above provisions therefore leads to the unlawful detention of asylum seekers on a regular basis.

The only case before the ECtHR that dealt with the immigration detention of asylum seekers in Hungary is the case *Lokpo and Touré v Hungary*[64] where the Court held that there was a violation of Article 5 (1) of the ECHR because the detention did not meet the lawfulness requirement.

This case highlights the main shortcomings of the Hungarian immigration detention system, namely the fact that despite the safeguards listed in the relevant laws, authorities systematically fail to provide individualized and detailed justification of the detention measure imposed and to terminate detention immediately when it becomes clear that the expulsion order cannot be executed.

According to the well-established case law of the ECtHR and the HRC, under no circumstances could any deprivation of liberty be arbitrary. [65] A detention can be regarded as arbitrary, in particular, if the State party is not capable of demonstrating that there were not less invasive means of achieving the same objectives (compliance with the State's party's immigration policies), e.g. the imposition of reporting obligations or other conditions of a supervised release."[66]

It is also problematic that in practice it is rarely assessed by proceeding authorities when deciding upon the prolongation of detention if the expulsion measure can be implemented with the passage of time. It is clear from the practice that in the cases where deportation is impeded by the obstruction or the non-compliance of the embassy or the consulate of the alien in question the passage of time would not necessarily facilitate the execution of the deportation. But if the aim of the detention is no longer realistic, the detention has to be terminated immediately under Section 54 (6) of the TCN Act.[67]

Due to the impossible purpose of the detention (to execute the expulsion order by deportation) it is even more obvious that the prolonged detention of asylum seekers awaiting for a decision on their asylum claim is unlawful since asylum seekers **are not available for removal until a final decision on their claim has been made.** For instance, in *S.D. v. Greece* the ECtHR ruled that the detention for the purpose of securing expulsion of an asylum seeker was deprived of basis in law, since the asylum seeker cannot be expelled pending the outcome of his asylum application (§ 62).[68]

---

[62] Article 18 of the COUNCIL DIRECTIVE 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (asylum procedures directive)
[63] DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
[64] *Lokpo and Touré v. Hungary*, 10816/10, 8 March 2012
[65] See for example: *Chahal v. The United Kingdom* - 22414/93 [1996] ECHR 54 (15 November 1996) par. 118. Available at: http://www.worldlii.org/eu/cases/ECHR/1996/54.html Accessed: 5 March 2005
[66] Júlia Mink: *Detention of asylum seekers in Hungary*, Hungarian Helsinki Committee, Budapest, 2007. p. 20.
[67] Section 54 (6) of the TCN Act sets forth that "*Detention ordered under immigration laws shall be terminated immediately (…) b) when it becomes evident that the expulsion or transfer cannot be executed.*"
[68] *S.D. v. Greece*, (Application no. 53541/07), June 11, 2009

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

No alternatives are applied despite the clear legal provisions

According to the HHC's experience in providing legal assistance for asylum seekers and irregular migrants, the Hungarian authorities also fail to observe the possibility of imposing less intrusive measures on the foreigner concerned, which are listed by the TCN Act, though rarely ever applied. These alternatives to detention are the

(i) confiscation of the travel document (section 48 (2) of the TCN Act)

(ii) confinement of a third country national in a designated place (section 62 (1) of the TCN Act).

The systematic and quasi automatic application of immigration detention is the most important shortcoming of the system. According to the HHC's experience most of the aliens apprehended by the Police for unlawful entry or stay are immediately detained even if they apply for asylum. Previously to the modification of the TCN Act and the Act LXXX of 2007 on asylum and the change of practice (before the autumn of 2010), those who immediately applied for asylum had the chance to get into an open processing centre. According to the HHC's information, the only exceptions to the above-described detention policy are for unaccompanied minors (whose detention is prohibited by law under Section 56 (2) of the TCN Act) and families with minor children, while pregnant women and married couples are also detained in a separate jail for families with children and (married) couples in Békéscsaba.

With the recent amendment of the alien policing detention, the detention of irregular migrant families (including asylum seekers) with children has become possible for up to 30 days. The law provides that this measure can only be applied when no other less restrictive means can be used in order to secure the deportation of the family (such as the seizure of travel documents or designating a compulsory place of residence). However, in practice this measure is applied in a quasi-automatic manner, without considering any alternatives and regardless of the child's best interest.[69]

The HHC is only aware of a few dozens of cases where alternatives to detention (compulsory place of residence) were ordered by the Office of Immigration and Nationality (the asylum and immigration authority in Hungary) as compared to the 1703 cases where detention was imposed.[70]

b) Judicial control over immigration detention (the *habeas corpus)*

According to both the HRC and the ECtHR the scope of the judicial review should encompass the examination of both the legality and the justification of the detention order. In order to consider the judicial review of the detention effective it is necessary that the competent court be entitled to order the release of the person deprived of his liberty if the detention is not lawful. However, the legal framework does not explicitly allow such a power to the local court reviewing immigration detention. Under Section 57 (3) of the TCN Act the detained foreigner may only file a complaint if the authority executing the detention order failed to comply with its obligations in informing the detainee about his/her rights and obligations and the physical conditions in detention but the law does not foresee such a complaint based on the legal basis of the detention.[71]

Judicial review, however, clearly does not qualify as effective if the proceeding "*court is restricted to carry out only a formal analysis of the fulfillment of the requirements of domestic law (legality in the strict sense) without assessing the case in substance to exclude the possibility of arbitrariness.*[72] Alien policing (immigration) detention is to be **reviewed** and can only be prolonged by a local court every 30 days. However, this remains a **mere formality** since local courts issue basically **identical**

[69] Article 3 of the Convention on the Rights of the Child
[70] Information obtained from the Office of Immigration and Nationality
[71] Section 57 (3) of the TCN Act sets forth that the third-country national placed under detention may lodge a complaint in the event of the immigration authority's failure to comply with its obligations set out under Sections 60-61.
[72] ECHR Article 5(4), ICCPR Article 9(4)

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

decisions in all cases, the reasoning of which is short and laconic, lacking proper fact assessment and individualisation.

