WRITTEN COMMENTS BY

THE HUNGARIAN HELSINKI COMMITTEE

THE HUNGARIAN CIVIL LIBERTIES UNION

THE HUMAN RIGHTS DOCUMENTATION AND INFORMATION CENTER

THE LEGAL DEFENCE BUREAU FOR NATIONAL AND ETHNIC MINORITIES

REGARDING THE FOURTH PERIODIC REPORT OF HUNGARY UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

FOR CONSIDERATION AT ITS 74th SESSION, MARCH 2002

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The present submission is the joint statement of four leading human rights organizations in Hungary. The Hungarian Helsinki Committee coordinated the preparation and editing of the submission, and each organization contributed information to sections relevant to their field of activities.

The **Hungarian Helsinki Committee (HHC)** is a non-governmental human rights organization founded in 1989, a member of the International Helsinki Federation for Human Rights. The Hungarian Helsinki Committee aims to monitor the respect for human rights protected by international human rights instruments, to inform the public about human rights violations and to provide victims of human rights abuse with free legal assistance. The Committee's primary activities are twofold: firstly, it monitors the human rights performance of law enforcement agencies through civilian oversight of detention by the police and prison authorities or border guards and, as an implementing partner of UNHCR, the activities of refugee authorities; secondly, it provides free legal advice and representation to mainly persons who are restricted or deprived of their personal liberty, and asylum seekers and refugees.

The **Hungarian Civil Liberties Union (HCLU)** is a non-profit organization created in 1994. The HCLU works independently of the Government and of any political parties. Largely foundations provide its financial resources and advisors of high reputation support its activities. The chief aim of the Hungarian Civil Liberties Union is to promote the cause of the fundamental rights and principles laid down by the Hungarian Constitution and by international treaties. It gives pride of place to the protection of personal freedoms, of human dignity, and of privacy. The HCLU focuses its activities on the protection of personal data and the securing of access to information of public interest, the rights of the medical patients, the rights of the drug users and the coercive powers and actions of the authorities.

The **Human Rights Information and Documentation Center (INDOK)**, a foundation operating since early 1998, focuses on gathering human rights documents and disseminating information about international human rights law and practice. INDOK's primary activities are centered on providing assistance and information concerning human rights issues to organizations and professionals and on strengthening public attitudes to be in accordance with international human rights norms. This is achieved through establishing a wide-ranging documentary service, organizing conferences, professional and awareness-raising programs and publishing human rights publications. INDOK's aim is to provide a forum in Hungary where experts may find human rights related information and where interested individuals may receive professional advice about using international human rights mechanisms.

The **Legal Defense Bureau for National and Ethnic Minorities (NEKI)** was established in the framework of the Másság (Otherness) Foundation in 1994. NEKI aims at protecting the rights of national and ethnic minorities living in Hungary, through bringing conflicts and cases of discrimination to the attention of the public and by contributing to the resolution of problems by seeking legal remedy for victims of rights violations. NEKI provides free legal advice and representation in cases of discrimination based on the victim's ethnic or national origin or in cases of significance to the implementation of the rule of law. NEKI's main working methods are fact-finding, initiating legal proceedings, and representing the victims before authorities.

EXECUTIVE SUMMARY

The Hungarian Helsinki Committee ("HHC"), the Hungarian Civil Liberties Union ("HCLU"), the Human Rights Documentation and Information Center ("INDOK") and the Legal Defense Bureau for National and Ethnic Minorities ("NEKI") respectfully submit these written comments for consideration by the Human Rights Committee at its 74th session on 22 March 2002.

Our written comments are filed to provide additional information and analysis to supplement the Fourth Periodic Report of the Government of Hungary[1] ("Government Report") on the implementation of the International Covenant on Civil and Political Rights ("Covenant"). Although the present submission is intended to be a comprehensive report that highlights areas of non-compliance with respect to the entire Covenant, it does not purport to be exhaustive with regard to all existing human rights concerns in Hungary.

We appreciate the efforts made by the Hungarian governments during the past ten years to afford to everyone in Hungary the rights enshrined in the Covenant, as set out in the Government Report. It must be noted, however, that information contained in the Government Report, submitted several years ago, is in many respects outdated: substantial changes in the legal framework have brought about both positive and negative developments. However, further steps are required on the part of the government in order to achieve the full and effective realization of its obligations under the Covenant.

In the past decade, the institutional framework required by the rule of law has been put in place by passing legislation central to the functioning of a parliamentary democracy, fundamentally revising the constitutional framework and establishing and strengthening institutions safeguarding the protection of fundamental human and civil rights (i.e. Constitutional Court, Parliamentary Commissioners for Human Rights, Data Protection and Minority Rights, an independent judiciary, etc.). Notwithstanding these commendable steps, tendencies aiming at unduly restricting fundamental rights in the name of preserving "law and order" as well as ineffective or non-existent remedies for violations of human rights corroborate the need for further improvement without delay.

Our key concerns are set out below.

As to **Article 2**, the lack of comprehensive legislation prohibiting discrimination, inadequate sanctions for the prevention of discriminatory acts and the non-existence of an institutional system to enforce the implementation of anti-discrimination legislation hinder effective state action against discriminatory acts.

As to **Article 6**, the regulations concerning the power of law enforcement officers (police, prison authorities, national security agencies) to use firearms are internally inconsistent, thereby inferring the threat of arbitrary application.

[1] CCPR/C/HUN/2000/4, 13 March 2001

As to **Article 7**, the likelihood of ill-treatment by the police, mainly targeted against Roma and foreigners, is considerable particularly upon arrest and/or during time spent in detention facilities. Furthermore, the practice of segregating HIV-positive convicts and compulsory screening of detainees in Hungarian penitentiaries is a reason for concern. The lack of any binding normative provision that would prohibit the use of caged beds as a means of restraint in psychiatric institutions is also alarming.

As to **Article 9**, the wide-ranging power of the police to apply short-term arrest even against persons not suspected of any crime or misdemeanor is coupled with the lack of any legal remedy against this form of deprivation of liberty. Police may use this measure as a means of arbitrary punishment. The institution of "calling someone to account," used frequently in practice by police while the arrested person is still not under the scope of a criminal procedure, allows for the possibility that a detainee could be questioned without being afforded due process rights as a suspect. Courts in many instances still seem likely to consider ordering pre-trial detention a mere formality. Moreover, one of the grounds for ordering pre-trial detention violates the principle of presumption of innocence. The fast-track treatment for persons in pre-trial detention remains a theoretical possibility while the right to trial within a reasonable time is frequently violated. Suspects do not have the possibility of seeking legal remedy against the Supreme Court's decision to prolong pre-trial detention. There is no maximum time limit for the duration of pre-trial detention, and the lack of political will poses an obstacle to resolving this problem in spite of legal possibilities already in place. The execution of pre-trial detention in police jails is a further serious concern due to the danger of extorting of evidence and physical or psychological pressure.

Since August 1998, the majority of asylum seekers were held in *de facto* detention in military barracks of the border guard. Between August 1998-August 1999, this deprivation of liberty was not in accordance with any legal ground or procedure prescribed by law as it was based on a measure that lacked the qualities of law. Notwithstanding changes brought about by amendments of the law regarding detention of asylum seekers, the situation has remained unchanged insofar as the placement of asylum seekers in open or closed facilities depends entirely on which authority they meet first. This detention, which currently may last as long as twelve months, is considered arbitrary even if a judge orders it.

As to **Article 10**, substandard living conditions in border guard community shelters for migrants, as well as overcrowding and poor physical conditions of detention in prisons, deficiencies in the humane treatment of detained persons and in the implementation of legal institutions aimed at the social rehabilitation of convicts are causes for concern.

As to **Article 13**, the wide range of reasons for ordering the immediate execution of expulsion decisions extend beyond those permitted under the Covenant, and thereby preclude exercising the right to an effective remedy against such decisions.

As to **Article 14**, public criticism of the judiciary by government officials, delays in establishing appellate courts and unsatisfactory working conditions in courts give cause for concern, as does the executive's continued control of the budget process. In explicit contradiction of the Covenant, there is no free legal assistance in criminal cases for those who do not have the means to pay for it, as the state only advances and does not cover the

costs of appointed defense counsels. Furthermore, the Parliamentary Commissioner for Human Rights and various non-governmental organizations have repeatedly pointed out the ineffective functioning of the system of appointed defense counsels. The theoretically well-established system of compensations for miscarriages of justice leaves much to be desired in practice.

As to **Article 17**, the police's wide-ranging powers to check the identity of persons allow for arbitrariness and affects a disproportionately high number of persons belonging to certain groups in society, such as Roma, poorly dressed persons and non-white foreigners. Alien policing authorities and members of the border guard may enter without a warrant private homes and private premises in order to control the observance of aliens policing provisions. Police have almost unlimited authorization to access and to process information pertaining to business life as well as citizens' financial position and health status. The present system of gaining access to information concerning rights violations in the communist era does not enable victims to fully exercise their right to access information relating to them.

