HUNGARIAN HELSINKI COMMITTEE

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Council of Europe
DGI – Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments
of the European Court of Human Rights

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Subject: Addendum to communication from the Hungarian Helsinki Committee concerning the cases of ISTVAN GABOR KOVACS and VARGA AND OTHERS v. Hungary
(Action Plan plication nos. 15707/10, 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13)

Dear Madams and Sirs,

The **Hungarian Helsinki Committee (HHC)** is a leading human rights organisation in Hungary and in Central Europe. The HHC monitors the enforcement of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC's main areas of activities are centred on protecting the rights of asylum seekers and foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention and the effective enforcement of the right to defence and equality before the law.

The HHC ran a detention-monitoring program for over two decades between 1995 and 2017. In this period, the organization carried out 1237 monitoring visits at police jails, 48 visits at penitentiary institutions and made 51 inspections at places of immigration detention. The HHC submitted numerous communications to various international forums (CPT, UNWGAD, CPT, SPT, UPR, etc.) in related subject matters. The HHC lawyers have litigated cases related to the conditions of and treatment in detention in Hungarian prisons before domestic forums and the European Court of Human Rights (see e.g. the cases *Engel v. Hungary*, Application no.: 46857/06, and *Csüllög v. Hungary*, Application no.: 30042/08), and three out of the six applicants in the Varga and Others v. Hungary case were also represented by HHC's lawyers.

With reference to the judgments of the European Court of Human Rights (ECtHR) **in the cases of ISTVAN GABOR KOVACS and VARGA AND OTHERS v. Hungary**, and the action plan on the implementation of these judgements submitted by the Government of Hungary on 27 January 2021, **the HHC respectfully submits the following addendum to its observations** submitted on 26 January 2021 under Rule 9 (2) of the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements".

Hungarian Helsinki Committee

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1. General observations

1.1 Issues related to the timing and quality of the Action Plan

In its Decision CM/Del/Dec(2020)1377bis/H46-16 of September 2020, the Deputies invited the Hungarian authorities to submit an updated comprehensive action plan by the end of December 2020. The deadline for Rule 9 submissions from NGO's was 26 January 2021, which the HHC respected. However, the Government of Hungary submitted the Revised Action Plan on 27 January 2021, i.e. right after the NGO submission deadline expired. While there is no evidence that this timing was intentional, it certainly is not conducive to the meaningful participation of civil society, as it prevents NGOS from being able to react to the Government's claims or provide additional explanation regarding certain issues discussed in the Action Plan. For this reason, such delays should be avoided in the future.

As the Government's submission was submitted after the deadline given to the Hungarian Helsinki Committee, we hereby present an Addendum to the HHC's Rule 9.2 communication submitted on 26 January 2021.

Furthermore, the action plan contains outdated information, vague and not sufficiently substantiated claims.

The Revised Action Plan is not updated in reality, in the sense that it simply adds language and new information to the old text, without eliminating those parts that are outdated and not true any more. The text does not differentiate (i) between recent and previous facts, circumstances, arguments, (ii) between legislation in force and norms that are no longer applicable.

By way of example, the Action Plan

- *lists the capacity-building projects scheduled for the period between 2015 and 2019 using present and future tense, thus it is unclear whether those projects have been fully or partially implemented (p. 11[1]);*
- *it talks about "compensation on account of the infringement of personality rights" under the Civil Code as a new type or remedy, the effectiveness of which cannot be assessed due to the fact that no case law has emerged due to the "short period of time" since became applicable, although this type of remedy has been applicable since March 2014, and it has been established since then that it is not effective in the case of prison overcrowding (pp. 24-25);*
- *it describes in detail, at length (altogether 4 pages – pp. 26-29) and in present tense the rules of the old compensation procedure which are no longer in force.*

The inconsistent and undefined application of the terminology also contributes to the lack of the clarity of the Action Plan, which *might be misleading For those not being familiar with the Hungarian legal system and might lead to confusion.*

[1] Since the first 41 pages of the Action Plan do not contain page numbers, which makes referencing difficult, when indicating page numbers, we refer to the page number of the pdf document (which includes the cover page added by the CoM) with those in mind who access to document electronically.