8. The duration and conditions of immigration detention

Recommendation 4:

Immigration detention should only be used as a last resort for the shortest period of time.

According to the relevant provisions in Hungarian law detention should cease immediately if it becomes evident that the expulsion cannot be carried out. In practice this rarely happens, detainees spend on average 4-5 months in detention[73]. The maximum period of immigration detention was prolonged from 6 months to 12 months by the 2010 amendment of the Aliens Act[74]. This amendment has also authorized the detention of families with children up to 30 days.

Recommendation 5:

Detention conditions should be humane and should take the individual detainees' status, needs, dignity and vulnerabilities into consideration. Immigration detainees should be held separately from persons detained in or as a result of criminal procedures.

Humane treatment of detainees is prescribed by Article 10 of the ICCPR; similar obligations derive from Article 3 of the ECHR and Recital 17 of the Returns Directive[75]. There is also a constitutional right in Hungary not to be subject to torture, inhumane degrading treatment[76].

Despite these obligations serious concerns were raised concerning the ill-treatment and medications used in immigration detention. UNHCR published its observations[77] on Hungary in April 2012 confirming these allegations. The Commissioner for Fundamental Rights visited the largest immigration detention facility in Nyírbátor and published its report[78] in September 2012 which was triggered by complaints received regarding access to fresh air, limited telephone use, restrictions on the use of sanitary facilities and their limited quantity and poor quality and also on the abusive treatment by guards. The report found that most complaints were well-founded. Detainees in one of the buildings for example "were forced to urinate into plastic bottles in their cells in front of their cell-mates, resulting in an infringement of the prohibition on degrading treatment".[79]

The report confirms the complaints received by HHC monitors[80] regarding the prevalence of abuse by guards: "With one or two exceptions, the foreign nationals interviewed either complained of having suffered violent treatment by the guards or that one of their co-detainees had sustained such treatment, or that they had witnessed such incidents".[81]

---

[73] Hungary as a country of asylum, p. 15 at http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html
[74] Act II of 2007 on the entry and stay of third country nationals
[75] Directive 2008/115/EC at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:pdf
[76] Article III. of Fundamental Law at http://www.kormany.hu/download/0/d9/30000/Alapt%C3%B6rv%C3%A9ny.pdf
[77] "Detained asylum-seekers vehemently complained about the violent behaviour of the guards….Detained asylum-seekers also complain about having been systematically given drugs/tranquillizers, resulting in some of them becoming addicted by the end of their detention term." Hungary as a country of asylum, p. 17 at http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html
[78] Report in case number AJB 1953/2012 at http://www.obh.hu/allam/eng/pdf/20121953.pdf
[79] Report in case number AJB 1953/2012, p. 26 at http://www.obh.hu/allam/eng/pdf/20121953.pdf
[80] HHC Report on the monitoring visit to Nyírbátor at http://helsinki.hu/jelentes-a-nyirbatori-orzott-szallason-tett-latogatasrol
[81] Report in case number AJB 1953/2012, p. 27 at http://www.obh.hu/allam/eng/pdf/20121953.pdf

HUNGARIAN HELSINKI COMMITTEE
H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12.
P.O. box: H-1242 Budapest, Pf. 317.
Tel/fax: + 36 1 321 4323, 321 4141, 321 4327
helsinki@helsinki.hu
www.helsinki.hu

Recommendation 6:

Children and other vulnerable persons including victims of torture and trauma and persons with disabilities should not be detained at all. Age assessment for minors should be conducted in a systematic way using a thorough scientific and methodological basis.

Despite the explicit prohibition of putting unaccompanied minors in alien policing detention[82], the HHC meets minors on its monitoring visits who are nevertheless detained (for example please see the case of four Afghan unaccompanied minors met in the Kiskunhalas immigration detention facility in December 2011[83]). There is no appropriate age assessment in such cases; doctors reportedly limit themselves to look at the torso of allegedly under-age detainees.

The Commissioner for Fundamental Rights has also regarded the lack of proper age assessment problematic and suggested "an amendment of the relevant law (Section 44 of the Asylum Law) to ensure that the examination is conducted in a child- and gender-sensitive manner and to include investigation into the psychological maturity of the applicant and the relevant ethnic and cultural facts/components as stipulated by General Comment No. 6 of the Committee on the Rights of the Child".[84] UNHCR has also recommended "developing and issuing a standard operating procedure on age assessment".[85]

With the recent amendment of the alien policing detention, the detention of irregular migrant families (including asylum seekers) with children has become possible for up to 30 days[86]. The law provides that this measure can only be applied when no other less restrictive means can be used but in practice this measure is applied in a quasi-automatic manner, without considering any alternatives and regardless of the child's best interest.

Irregular migrants and asylum seekers with special needs (such as pregnant women, elderly persons, single women, or those suffering from post-traumatic stress disorder (PTSD) or other psychological problems) do not receive adequate differentiated treatment in alien policing detention.

[82] Section 56 (2) of the Act II of 2007 on Third Country Nationals' Entry and Stay
[83] Serbia as a Safe Third Country: Revisited, p. 8. at http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf
[84] Report AJB 7120/2009 (January 2010), http://www.obh.hu/allam/eng/pdf/200907120.pdf
[85] Hungary as a country of asylum, p. 20 at http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines/hungary-as-a-country-of-asylum-2012.html
[86] Section 56 (3) of the Act II of 2007 on Third Country Nationals' Entry and Stay