As to **Article 18**, the government's attempts at restricting state registration of churches, differential treatment in granting financial benefits for churches and unwarranted restrictive tendencies against smaller religious communities have received repeated criticism.

As to **Article 19**, despite repeated criticism, the current government has failed to redress dominance by the governing parties in the management of public service media. The government's reluctance to disclose information of public interest also gives rise to concern.

As to **Article 20**, there is an increasing tendency of Hungarian public figures to openly use hate speech, most often targeted against the Roma minority, "illegal" migrants or often with a coded but well understandable anti-Semitic content – a phenomenon paralleled and enhanced by the ineffective system of sanctions for such actions.

As to **Article 26**, the lack of a clear definition of discrimination in Hungarian law hinders effective protection for victims of discriminatory acts. The majority of anti-discrimination provisions, scattered throughout the legal system, are not backed by appropriate sanctions and therefore remain to be of a declarative nature. The constitutional provision rendering all forms of discrimination to be strictly punished by law remains ineffectively implemented. The overrepresentation of Roma in penitentiary institutions gives rise to concerns regarding the unbiased functioning of law enforcement and judicial organs.

As to **Article 27**, deficiencies in the legal framework of minority self-governments impede their effective operation, particularly regarding the Roma minority, the needs of which differ from those of more integrated minority groups.

DISCUSSION

ARTICLE 2

The Hungarian anti-discrimination system is based on § 70/A of the Constitution, which prescribes the ban on discrimination and renders all forms of discrimination to be strictly punishable by law.[2] This fundamental ban is amplified by a patchwork of anti-discrimination provisions scattered in statutes governing different fields of social life. Such provisions can be found for example in the Labor Code, the Public Education Act, the Minorities Act, the Health Care Act, etc. However, most of these provisions are not backed by a system of sanctions, therefore remain little more than declarations. Even in labor law where there is a relatively extensive system of anti-discrimination sanctions (with a provision on the reversed burden of proof) this system does not function properly. This is partly due to the fact that there is no widespread awareness of available remedies within the groups most vulnerable to discrimination and partly due to the unwillingness of the competent authorities to act with the necessary firmness against discriminatory acts.

Therefore, several experts (including the Minorities Ombudsman) and NGOs have been emphasizing **the necessity of adopting a comprehensive general anti-discrimination act**; **developing an adequate system of sanctions which is suitable for the prevention of discriminatory acts and the effective punishment of the offenders**. They have also been pressing for the **setting up of an effective institutional system to guarantee the implementation of the anti-discrimination act and the above sanctions**. For a long time the present Government seemed resistant to the idea of adopting a comprehensive anti-discrimination act: its representatives claimed on several occasions that the existing system was sufficient and it was functioning properly. However, as a result of the campaign led by the Minorities Ombudsman, the Ministry of Justice finally agreed to establish a so-called "Codification Committee" to deal with the question. The body held its first meeting on 29 March 2001, where it decided to start the overview of the existing legislation. The Minorities Ombudsman was rather critical about these seemingly positive new developments. In his opinion, the overview of existing legislation has already been performed on different occasions by different organs, so the decision to start the process all over again seems to be no more than a strategy of procrastination.[3]

Please see the discussion of the most problematic aspects of the Hungarian anti-discrimination system and the fields in which the most instances of discrimination occur under our comments to Article 26.

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[2] Act XX of 1949 on the Constitution of the Republic of Hungary. § 70/A: (1) The Republic of Hungary shall ensure human and civil rights for everyone within its territory without discrimination of any kind, whether based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or upon any other grounds. (2) Any discrimination described in Paragraph (1) shall be severely punished by law. (3) The Republic of Hungary shall endeavor to implement equal rights for everyone through measures that create equal opportunities for all.

[3] Information provided by the Minorities Ombudsman

ARTICLE 6

As to Government Report Par. 83 and 84, we wish to note that although Act XXXIV of 1994 on the police ("the Police Act") strongly limited **the right of the Police to use firearms[4], the rules in effect maintained several controversial provisions.**

As a general rule, a police officer may use firearms mainly in self-defense, in order to prevent the commission of a serious crime endangering the lives of others or to prevent the escape of persons who committed certain crimes. This provision refers not only to persons who directly endangered the lives of others but to all persons who committed a crime listed in Chapters X and XI of the Penal Code (i.e. anti-state crimes, crimes against humanity and war crimes). According to § 150 of the Penal Code, failure to report an anti-state crime is an anti-state crime *per se*, punishable with a prison sentence not longer than two years. A police officer is still entitled to fire at a person who attempts to escape after he/she decided not to report about an anti-state crime. This summary empowering of police officers to use firearms against every offender of an anti-state crime is evidently a remnant of the totalitarian concept, considering "political" crimes more severe than any kind of common law felony.

Members of the national security services may use *inter alia* firearms if somebody tries to obtain classified national security document by force.[5]

The Police Service Regulations[6] introduced further limitations on the use of firearms. According to the Police Act,[7] firearms may be used for preventing a person's escape from arrest. According the Police Service Regulations, this rule may be only applied in case the arrest was ordered because of murder or of a crime listed in the Chapters X and XI of the Penal Code. The two-fold provisions create a legal confusion. A police officer who shoots and kills a thief who tried to flee from a police jail acts contrary to the Service Regulations but in accordance with the law.

Unlike police officers, prison-guards are entitled to use firearms in order to prevent male inmates from escaping, regardless of the reasons for his arrest and/or sentence.[8]

ARTICLE 7

As to respect for the prohibition of torture or cruel, inhuman or degrading treatment or punishment, we wish to emphasize **the need for substantial and prompt improvements** in this field. **The likelihood of ill-treatment by law enforcement personnel, targeted particularly against Roma and foreign nationals, is considerable especially at the time of arrest or during detention. Furthermore, the practice of segregating HIV**

[4] §§ 54-57 of the Police Act
[5] § 36 (1) (c) of Act CXXV on 1995 on National Security Services
[6] Decree no. 3/1995 (III.1.) of the Minister of Interior
[7] § 54 (j) of the Police Act
[8] § 22 (3) (g) of the Act CVII of 1995 on the Organization of Prison Administration

positive convicts and compulsory HIV screening of detainees in Hungarian penitentiaries is a reason for concern. The lack of any binding normative provision that would prohibit the use of caged beds, as a means of restraint in psychiatric institutions is also alarming.

International observers also highlight our concerns. For instance, the 1999 report of the European Commission Against Racism and Intolerance (ECRI) on Hungary notes "ECRI wishes to express its deep concern at the continuation of police discrimination and ill-treatment of members of the Roma/Gypsy community in particular".[9]

The Government Report asserts "According to the report of the Commission [sic] for the Prevention of Torture of the Council of Europe, no cases prohibited by Article 7 occurred in Hungary during the reporting period."[10] The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) conducted two visits to Hungary – in November 1994 and in December 1999. As the Government Report was submitted in 1999 and the CPT's report on its second visit was made public only in 2000, the above quoted statement must refer to the 1994 CPT Report. In our view however, the Government Report's assertion is in contradiction with the CPT's 1994 conclusion that "The delegation did hear numerous allegations of physical ill-treatment inflicted by the police on detained persons, both at the time of arrest and during subsequent interrogations. [...] The majority of the allegations of physical ill-treatment heard were remarkably consistent as regards the precise form of ill-treatment involved. In most cases, the persons concerned alleged that, after their hands had been handcuffed behind them (or their ankles attached to an item of furniture), they had been struck with truncheons, punched, slapped or kicked by police officers. The delegation found that, in a number of cases, the allegations made were supported by medical evidence".[11]

In the 1999 CPT Report practically repeated the observations quoted above, adding, "foreign nationals, juveniles and Roma seemed to be particularly at risk of such ill-treatment."[12] The body's final conclusion was as follows: "In its 1994 visit report, the CPT concluded that 'persons deprived of their liberty by the police in Budapest run a not inconsiderable risk of ill-treatment'. In the light of all the information gathered during the 1999 visit, the Committee must emphasize that it remains concerned about the treatment of persons detained by the police in Hungary, and not only in Budapest."[13]

Accordingly, the CPT reiterated most of its relevant recommendations made in its 1994 report, including the recommendation that senior police officers "deliver to their

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[9] § 17 of the European Commission Against Racism and Intolerance (ECRI), Second Report on Hungary, adopted on 18 June 1999 www.ecri.coe.int/en/08/01/15/Hungary.pdf

[10] Government Report, Par. 98

[11] § 17 of the Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 14 November 1994 (hereinafter: 1994 CPT Report) http://www.cpt.coe.int/reports/inf1996-05en.htm

[12] § 14 of the Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999 (hereinafter: 1999 CPT Report) http://www.cpt.coe.int/reports/inf2001-02en.htm