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For instance, the Action Plan uses

- *"reintegration custody" and "reintegration detention" to refer to the same institution (pp. 18-21 and 49)*
- *"penal institutions" and "correctional facilities" as equivalent terms;*
- *the term "misdemeanour" as an equivalent of both petty offences (non-criminal violations adjudicated on the basis of a law other than the Criminal Code, p. 18) and minor criminal offences (adjudicated on the basis of the criminal Code, p. 43).*

In addition, the Table outlining the outcomes of compensation procedures (p. 33) contains terms that are not explained and are hard to interpret even for those who are familiar with the Hungarian legal system. It is unclear how "ascertainment of compensation" relates to "the request is granted", what "noted" or "misrepresentation" mean or what kind of "fine" is paid by whom in a compensation claims procedure. Furthermore, "abolition" seems to refer to the quashing of a first instance compensation decision by a second instance court (though in the absence of an explanation one cannot be sure). If this is the case, then an abolition is an interim decision to be followed by another first instance decision, and therefore its inclusion in the manner applied by the Government makes it somewhat difficult to interpret the numbers. The list of these clarity problems could be continued for long.

Based on the above, we respectfully ask the Committee of Ministers to call on the Government of Hungary to submit a Revised Action Plan that is updated, coherent and thus reflects the importance of the procedure.

1.2 Evidence provided by Action Plan is unsatisfactory

1.2.1 Insufficient handling of statistical evidence

Most of the information, the Action Plan contains does not rely on statistical evidence. In the few cases where data are disclosed, the sources of these data are not indicated (with the exception on pp. 22-23). This is not only problematic from the point of view of credibility, but it also makes it very difficult for NGOs to follow up this information. If the sources of the data were indicated, it would be possible for NGOs and other interested parties to monitor how the data change through submitting freedom of information (FOI) requests to those bodies that provided the information to the Government Agent. Without the indication of the source, this is practically impossible. By way of example, one set of data without the source disclosed is the length of compensation proceedings that the HHC has long been trying to access in its FOI requests[2] submitted to the National Office of the Judiciary (see Action Plan pp. 34-35). Despite the HHC's numerous attempts asking about the average length of cases between their arrival to the court and adjudication and the number of cases pending for longer than a year, the National Office of the Judiciary never responded to these FOI requests claiming that no official data collection was in place in these regards. Since this information concerns court proceedings, we cannot but assume that the National Office of the Judiciary is capable of collecting this information and was willing to do so when the request came from the Ministry of Justice. If this is the case, the response provided to HHC's FOI request is not truthful. If the data were indeed provided by another body, it

[2] Source: Response no. 2019.OBH.XII.B.31/5 issued by the National Office for the Judiciary to the HHC's FOI request, 16 January 2020; Response no. 2019.OBH.XII.B.31/5 issued by the National Office for the Judiciary to the HHC's FOI request, 16 January 2020; Response no. 2020.OBH.XII.B.66/5. issued by the National Office for the Judiciary to the HHC's FOI request, 13 January 2021; and Response no. 2020.OBH.XII.B.66/11. issued by the National Office for the Judiciary to the HHC's FOI request, 21 January 2021.

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would be essential for civil society to know so that next time this information is needed, NGOs would know which state body (or bodies) to approach with FOI requests.

As emphasised above, as a result of the unclear terminology applied, the data shown in two tables (Action Plan , pp. 33-35) regarding the number of completed compensation cases and the duration of compensation proceedings are hardly possible to comprehend.

It is also to be mentioned that in some cases the Action Plan presents some old data from 2018 without disclosing any numbers on the latest developments, e.g. numbers on the prevalence of house arrest are only shown from 2014 to April 2018 (Action Plan , pp. 22-23), whereas no data are presented regarding "supervisory measures" that replaced house arrest and other coercive measures after 1 July 2018.

Additionally, there are various examples of the Action Plan disclosing some arbitrary numbers on a given arbitrary date without explaining the relevance of the date or the different statistics used (see Action Plan, pp. 23 and 32-35). Hence, based on data shown in the Action Plan, it is not possible to arrive at any substantially certain conclusion regarding a number of issues.