[13] Ibid. § 18

subordinates the clear message that the ill-treatment of detained persons is not acceptable and will be the subject of sever sanctions".[14]

In our experience, this, however, is usually not the case, and it is not only the "code of silence" within the police that poses a problem in this respect. The authorities in charge of investigating and adjudicating criminal offenses committed by police officers often prove to be excessively lenient. The most relevant police crimes in this respect are *ill-treatment in official procedure* and *forced interrogation*. Figures from the Public Prosecutor's Office show 1,133 such crimes reported in 2000, 1,068 in 1999 and 1,247 in 1998.[15] On average, only 11 percent of the reported cases of ill-treatment and only 8 percent of reported cases of forced interrogation end with the Prosecutor's Office pressing charges against the accused police officers.[16]

Interestingly, the police's (or rather: the Ministry of Interior's) data do not seem to tally at all with those provided by the Public Prosecutor's Office. In the Hungarian Government's response to the 1999 CPT report, the Ministry of Interior stated that in 1999, altogether 123 complaints were lodged against the police for ill-treatment and forced interrogation (104 for ill-treatment, 19 for forced interrogation, plus an additional 11 complaints for unlawful detention).[17] This is in sharp contradiction with the data of the Public Prosecutor's Office, according to which in 1999, 787 complaints were lodged on counts of ill-treatment and 283 on counts of forced interrogation. Although the breakdown of data does not show how many of these concerned the police, it is highly unlikely that, for instance out of 787 ill-treatment complaints only 104 were filed against the police, and 674 against other law enforcement agencies, such as the border guards. In our view, this misrepresentation of data reflects the denial and scaling down of the problem by the police.

According to NGO estimations, the proportion of complaints lodged and charges pressed is especially unfavorable in the case of Roma, as approximately only 5 percent of complaints lodged by Roma lead to convictions.[18] The conclusion that a disproportionate number of cases brought by Roma are either 'terminated' after investigation or do not lead to convictions is supported by the findings of Human Rights Watch: "Of the fifteen cases opened [by Roma] against police officers in Hajdúhadház [a town notorious for the violence of the police force against the extensive Roma population] in recent years, all remain either unresolved or ended in acquittals."[19]

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[14] Ibid. Par. 19.

[15] Source: *Legfõbb Ügyészség Számí tástechnika-alkalmazási és Információs Fõosztálya* (Computer Application and Information Department of the Chief Public Prosecutor's Office). For more details see Appendix A.

[16] Source: *Legfõbb Ügyészség Számí tástechnika-alkalmazási és Információs Fõosztálya* (Computer Application and Information Department of the Chief Public Prosecutor's Office)

[17] § 7 of the Response of the Hungarian Government to the report of the CPT on its visit to Hungary from 5 to 16 December 1999 (hereinafter: Government Response to the CPT) http://www.cpt.coe.int/en/reports/inf2001-03en.htm

[18] NEKI, White Booklet, 1999

[19] Human Rights Watch World Report 2000, p. 272. Half of the town's police force were under investigation for abusive conduct at the time

The problem is aggravated by the fact that courts tend to be lenient in such cases.[20] Of 101 convictions for relevant official crimes (ill-treatment, forced interrogation and unlawful detention), effective (i.e. not suspended) imprisonment was imposed in only two cases (1.9 percent). By contrast, 68 of the 332 defendants found guilty of violence against an official were given an effective prison sentence (20.4 percent).[21] The 1999 data provided by the Ministry of Interior to the CPT (which, as we pointed out above, are in contrast with those provided by the Public Prosecutor's Office) show an even less favorable picture: 124 (92.5 percent) were terminated out of the 134 cases initiated on the basis of complaints lodged against the police for ill-treatment, forced interrogation and unlawful detention. At the time of data provision (March 2001) seven cases were in progress and only three were closed with sanctions. In two cases the sanction imposed by the court was one-year probation, and in the third case a fine was imposed.[22]

To further substantiate our assertion that the condemnation of excessive use of force is uncommon within the police and the competent authorities are reluctant to take firm action against such instances, we wish to quote a relevant case from the practice of the Hungarian Helsinki Committee.

> On 20 November 2000, B. K. had a conflict with the staff of the local health center, who in turn notified the police. Two policemen arrived, handcuffed the resistant B. K. and escorted him to the Budapest 11th District Police Station, where he was locked up in the cell for arrested people. In an admittedly aggressive manner, he demanded to be allowed to use the toilet and notify his attorney. At this moment, 4 or 5 police officers systematically beat him up. When finally allowed to leave the police station, an officer asked B. K. whether he wanted to file a complaint, but, exhausted and humiliated, he stated that he had given a negative answer. The next day, however, he changed his mind: after visiting a doctor (who in the report on the medical examination recorded haematoma around both eyes, lesions around the right ear, blood suffusion on the chin and bruises on the right thigh), he filed a complaint with the Prosecutorial Investigative Office of Budapest.
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> Claiming that there was a lack of well-grounded suspicion of a criminal offense committed, on 3 May 2001, the Prosecutorial Investigative Office of Budapest refused to launch an investigation on the basis of the facts established in the criminal procedure initiated against B. K. for his violent behavior in the health center (for which he admitted his responsibility). B. K. then sought legal assistance from the Hungarian Helsinki Committee's (HHC) legal aid service. The HHC's attorney filed a complaint against the refusal of investigation, claiming that the prosecutor in charge of the investigation made a number of procedural mistakes: among other things, she failed to hear B. K. on the case. The Chief Public Prosecutor of Budapest approved the complaint and instructed the case-investigating prosecutor to commence the procedure. After properly conducting the investigation, the prosecutor's decision of 25 October 2001 established that "[b]ased on the aforementioned facts, it can be concluded that B. K. was handcuffed and physically abused while detained at the 11th District Police Station, which act qualifies as ill-treatment in official proceedings (violating § 226 of the Penal Code) and simple battery against a defenseless person (violating § 170 (1) and (3) of the Penal Code)." However, the attempts to identify the perpetrators failed, because

[20] See Annex A
[21] Source: Statistical Department of the Ministry of Justice
[22] § 7 of the Government Response to the CPT

as B. K. is visually impaired and after such a long time, he was unable to identify the offenders from the photos shown to him of all the police officers who were on duty at the time of the offense. Therefore, the Prosecutorial Investigative Office terminated the investigation.

Founding his claim on the Prosecutorial Investigative Office's conclusion establishing that he had been ill-treated, B. K. demanded material compensation from the commander of the 11th District Police Station. Under the relevant provisions of Act XXXIV of 1994 on the Police Force, it would have been the police commander's obligation to assure that his subordinates act in a lawful manner while performing their duties. However, on 24 January 2002, the Legal Department of the Budapest Police Headquarters notified B. K. that the Prosecutorial Investigative Office's decision is not coherent and well-founded, and thus, it fails to substantiate that the officers of the police station acted in an unlawful manner, so his claim for damages cannot be fulfilled. Presently, B. K. is considering filing a lawsuit against the police.

Regarding Par. 87 of the Government Report, we wish to express our concerns with respect to **the practice of segregating HIV positive convicts** as well as the **compulsory HIV screening of detainees** in Hungarian penitentiaries.

Following its 1999 visit to Hungary, the European Committee for the Prevention of Torture (CPT) expressed its concern that prisoners who did not agree to HIV screening would immediately be placed in segregation in their respective establishments (as well as those found to be HIV positive). According to the CPT's recommendations, being infected with HIV is not to be used as a justification for separating people. The CPT therefore recommended that Hungarian authorities bring their HIV policy into line with the relevant international standards, in particular those established by the World Health Organization and the Council of Europe.[23]

The Hungarian Helsinki Committee's Prison Monitoring Program carried out in 2000 also confirmed the CPT's above-mentioned findings. HIV infected detainees are separated from prisoners and are then transferred to Unit K of the Tököl Prison, where they are again placed separately from other convicts.

Regulations in force provide for the segregation of all HIV positive detainees in penitentiary institutions and police detention facilities.[24]

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[23] §§ 121-122 of the Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, released on 29 March 2001 CPT Inf(2001)2 http://www.cpt.coe.int/en/reports/inf2001-02en.pdf

[24] According to § 39 of decree 6/1996 of the Minister of Justice on the rules of the implementation of confinement and preliminary arrest, HIV positive detainees are to be placed separately from other detainees at the detention facility. This means placement in a different detention building, in a separated part of such a unit, or in a separate cell or living space.
According to § 18 of decree 19/1995 of the Minister of the Interior for the regulation of police detention establishments, HIV positive detainees are to be placed separately from other detainees during detention.
According to § 38 of joint decree 7/2000 issued of the Minister of Justice and the Minister of the Interior on the detailed rules for detention and detention substituted for a fine, HIV positive persons are to be kept separately from other detainees during detention such as is applied in due course as part of proceedings against persons convicted of misdemeanor.

At the time of the CPT's visit in 1999, the practice of keeping HIV positive persons segregated from other detainees in penal facilities had a normative basis. The prescription was later extended to police detention establishments and to detention on account of misdemeanor, despite the explicit recommendation of the CPT to stop the practice. These recommendations were disregarded by the government: it not only failed to take measures for stopping disadvantageous discrimination but also extended the legal basis of the prescription for separating detainees.

Such a practice of separation is tantamount to disadvantageous discrimination against detainees. The Constitution prohibits discrimination on *inter alia* grounds of health such as some disease. Segregation cannot be justified with reference to the aim of preventing the spread of infectious diseases, as according to the rule on the taking of measures necessary to prevent epidemics, "everyday contact with persons with AIDS poses no risk of acquiring the infection".[25]

Persons serving prison terms or closed confinement terms in penitentiary facilities, and juvenile persons placed in correction facilities or community homes are subject to compulsory HIV screening.[26]

HIV screening is thus made compulsory by a legal rule in certain cases. The practice of sanctioning refusal to submit to screening by isolation from other detainees, observed by the CPT, is not justified by a legal rule. Nor could it be, to begin with, since this would amount to discrimination against the detainee, which is prohibited by several human rights instruments as well as the Hungarian Constitution.

The practice described by the CPT also conflicts with relevant rules of Hungarian law. According to the Health Care Act[27] separation on the ground of preventing epidemics is justified when capacity for infection exists, i.e. when a physician identifies the disease and orders the person's segregation. As long as a physician has not identified someone as capable of transmitting an infection - which is impossible without screening - and has not given an order for isolation, isolation cannot be performed with reference to infection.

On a close reading, legal rules relating to compulsory HIV screening and the segregation of convicts fail to meet the appropriate standards and levels of regulation prescribed by rules of legislation. According to § 2 of the Act XI of 1987 on legislation, fundamental rights and duties of citizens, their conditions and limits as well as the procedural rules for lending them effect are to be laid down in acts of Parliament. Because of the regulation of a social relationship, which affects fundamental human rights, personal freedom, human dignity, and the principle of equal treatment with a norm lower than the level of an act of Parliament, i.e. by decree, the current regulations also contradict the above provisions of the Legislation Act.

[25] Decree 18/ 1998 (VI. 3.) of the Minister of Public Welfare
[26] § 1 of Decree no. 5/1988 of the Ministry of Health on the measures necessary for preventing the spread of HIV and on the conditions of issuing screening orders
[27] § 63 and 64 of Act no. CLVI of 1997 on health care

We also wish to call the attention of the Human Rights Committee to **the lack of any binding normative provision that would prohibit the use of caged beds as a means of restraint in psychiatric institutions**.

The CPT also visited psychiatric institutions in 1999. Following an examination conducted in the psychiatric institution in Ludányhalász, the CPT requested the government to take immediate measures to stop the use of caged beds as a means of restraint. They asked to be informed of measures taken within three months.[28]

In order to honor this request, the Ministry of Social and Family Affairs conducted a nation-wide survey in psychiatric facilities to ascertain the number of caged beds still in use. The survey revealed that in psychiatric homes in half or so of the country's counties, caged beds were still in use as instruments for restraining patients' freedom. After this, the Ministry called on the management of the respective facilities to terminate the use of caged beds. In their reply to the CPT, they informed the Committee not only about the results of the survey but also about a Methodological Circular ("Guiding principles for nursing and caring activities in homes for patients with obsessive or psychiatric disorders"), issued in 1997 by the Hungarian Psychiatric Society which enunciated the categorical prohibition of the use of caged beds in such facilities.

The government response to the CPT failed to include the fact that at the time of its response, the legal rule which made application of the Methodological Circular compulsory was no longer effective, and that as a result, there was no legally enforceable, normative prescription prohibiting the use of caged beds.

> In December 2000, a fire broke out in a psychiatric establishment and a young man died because he could not get out of the caged bed, which had been padlocked.

According to regulations presently in force, restriction of liberty is regulated by the same rules as are valid for health establishments generally.

The Health Care Act does not contain the detailed rules of the methods and instruments of restraint.

In late 2000, the Constitutional Court ruled[29] that the lack of normative background for the application of methods for restraining the personal liberty of psychiatric patients amounted to a violation of the rights of these patients. The Constitutional Court called on the legislature to put an end to the unconstitutional state of affairs of omission. The provisions of the Health Care Act relating to psychiatric patients were modified as of 12 July 2001, codifying the prohibition of torturous, cruel, inhumane, degrading or punitive measures, but no ministry decree has been issued to date which would set out in detail what measures were to be considered as prohibited and what measures as allowed.

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[28] § 8 and § 157 of the Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, released on 29 March 2001, CPT Inf(2001)2 http://www.cpt.coe.int/en/reports/inf2001-02en.pdf

[29] Decision no. 36/2000 (X. 27.) of the Constitutional Court

In mid-2001, the Ministry for Social and Family Affairs published methodological guidelines, which state that caged beds are excluded from the range of permissible methods of restraint in psychiatric establishments. This move toward regulation suffers from the weakness that the Guidelines lack legally binding force, therefore practice contrary to the Guidelines cannot be legally sanctioned. They further contain recommendations only for social provision for psychiatric patients, in other words the suggestions do not pertain to provision offered in health care facilities such as the psychiatry wards of hospitals.

The results of a survey conducted in 2001 by the Forum for the Protection of Interests in Psychiatry also points out examples demonstrating the weakness of the professional recommendations and the lack of legal regulation. This survey revealed the existence of eight psychiatric homes where caged beds were used for restraining freedom. Moreover, as many as twelve caged beds were found to be still in use in one facility.

We wish to conclude that **the use of caged beds in psychiatric institutions is still not explicitly prohibited either by legal or professional norms**, nor is there any case law to support the efforts to assert this prohibition or give assistance in choosing measures of restraint which are allowed in psychiatric homes. This is clearly contrary to the prohibition of inhuman treatment and **a violation of Hungary's obligations under Article 7 of the Covenant**.

ARTICLE 9

Article 9 (1)

As regards the detention of illegal migrants and asylum seekers in Hungary, we wish to emphasize that **asylum-seekers and other illegal migrants were in *de facto* detention between August 1998 – 31 August 1999 that lacked any grounds and procedures established by domestic law regulation resulting to a clear violation of Article 9 (1) of the Covenant**. Moreover, **judicial interpretation of the scope of judicial review of decisions ordering aliens' policing detention and compulsory place of stay for asylum-seekers and illegal migrants resulted in that foreigners not having an effective right to judicial review on all the legal grounds of their detention, constituting a violation of Article 9 (4) of the Covenant**.

i)
Excerpts from the Act LXXXVI of 1993 on the entry, stay in Hungary and immigration of Foreigners (1993 Aliens Act) as quoted in the Government's report reflect the legal text in force from 1994 until September 1999. Regulations on aliens' policing detention and designation of a compulsory place of stay had remained unchanged between 1994 – September 1999.

In March 1995, three Hungarian human rights NGOs[30] carried out a mission in the aliens police shelter for illegal migrants in Kerepestarcsa (also referred to as Kistarcsa). The

[30] The Hungarian Helsinki Committee, the Center for the Defense of Human Rights Hungary – MEJOK and the Veritas Foundation

Kistarcsa, 1995 report summarizing the mission's findings stated, „the temporary shelter at Kistarcsa cannot be maintained in its present condition. [...] The circumstances prevailing in the shelter infringe human rights."[31] The report also exposed the problem of unlawful *de facto* detention of foreigners in the Kerepestarcsa shelter. The Kerepestarcsa shelter also received criticism in the 1994 CPT Report:[32] the community shelter „failed miserably to reach an acceptable standard" both concerning offering material conditions of detention as well as a regime appropriate for the legal status of those detained. As a result, the Minister of Interior ordered the Kerepestarcsa shelter to be closed down in July 1995.

As a consequence, a chain of community shelters around the border was enlarged in summer 1995 and used widely to accommodate irregular and indigent migrants as a substitute for the Kerepestarcsa shelter. These shelters, maintained by the Border Guards, were semi-closed institutions that served as designated places of residence for both migrants awaiting deportation and asylum-seekers. Foreigners who could not be sent back to their country of origin on *non-refoulement* grounds could also be accommodated in these community shelters. The legal and physical situation of this latter group has been a major source of human rights concern for the past years, which have not been remedied by even the recent modifications of the laws. (Please see our concerns in detail under Article 10 (1)).

As late as the end of 1997, Parliament decided to lift Hungary's geographical limitation to the application of the 1951 Geneva Convention relating to the Status of Refugees and in parallel, it adopted the new Asylum Act.[33] Both measures took effect on 1 March 1998.