1.2.2 No evidence provided on the practical implementation of several legal provisions referred by the Action Plan

The HHC agrees with the Government that "to carry out the measures related to the supplementation of the Action Plan, it is of paramount importance that a clear and comprehensive view be obtained about the current detention situation" (Action Plan p. 22). However, the second half of the Action Plan merely explains some specific legal provisions (mostly of the Penitentiary Code[3] and the ministerial decree[4] specifying the rules of executing custodial sanctions) but contains no statistical evidence whatsoever, which prevents the reader from obtaining a clear and comprehensive view on the current detention situation. As HHC's long-standing experience shows, introducing new legal institutions and desired principles into legislation is necessary but is not sufficient in itself to achieve systemic institutional change, i.e. it is equally important to provide the necessary means to the prison system to be able to carry out the desired changes in practice (such as setting up special units within the prison system, or employing a sufficient number of well-trained professionals who can tend to disabled detainees' special needs).

By way of example, the Action Plan describes in detail the different provisions allowing inmates to leave the prison in order to maintain contacts with their families, such as leave of absence, prison furlough, receiving visitors outside the prison, but provides no information whatsoever on how often these are applied, how many prisoners can avail themselves of these possibilities. Similarly, it is a welcome development that some special security regimes were introduced in 2013 to create more individualised forms of serving a prison sentence but it is just as important to provide evidence of the practical implementation of these. For example, approaching the end of their long (minimum of 5 years) prison sentence spent in medium or maximum security regime detainees may be relocated to a "transitory unit"[5], which makes a wider-range of rewards available to help their gradual reintegration into society (for example, more opportunities are provided to contact their families). The transitory unit is mentioned

[3] Act CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement (hereinafter: Penitentiary Code)
[4] Ministry of Justice Decree 16/2014, Transitional Act, and Instruction 37/2020 (VII.24.) of the NPA
[5] Penitentiary Code: Article 103(1)

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in the action plan as a unit within which the inmates may avail themselves of the possibilities to meet their families outside the prison, it is however not indicated in the report that there are hardly any transitory units in practice.

Furthermore, giving sufficient evidence of whether adequate care is available for disabled detainees is crucial. For that, a spot-on and detailed explanation of the number of proper facilities and a sufficient number of professionals is needed. Regrettably the Action Plan does not contain such information(pp. 52-53), nor have the HHC's numerous attempts to acquire data on how many different types of professionals (psychologists, social workers, reintegration officers, etc.) work in the prison system and what their numbers are proven to be successful, so it is not possible to adequately assess how and under what circumstances disabled detainees are cared for.

As the Action Plan points out, it is of utmost importance whether the law uses wording that is binding to the prison service or it just creates desirable but optional goals to achieve (Action Plan p. 24). Nonetheless, without the Government publishing a comprehensive analysis by examining well-explained and sourced data, it is not possible to obtain a clear view of the current detention situation, including how the special regimes of detention operate in practice (Action Plan, pp. 36-49), or how disabled detainees are cared for (Action Plan, pp. 53-54).

2. Specific observations

2.1 Observations regarding the information on reintegration custody

While the introduction of alternative measures to detention such as reintegration custody is welcomed by the HHC, it has to be noted that it is not a new development (reintegration custody has been applicable since 2015) and the potential of reintegration custody is still not fully exploited. Despite the Action Plan deeming reintegration custody a "success" (Action Plan, p. 18), the data disclosed by the Government is in accordance with the analysis provided by the HHC's latest Rule 9 communication, i.e. **reintegration custody is still significantly underused.** As presented in HHC's Rule 9 communication as well, the extent of its application has actually decreased between 2019 and 2020 (See the Action Plan's "Statistical data on reintegration custody" table on pp. 19-20). In fact, the table shown in the Action Plan suggests that since its introduction, reintegration custody has been applied at about a similarly low level in each year from 2015 to this date. Exploiting the full potential of alternative measures to detention is crucially important to prevent systemic problems arising within the prison system; building new prison complexes will not be able to change a restrictive, punitive criminal policy.

2.2 Issues regarding the right to keep contact in detention (family visits)

As mentioned before, the HHC welcomes the effort put into creating the legal framework to individualise the execution of prison sentences, for example, a "positive" deviation is possible from general contact rules in case of low-security risk detainees (Action Plan, p. 43). However, the Action Plan fails to provide practical information and data on the prevalence of each security level within the total number of inmates. Additionally, regardless of theoretical differences between security levels, the general restrictive policy regarding visitation remains (see HHC's latest Rule 9 communication point 3.1, pp. 3-4), erasing any actual gradual distinction between special regimes as there is no possibility of any physical contact between inmates and family members irrespective of the inmates' actual risk classification.