The Asylum Act modified the personal scope of the 1993 Aliens Act so that it did not prevent the alien policing authorities from proceeding against asylum-seekers, who are generally viewed as illegal aliens until they are accorded some form of state protection. Having the same legal situation in the current law, which gives the possibility for parallel procedures, the majority of asylum-seekers are viewed as persecuted individuals meriting protection (in the status determination procedure) but also as illegal entrants, the forgers of documents and illegal aliens (in the alien policing procedure).

Shortly after the Asylum Act had entered into force, certain European Union member states (chiefly Austria) must have advanced criticisms because of the masses of illegal migrants arriving from Hungary at their borders. Instead of stepping up borders controls, the government displayed more vigilance over the movement of aliens in general. Detention of illegal migrants has dramatically increased due to an internal non-public measure taken by the National Border Guards in conjunction with the National Police Headquarters in August 1998. (Between July 1995 and August 1998, aliens housed in community shelters could move freely during the day.) This measure was introduced at a time when the number of the asylum applications had risen sharply. Thus, asylum-seekers referred to a community shelter were in fact subjected to detention – this, however, did not comply with relevant legal regulations, as only an act of Parliament might have prescribed the detention, not an internal measure of law enforcement agencies. The unlawful practice of detention, moreover, inhuman living conditions ensuing from the internal measure again attracted serious criticism

[31] Kistarcsa, 1995, Hungarian Helsinki Committee, p. 99
[32] §§ 57-85of the 1994 CPT Report
[33] Act CXXIX of 1997 on asylum

from various international organizations (UN Committee Against Torture,[34] European Commission[35]) as well as foreign and domestic human rights NGOs. **The *de facto* detention of migrants in community shelters between August 1998 and 31 August 1999 was not in accordance with any ground or a procedure established by law and was therefore a clear breach of Article 9 (1) of the Covenant.**

Regrettably, the practice has then been confirmed with some modifications by the so-called Anti-Mafia Act[36] that entered into force on 1 September 1999 and which amended both the Aliens Act and the Asylum Act. As a step back, the new regulation ordered that the compulsory place of residence had to be designated at a community shelter (as opposed to the previous ruling where this possibility was optional), if the foreign national was not able to support himself, and had not adequate place of abode, financial resources, income or sponsor or relative obliged to provide support, further, in cases when increased control over the foreign national was necessary for public security reasons.[37] Parallel to this, the law prescribed that leave of the community shelter could only be permitted under circumstances deserving special consideration, if i) the order of stay at community shelter was based on uncertified identity, until the identity of the foreign national was established; ii) the order of stay at community shelter was subsequent to an expulsion order delivery and it was presumed that expulsion or return of the foreign national can be executed within 6 months; iii) non-returnable aliens were ordered to stay at community shelters but they were under criminal procedure for crimes connected with illicit drug trafficking, terrorism, man smuggling, smuggling of firearms, money laundering, organized crime until the completion of the criminal procedure.[38] Interpretation of the above provisions, which could allow daily leave from the shelters, was applied very restrictively with few persons benefiting from leave at all.

The arbitrariness of detention is further pointed out by the fact that illegal foreigners, who were not caught while crossing the border or in the territory of the country and were therefore able to reach one of the three open reception facilities for asylum seekers, were not placed in detention.

The new regulation was applied to all aliens regardless of whether they were asylum-seekers or not. Despite of the protection afforded by § 32 (1) of the 1993 Aliens Act to foreigners falling under the *non-refoulement* principle, such persons were mostly also detained in case they were not able to certify their identity with a valid passport or other travel document. Despite of having been granted protection in Hungary against severe human rights risks in their country of origin, such persons ended up in the same situation as illegal migrants, without having a clearly defined legal status. This led to not having the most basic rights, such as freedom of movement, the right to basic education, to work, to social benefits and health care.

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[34] § 83 of the Concluding Observations of the Committee Against Torture: Hungary, 19/11/1998, A/54/44
[35] Commission of the European Communities, 2000 Regular Report on Hungary's Progress towards Accession, 8 November 2000 http://europe.eu.int/comm/enlargement/report_11_00/pdf/en/hu_en.pdf
[36] Act LXXV of 1999 on the rules of suppressing organized crime and other related phenomena and necessary amendments
[37] § 43 (3) of the 1993 Aliens Act
[38] § 43 (6) of the 1993 Aliens Act

On average, some 900 persons per month (including women and children) were in *de facto* detention in community shelters in 1998-1999 but figures in early 1999 exceeded 1,500 persons. At end of December 1999, the number of children kept in confinement totaled thirty.[39]

The implementation of aliens' policing detention regulations resulted in that aliens falling under the scope of the *non-refoulement* principle as well as migrants whose expulsion could obviously not be executed because of reasons beyond the foreigner's control (i.e. country of origin rejected to issue travel documents, administrative organs in the country of origin do not function in practice) were kept in aliens' policing detention. As the main purpose of ordering aliens' policing detention set out by § 36 (1) of the 1993 Aliens Act is to ensure that the alien's expulsion would be eventually executed, this **practice has not been in accordance with grounds established by the law** in the aforementioned cases, which has been a **violation of Article 9 (1) of the Covenant**.

One improvement as a result of the 1999 amendments to the 1993 Aliens Act was the setting of an upper time limit for compulsory stay (de facto detention for most foreigners) at the community shelter. The new provisions also stated that if the community shelter had been designated for compulsory stay, the period of stay could not exceed eighteen months. After this period, a different place of stay is to be designated. Although the maximum period of confinement has to be considered an improvement compared to the open-ended period in force until September 1999, it was still considered as disproportionate compared to the offence committed. As the European Commission's report stressed, "[t]he detention of illegal migrants has continued to pose problems similar to those experienced in previous years. Although setting a time limit for detention was a positive step, the overall period of 18 months is still excessively long."[40]

In June 2001, Parliament passed an entirely new Act XXXIX of 2001 on the entry and stay of foreigners (2001 Aliens Act), which replaces the 1993 Aliens Act from 1 January 2002.

ii)
According to both the new and the previous legislation, review of a decision ordering stay at a designated place cannot be appealed before an administrative body, but the alien may request the judicial review of the decision from the local court. Provisions applicable for the judicial review of aliens policing detention govern the court procedure. As those provisions apply the rules of criminal procedure in the judicial review process, foreigners who were subject to a court procedure reviewing an administrative decision on the designation of a compulsory stay were in numerous cases referred to as "the defendant" by the judges and their cases were processed by the criminal chambers of the courts. An appeal against the first instance court decision on judicial review of compulsory stay may be lodged with the county court. Due to the fact that twenty different county courts have jurisdiction over such cases,

[39] Background information on the situation in the Republic of Hungary in the context of the Return of Asylum Seekers, UNHCR December 1999
[40] Commission of the European Communities, 2000 Regular Report on Hungary's Progress towards Accession, 8 November 2000 http://europe.eu.int/comm/enlargement/report_11_00/pdf/en/hu_en.pdf

unified jurisprudence is still lacking, which gave great concern in cases where *de facto* detention of aliens is at issue. The majority of county courts, however, seemed to share a worrying legal interpretation about the scope of judicial review: most courts rejected to review the conditions prescribed by the border guards for the alien for leaving the shelter, instead, they examined whether the legal basis of delivering a decision on designating a compulsory place of stay had actually existed (in most of the cases the mere designation was lawful). This approach resulted in that many foreigners could not achieve judicial review about the lawfulness of applying § 43 (6) of the 1993 Aliens Act, which actually formed the basis of depriving the foreigner's liberty. This **interpretation clearly breaches the principle of having an effective right to judicial review on the legal grounds of detention, as protected by Article 9 (4) of the Covenant**.

iii)
According to § 46 (1) (b) of the 2001 Aliens Act, "in order to ensure the implementation of the expulsion order, the regional alien policing authority may place the foreigner in alien policing detention who has refused to depart or there are other good reasons to presume that he would delay or thwart the implementation of the expulsion order." The foreigner's alien policing detention can only be ordered in case he/she has been previously expelled. As both the new and old legal regime do not exclude aliens' policing procedures against asylum-seekers, asylum seekers may also find themselves in alien policing detention if the authorities order expulsion but suspend its implementation until the asylum claim has been rejected.

Since the entry into force of the 2001 Aliens Act on 1 January 2002, § 46 (1) (b) has been widely used by the Office of Immigration and Naturalization ("OIN") of the Ministry of Interior. According to recent verbal statements to the Hungarian Helsinki Committee by OIN officials, OIN applies differential treatment in expelling and taking foreigners into detention based on the foreigner's citizenship. OIN officials confirmed that Afghan, Iraqi or Somali asylum-seekers are not expelled; meanwhile e.g. Bangladeshi asylum-seekers are expelled and subsequently detained. The differentiation between foreigners who have identical legal status (i.e. asylum seekers) has no basis in law. Furthermore, the placement of asylum-seekers who crossed the border illegally continues to be arbitrary as in practice the asylum seeker's first contact with an authority (refugee authority or Border Guards) will determine whether he/she will be detained or placed in an open facility.

The very vague wording of § 46 (1) (b) of the 2001 Aliens Act allows for the detention of asylum seekers who had illegally crossed the border but did not commit any other offence thereafter.

Article 9 (2)

As regards Article 9 (2), police can apply a **short time arrest** (*elõállítás*) not only in case somebody was caught in the act (in this case arrest is mandatory) but also if someone cannot establish his/her identity or for the purpose of enforcing a blood or urine test. Furthermore, a short time arrest can be applied against persons suspected of a crime (a strongly founded suspicion is not required), or who fail to stop a misdemeanor (e.g. prostitution or unlicensed street wending) despite a police warning.[41] A short time arrest may not last longer than

[41] § 33 (2) (a), (b), (c) and (f) of the Act on Police

"necessary", but not longer than eight or (in exceptional cases) twelve hours. Information must be provided about the reason of the arrest to the person under short time arrest.

As people under short time arrest are not detained by a decision of an authority or a court, they may not be placed in a police lock-up. Those arrested this way are kept in a special "short time arrest room," furnished usually with nothing but a bench, and are not given any meals. They are usually allowed to inform a family member about the arrest, but this may be denied by the police in order to protect the purpose of the arrest.[42] During the short time arrest, the person arrested may not meet visitors.[43] As a criminal procedure has not yet started, the arrested person is not entitled to contact a lawyer. However the police can informally question him/her without being a suspect of a crime. This type of questioning is not referred to in either the Police Act or the Criminal Procedure Code. Nevertheless, its practice indeed exists, as it is mentioned quite often in police reports or studies on criminology and is termed "calling somebody to account" in police jargon. As this type of informal questioning takes place before the beginning of a criminal procedure, police officers are not obliged to remind the arrested person about his/her rights as a suspect.

Police have been reported to use short time arrests as a form of unofficial punishment in case someone fails to stop committing a misdemeanor or if a person fails to act appropriately during an identity check. The Hungarian Helsinki Committee in the framework of its program monitoring police jails has repeatedly found (particularly in 1998-99) that prostitutes on the street are placed under short time arrest at night, are detained for four hours and then released.

> On 27 July 1996 at 3:30 am. in Budapest, police stopped a car with three Nigerian citizens. The police asked for the driver's documents and ordered him to get out of the car. As the driver protested, the police officers pulled him from the car and handcuffed him. All three men were taken to the 6-7 district police station, from where they were released at 12:30 pm without having been interrogated. The investigation bureau of the Budapest Prosecutor's Office terminated the investigation, arguing that the short time arrest commenced at 4:45 am., one hour later than indicated in the criminal report, therefore the detention did not exceed the maximum eight-hour time limit prescribed by law.

As short time arrest can be easily applied, the number of short time arrests is 7-8 times higher than that of 72-hours detention ordered based on a written decision of a police authority, and 16-20 times higher than that of pre-trial detentions based on a court order.[44] (An average of 117,000 short time arrests per year compared to 16,000 cases of 72-hour detention and 6,000 cases of pre-trial detention. For details see Annex B Table B3.)

Article 9 (3)

i)

As to Article 9 (3), courts in many instances still seem likely to consider ordering pre-trial detention a "mere formality". Government Report Par. 106 claims that the practice

[42] § 18 (1) of the Act on Police
[43] § 45 (5) of the Service Regulations
[44] Source: Public Prosecutor's Office

of court orders on pre-trial detention is not "a mere formality". However, the statistical data provided by the Government Report for 1990–1994 seem to contradict this fact, as – on average – the courts decided against the prosecutor's motion in only about 6-8 percent of the cases. This tendency has not significantly changed since then: in 1998 93.5 percent, in 1999 93.4 percent and in 2000 92.3 percent of the prosecutorial motions concerning pre-trial detention were approved by the courts.[45] There is reasonable ground to believe that in ordering pre-trial detention, courts greatly and in some cases automatically rely on the motion initiated by the police and submitted by the prosecutor, and sometimes fail to consider whether the legally required conditions of pre-trial detention are present.[46] This observation is substantiated by a study[47] which – based on statistical data – explains the frequency of pre-trial detention, *inter alia*, by the fact that "neither the prosecutors, nor the courts pay enough attention to thoroughly scrutinizing the grounds for ordering pre-trial detention or the possible counter-arguments: on the basis of the investigative authority's motion they tend to initiate and order pre-trial detention sometimes even in doubtful cases."[48]

Under the relevant provisions of the Code of Criminal Procedure[49] compensation may be claimed for unlawful or subsequently unjustified pre-trial detention. However, several potential claimants realize this possibility after the deadline for submitting the claim expires (see our comments on compensation under Article 14). In such cases the possibility of claiming compensation for damages caused by public administrative organs in their official capacity arises.[50] However, in such cases if no formal violations are committed with respect to the ordering of the coercive measure (i.e. the decision is made at a lawful hearing and on the basis of a lawfully submitted motion) the civil court will most probably turn down such claims, as it cannot possibly examine whether the conditions required by the Code of Criminal Procedure (e.g. the danger of escape, hiding, etc.) were present at the time of ordering the pre-trial detention.

> On the basis of a motion submitted by the prosecutor, the Pest Central District Court placed S. J. in pre-trial detention in 1995. Based on the testimony of a previous suspect and the uncertain testimony of the victim, he was accused of robbery. S. J. denied the charges and even presented an alibi. The pre-trial detention was terminated after 30 days. Unfortunately, S. J. missed the deadline for submitting claims for criminal

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45 Sources: 1998, 1999 and 2000 Prosecutorial Statistical Bulletins. (p. 86, p. 86 and p. 88 respectively)

46 § 92 (1) of the Code of Criminal Procedure: "In the case of an offense punishable with imprisonment the defendant may be subjected to pre-trial detention if a) he has escaped or hid from the authorities or – due to the gravity of the crime or any other reason – it may be presumed that he may escape or hide; b) there is ground to presume that he would frustrate, hinder or threaten the procedure if he was not taken into custody; c) if during the procedure he has committed another offense punishable with imprisonment, or there is ground to presume that he would accomplish the attempted or prepared offense or would commit another offense punishable with imprisonment if he was not taken into custody."

47 Erika Róth: *Az elí télés elõtti fogvatartás dilemmái* (Dilemmas of pre-trial detention). Budapest, Osiris kiadó 2000, Doktori mestermunkák sorozat ('Doctoral Masterpieces' series), pp. 120–131

48 *Ibid*. p. 130

49 §§ 383–385/A of the Code of Criminal Procedure

50 § 349 of the Civil Code: (1) Liability for damages caused within the jurisdiction of government administration shall be established only if the damage cannot be abated by common legal remedies or the aggrieved person resorts to the ordinary legal remedies for the abatement of damages. (3) Unless otherwise provided by legal regulation, these provisions shall also be applied to liability for damages caused within the jurisdiction of a court or public prosecutor.

compensation as provided by the Code of Criminal Procedure. However, with the assistance of NEKI and based on § 349 of the Civil Code, he brought an action for compensation for damages caused in official capacity by the respondent court (that had ordered the pre-trial detention). The court turned down his claim on the ground that the order of pre-trial detention was lawful.[51] Without questioning the fairness of the judgment, we have to call attention to the fact that the court could only look into the formal lawfulness of the measure: it could not examine whether the grounds for ordering the pre-trial detention were present.

In another case[52] taken by NEKI in 2000, the police launched an investigation into a robbery. Based on the statement of the victim, the police were searching for a tall blonde woman until, following an identification test, the victim identified a short, thin Roma man, A. H., who was placed in pre-trial detention, where he spent six months. The prosecution finally terminated the proceedings against him, arguing that it could not be proven beyond reasonable doubt that it was he who had committed the crime.[53] The lawsuit filed for criminal compensation against the State is still pending before the court.