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2.3 Administrative concerns regarding remedy for the violation of detainees' rights to respect for family life

In relation to the Action Plan's section on "provisions related to the request, the complaint and other remedies" (pp. 51-52), an important systemic problem must be flagged. As the precondition of initiating any procedure (e.g. requesting a leave, a skype call and also filing a complaint), detainees shall submit their statements (requests or complaints) to the reintegration officers on a request form. The reintegration officer shall record the complaint in the inmate's register, but is not required to issue any document certifying that a request form has been submitted. Experience shows that in the absence of such a certificate, detainees are often unable to demonstrate that a complaint or request has actually been submitted. This raises serious concerns regarding the effectiveness of complaints procedures.

2.4 Compensation

One of the most pressing issues regarding compensations for overcrowding is the suspension of compensations granted in a final and binding judgment. The Action Plan contains a table on the duration of compensation proceedings (pp. 34-35), however, attention must be drawn to the fact that it does so only until February 2020, i.e. before the suspension of all compensation cases. Tha Action Plan does not provde any information of the average length of procedures concerned by the suspension.

According to the Ministry of Justice's response to HHC's FOI request, the oldest final and binding decision granting compensation to an inmate, the execution of which was suspended by the new legislation dates back to 9 March 2020[6] i.e. the concerned inmate has been waiting for the compensation amount for almost a year, and three more months will pass before the sum is transferred from the NMinistry of Justice. If the inmate is still in prison, they will have to wait until the end of the detention to access that amount.

The Action Plan also does not mention how many inmates are concerned by the suspension. In the same FOI response, the Ministry of Justice informed the HHC that as of 15 December 2020, the payment of compensations granted in final and binding judgments was suspended in altogether 4098 cases.

2.5 PTD data

It is again a data-related deficiency of the Action Plan that the data on pre-trial detention are presented in a form that is difficult to adequately assess.

When we look at the number of pre-trial detainees at the end of each year (see the table below), we can see that after some years of definite dropping, the decrease came to a halt, and seems to have started to rise again in 2020. The annual average number of pre-trial detainees in prisons would be a better indicator of the issues, however, that number is not at our disposal, nor is it accessible publicly.

[6] Source: Response no. V/10/1/2021 issued by the Ministry of Justice to the HHC's FOI request, 2 February 2021.

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Number of pre-trial detainees at the end of the year[7]

Date	Number of pre-trial detainees
31 December 2014	4610
31 December 2015	4021
31 December 2016	3622
31 December 2017	3401
31 December 2018	2694
31 December 2019	2709
15 December 2020[8]	3389

4. Recommendations

4.1 Procedural recommendations

In addition to the recommendations listed in its submission of 26 January 2021, the HHC respectfully makes the following recommendations:

- The HHC respectfully recommends to the Committee of Ministers of the Council of Europe to call on the Government **to submit the Action Plan at a time that provides civil society actors with sufficient time to assess and react to it.**
- The HHC respectfully recommends to the Committee of Ministers of the Council of Europe to call on the Government **to submit an updated, comprehensive, terminologically consistent Action Plan that provides statistical evidence on the claims made, and contains the sources of data on each of the referred legal institutions and institutional practices.**
- The HHC respectfully recommends to the Committee of Ministers of the Council of Europe Government to call on the Government **to collect and include in its next Action Plan those data that are indispensable for reviewing the effectiveness of the implementation process** (including but not limited to the average length of compensation procedures broken down by regional courts; the average daily compensation sums broken down by regional courts; the average length of time after which inmates can access the compensation amounts at the end of their prison sentence; the impact of the new legislation on the proportion of inmates who claim compensation; the impact of the new legislation on the proportion of inmates who have legal representation in the compensation procedure; the number of requests for the warden to allow the inmate to access the compensation amount before release, and the number of granted request; the annual average number of pre-trial detainees as opposed to persons under more lenient coercive measures, etc.).

[7] Source: statistical review of the penitentiary administration: https://bv.gov.hu/sites/default/files/Bortonstatisztikai_Szemle_2020.pdf, p. 17.
[8] Source: the National Penitentiary Administration's response to HHC's FOI request (no. 30500/14282- /2020.ált., 2 February 2021)