One of the grounds for ordering pre-trial detention violates the presumption of innocence. As outlined above, one of the grounds for pre-trial detention specified by the Hungarian Code of Criminal Procedure is that "there is ground to presume that he [...] would commit another offense punishable with imprisonment if he was not taken into custody". This provision contains the risk that a certain "abstract danger" would suffice for ordering pre-trial detention. It also contradicts the basic constitutional principle of the presumption of innocence. This provision entered into force on 1 April 2000. Prior to that date, pre-trial detention could be ordered on the grounds of reasonable belief that the accused person would commit "another offense" if he was not taken into custody. However, the Hungarian Constitutional Court[54] abolished this provision, declaring that it contradicts the constitution and the principle of presumption of innocence. This required an amendment of the Code of Criminal Procedure, as a result of which the above quoted new text entered into force. In our opinion, the reformulated text still contradicts the constitution since the basic principle of presumption of innocence is infringed. The fact that the danger of committing "another offense" as a possible condition of pre-trial detention was replaced by the danger of committing "another crime punishable with imprisonment" does not solve the problems related to the violation of the presumption of innocence.

ii)

Concerning Par. 114 of the Government Report about the authorities' duty to make efforts to minimize duration of pre-trial detention,[55] and to accord a fast-track treatment if the defendant is in pre-trial detention, we wish to remark that although these provisions look nice on paper the reality is different. According to the figures provided by the annual statistical bulletin of the Chief Public Prosecutor's Office, out of the 7872 pre-trial

[51] *White Booklet* 1999, p. 18;

[52] *White Booklet* 2000, pp. 20–21

[53] Based on NEKI's experience, we can say that investigating authorities as a rule do not terminate the proceedings against the suspect on the basis that it is proven that he/she did not commit the crime, instead, they generally claim that it cannot be proven beyond reasonable doubt that the suspect committed the crime

[54] Decision no. 26/1999 (IX. 8.) of the Constitutional Court

[55] § 96 (1) of the Code of Criminal Procedure

detentions implemented in 1999, 1107 (14 percent) lasted longer than 6 months (including 143 cases, in which the duration of the detention exceeded one year) and 1517 (19.3 percent) were terminated within one month.[56] In 2000 out of 7392 pre-trial detentions 1169 (15.8 percent) exceeded six months, i.e. the number and percentage of such detentions increased, although a higher percentage of detentions were terminated within one month (22.5 percent, or 1666 instances) and the number of detentions exceeding one year decreased to 128.[57] The available figures for the first half of 2001 are not promising of a significant improvement either: the number of pre-trial detentions exceeding six months grew by 0.05 percent compared to the first half of 2000 (from 527 to 556) and their proportion compared to the total number of pre-trial detentions also increased from 14.1 percent to 16 percent.[58] (See Annex B for further details.) Pre-trial detention of foreign nationals may be particularly lengthy in case Hungarian citizen accomplices do not appear in court in response to subpoenas.

In our view, these figure prove that in several cases **fast-track treatment for persons in pre-trial detention is not more than a theoretical possibility** and that the Hungarian **practice is contrary to the requirement of "trial within a reasonable time" as set forth by Article 9 (3) of the Covenant.**

Article 9 (4)

As to Article 9 (4) and **problems concerning the legal framework and practice of pre-trial detention,** we wish to discuss Par. 110 of the Government Report. The Government Report describes the procedure for extending pre-trial detention (preliminary arrest) ordered prior to the submission of the bill of indictment. The local court may extend pre-trial detention on a single occasion by a maximum period of two months. Following this, the county court has the right to extend the detention, on two occasions, in such a way that the extended detention shall not exceed one year from the original ordering of the arrest. Thereafter, the Supreme Court is entitled to prolong the arrest. The Code of Criminal Procedure (Act I of 1973) guarantees the right of the defendant and/or his/her defense counsel to appeal against the decision extending pre-trial detention: the decision of the local court may be appealed against before the county court, and an appeal against the county court's decision may be filed with the Supreme Court. However, **the Criminal Procedure Code provides the suspect and the defense counsel with no possibility to appeal against the Supreme Court's decision on the prolongation of pre-trial detention.** This means that exactly at the moment when detention starts to become extremely lengthy (over a year), the suspect is left without the possibility of appeal. We wish to emphasize that this situation is **contrary to Article 9 (4) of the Covenant**.

Regarding the system of review of pre-trial detention as outlined by Par. 112. of the Government Report, it is problematic that **the longer the detention is, the less frequent the review becomes.** The first review is due after six months, the second one is due after

[56] *Ügyészségi statisztikai tájékoztató – 1997. Kiadja: a Legfőbb Ügyészség Számítástechnika-alkalmazási és Információs Főosztálya* (Prosecutorial statistical bulletin – 1999, published by: the Computer Application and Information Department of the Chief Public Prosecutor's Office. Hereinafter: 1999 Prosecutorial Statistical Bulletin). p. 89.
[57] 2000 Prosecutorial Statistical Bulletin. p. 92
[58] Prosecutorial Statistical Bulletin for the 1st half of 2001. p. 92.

another six months, but thereafter the supervisions are only due on an annual basis. It would be reasonable to make the supervisions more frequent as time passes by.

Furthermore, **there is no final time limit for the duration of pre-trial detention** in the case of detention ordered prior to the submission of a bill of indictment (which is the most frequent case of pre-trial detention) and in the case of detention ordered during the preparation of the trial. (If the detention is ordered parallel to the announcement of the first instance decision, the maximum duration of detention equals the length of imprisonment imposed by the court of first instance, so in this case there is a time limit.) Therefore if the investigation or the first instance procedure is protracted for years (which is not unusual in the Hungarian legal system), there is no provision to prevent the authorities from keeping the suspect/defendant detained for exceedingly long periods of time.

Act XIX of 1998 on the Criminal Procedure (the **New Code of Criminal Procedure**) was originally intended to enter into force on 1 January 2000 and replace the 1973 Code. However, as it would have required adjustments in the Hungarian court system (a new level of so-called appeals courts would have been inserted between the level of county courts and the Supreme Court), which were not carried out due to the lack of political will on the part of the government coming into power in 1998, the New Code's entry into force was postponed until 1 January 2003. Presently, it is not uncertain that this date will not be further modified. The **provisions of the New Code would remedy some of the deficiencies** found in legislation presently in force.

Firstly, the system set up by the New Code would guarantee the possibility of appeal against all decisions extending the duration of pre-trial detention. Secondly, the New Code would automatically terminate pre-trial detention if its duration reaches three years, thereby setting an absolute time limit for pre-trial detention.

In the meantime, several provisions of the New Code (e.g. witness protection clauses) have already been inserted into the 1973 Code, so that they could be applied before the postponed entry into force of the entire New Code. The appeal system of the New Code could not be included in the Code, since it builds upon institutions (e.g. the investigative judge and the appeals courts) that do not yet exist. Nevertheless, as there are no obstacles preventing the lawmakers from inserting the three-year time limit for the duration of pre-trial detention into the 1973 Code, we recommend that this crucial step be promptly implemented in order to ensure that the code of criminal procedure comply with the Article 9 (4) of the Covenant.

The **problem of pre-trial detention implemented in police premises** is also related to the entry into force of the New Code. Under the current regulation, pre-trial detention should, as a rule, be implemented in penitentiary institutions, however, until the closing down of the investigation it may also be enforced in a police jail.[59] Available data show that the implementation of pre-trial detention in police premises has become the main rule rather

[59] § 116 (3) of Law Decree 11/1979 on the Implementation of Sanctions and Measures (hereinafter: Penitentiary Code)

than an exception: in 1999 the number of persons taken into pre-trial detention was 6823,[60] while only 3096 pre-trial detainees[61] awaiting the first instance decision were incarcerated in penitentiary institutions. The same numbers for 2000 were 6348[62] and 3079[63] respectively – therefore, at least half of all pre-trial detainees are detained in police jails. As the Hungarian Helsinki Committee had pointed out in 1998, this is problematic as "in almost every European country the situation of those held under pre-trial detention [in police jails] is worse than that of those serving prison sentences [...] The reasons for this have to do partly with physical conditions, partly with treatment, and in a number of cases with the police practice of using coercion during interrogation."[64] This constitutes a further compelling reason for the prompt entry into force of § 135 of the New Code. This provision would maximize the duration of pre-trial detention implemented in police premises to two months (in exceptional cases, and upon the decision of the court, pre-trial detainees may be held in police establishments for a maximum of 30 days, and they may be sent back twice to police establishments, each time for a maximum of 15 days, in exceptional circumstances justified by the investigation).

In its 1999 Report, the CPT welcomed "the adoption of Law No. XIX [of 1998], which stipulates in section 135 that pre-trial detention must be carried out in remand prisons. However, it is highly regrettable that the entry into force of that law has been delayed until January 2003. [...] Further the CPT recommends that the Hungarian authorities explore the possibility of accelerating the entry into force of section 135 of Law No XIX; [and] that appropriate measures be taken to ensure that the possibility offered by paragraph 2 of that section, to have remand prisoners kept on police premises for a certain period, is only resorted to in exceptional cases."[65] We fully support the CPT's recommendations.

ARTICLE 10

We wish to call the attention of the Human Rights Committee to the following issues pertaining to Article 10, with regard to which concerns can be voiced in the Hungarian context: **substandard living conditions in border guard community shelters for illegal migrants, as well as overcrowding and poor physical conditions of detention in prisons, deficiencies in the humane treatment of detained persons and in the performance of institutions aimed at the social rehabilitation of convicts**.

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[60] *Tájékoztató az egységes rendőrségi és ügyészségi bűnügyi statisztika adataiból – 1999, kiadja: BM Adatfeldolgozó, Nyilvántartó és Választási Hivatal és a Legfőbb Ügyészség Számítástechnika-alkalmazási és Információs Főosztálya* (Selection from the data of the unified police and prosecutorial statistics – 1999, published by: the Ministry of Interior's Office for Data Processing, Registration and Elections and the Computer Application and Information Department of the Chief Public Prosecutor's Office. Hereinafter: 1999 Unified Police and Prosecutorial Statistics). p. 301

[61] *1999. évi Fogvatartotti Létszámjelentés, készült a Büntetés-végrehajtás Országos Parancsnokságán* (1999 Penitentiary Statistics, issued by the National Prison Administration. Hereinafter 1999 Penitentiary Statistics). p. I.

[62] 2000 Unified Police and Prosecutorial Statistics. p. 311

[63] 2000 Penitentiary Statistics. p. I

[64] Punished before Sentence: Detention and Police Cells is Hungary. Constitutional and Legal Policy Institute – Hungarian Helsinki Committee, Budapest, 1998. p. 15

[65] § 44 of the 1999 CPT Report

Article 10 (1)

i)
During the past five years, the Hungarian government has been receiving steady and rather harsh criticism from, international organizations, domestic NGO's and the media related not only to its wide-ranging practice of detaining foreigners but also because of **poor living conditions prevailing in the community shelters.**

With regard to the Government Report par. 89, we wish to note that in its 1994 Report[66] based on a visit to the Kerepestarcsa community shelter in November 1994, the CPT stressed that the „failed miserably to reach an acceptable standard" both concerning offering material conditions of detention (overcrowding, sanitary and medical conditions, the lack of separation of men and women, and that the lack of differentiated treatment accorded to children and adults) as well as a regime appropriate for the legal status of those detained.[67] The findings of a joint mission to Kerepestarcsa by three Hungarian NGOs in March 1995[68] corroborated the CPT's critical observations. (Please see our comments under Article 9 (1).)

In 1998-1999, substandard and unsanitary physical conditions, overcrowding, the complete lack of facilities for any educational, recreational or exercise activity as well as the lack of information for migrants were the most frequent problems characteristic of border guard community shelters. The Committee Against Torture also expressed its concern "about reports on conditions in prisons, detention centers and holding centers for refugees such as, *inter alia*, overcrowding, lack of exercise, education and hygiene."[69]

The Parliamentary Commissioner for Human Rights (Ombudsman) carried out several investigations into community shelters based on complaints detailing inhuman and degrading conditions, hunger strikes and other rights violations. Following a complaint filed by the Hungarian Helsinki Committee concerning inhuman conditions in the Miskolc community shelter, the Ombudsman's Report[70] recommended that the facility be closed down. Consequently, the Minister of Interior ordered the community shelter to be closed as of 31 May 1998. The Ombudsman's report[71] on her visit to the Gyõr community shelter in June 1998 described violations of the constitutionally protected right to property, the right to legal security, the rule of law and children's' rights. Furthermore, the Ombudsman established the violation of the prohibition of inhuman treatment[72], as well as the right to human dignity[73] as the investigation found that men and women were not accommodated in separate dormitories. Thus it has happened that two Algerian Muslim women had to spend weeks sharing a room with twenty men from Kosovo.

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66 §§ 9-10 and §§ 57-86 of the 1994 CPT Report
67 § 58 of the 1994 CPT Report
68 The week-long fact finding mission was carried out by the Hungarian Helsinki Committee, Center for the Defense of Human Rights Hungary – MEJOK and the Veritas Foundation in March 1995.
69 § 83 of the Concluding observations of the Committee Against Torture: Hungary. 19/11/98. A/54/44, paras. 78-87. (Concluding Observations/Comments)
70 Report of the Parliamentary Commissioner for Human Rights in case no. OBH 3020/1998, May 1998
71 Report of the Parliamentary Commissioner for Human Rights in case no. OBH 3524/1998, based on the Ombudsman's visit to the Gyõr community shelter on 17 June 1998
72 § 54 (2) of the Hungarian Constitution
73 § 54 (1) of the Hungarian Constitution

Concerns about living conditions in the Nyírbátor community shelter expressed by the CPT following its November 1999 visit to Hungary[74] were identical with problems reported by the Hungarian Helsinki Committee based on its fact-finding visit in March 1999 to the Szombathely community shelter[75]:

> Although foreigners have access to cleaning facilities (hot water, daily shower), and they are provided with hygienic articles, the standard of hygiene in the hygienic facilities is very poor. The state of the toilet and washing facilities was of major concern, **the general standard of hygiene was found to be appalling**. There were no separate toilets for men and women. Service and other cleaning facilities were in very poor condition and dirty. The National Public Health Service (ÁNTSZ), the medical authority in Hungary does not examine hygienic conditions at the shelters at all as they are located within military territory.
>
> Living quarters are overcrowded, the larger rooms having 10-12 beds; there are usually no cabinets, thus inmates place their clothing underneath or on their beds, and are carrying their money and other valuables on themselves at all times.

At the Nyírbátor community shelter the CPT made the same observations, and found that problems regarding the **lack of separation of unrelated men and women** was still an existing phenomenon, and family privacy cannot always be respected. Furthermore, the CPT found that a few unaccompanied minors were accommodated together with adults. As women are often not accommodated in separate single-sex dormitories, having to share sleeping quarters with non-family member males potentially exposes them to physical and sexual abuse. This practice is contrary to UNHCR Executive Committee Conclusion No. 64 (1990) on Refugee Women and International Protection[76].

According to the general principles, families are transported from community shelters to open reception centers for asylum seekers and refugees. However, in reality this is often not the case, or only takes place with significant delay. In its background information paper of 1999[77] the UNHCR states that "although a policy of transferring families with children and unaccompanied minors to open Refugee Reception Centers has been applied since February 1999, the limited absorption capacities of the reception centers or the lack of adequate facilities for accommodating minors have hindered the full application of such a policy. As of December 1999, a total of 30 children were kept in confinement."[78]

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[74] §§ 49-70 of the 1999 CPT Report

[75] Three human rights organizations (Cordelia Foundation, the Centre for the Defence of Human Rights-Hungary (MEJOK) and the Hungarian Helsinki Committee) conducted a monitoring mission to the community shelter of the Border Guards Directorate in Szombathely on 28 February - 6 March 1999. The mission involved the participation of physicians (a forensic medical expert, a psychiatrist, a pediatrician), a psychologist, and interpreters among the 38 monitors. See www.helsinki.hu for full text of the report.

[76] UNHCR Executive Committee Conclusion No. 64 (1990) on Refugee Women and International Protection, para v. „integrate considerations specific to the protection of refugee women into assistance activities from their inception [...] in order to be able to deter, detect and redress instances of physical and sexual abuse."

[77] Background information on the situation in the Republic of Hungary in the context of the Return of Asylum Seekers, December 1999

[78] The 30 November 1999 daily report of the Border Guard National Headquarters registered 63 children detained in border community shelters around the country. However, just prior to the CPT's visit in early

With very few exceptions, in addition to the deprivation of their liberty (de facto detention) in the community shelters, migrants may not leave the very building of the shelter. They are denied enjoyment of the right to daily exercise in open air, and have practically nothing to do all day -- there are no recreational or working activities provided for them, with the exception of a television set.

If not transferred to an open reception center because of their asylum seeker status and vulnerable situation, children asylum seekers also are **denied daily exercise in open air**, the fundamental right to education, and are held behind bars without any possibilities of recreational activity. Newborns and their mothers held in detention in community shelters generally do not receive special care or attention, many times sharing the same room with several non-family member adults. Even asthmatic children are not allowed to leave overheated and humid rooms in the shelter.

Foreigners' dietary and religious requirements are often not taken into consideration during the preparation of meals. There is no possibility to adhere to a medically prescribed diet (during the visit there were two diabetes patients taking insulin). Complaints were heard that occasionally food past its expiry date was provided, and Muslim residents in several shelters alleged that their religious and nutritional habits were not entirely taken into account.

In Szombathely, **medical care provided for the foreigners was insufficient**. Complaints about health care were mainly related to the lack of access to doctor, the lack of medicines and the unavailability of appropriate treatment. The threat of epidemic disease is great, the heterogeneous group of foreigners – many times coming from a tropical environment – may be carriers of illnesses for which the basic requirements of prevention and protection are non-existent. The professional level and equipment of health care should be improved as specialized medical staff, children's nurses are lacking. The number of foreigners suffering from psychological-psychiatric problems is alarmingly high, and the majority are neither diagnosed nor treated. The CPT also noted that the psychological and psychiatric support at the shelter was completely absent, and the delegation made an immediate observation requesting the immediate strengthening of medical and psychological services at Nyírbátor community shelter.

One of the most serious psychological hardships for migrants detained in community shelters is that they hardly understand anything from the procedures they are subject to, they are lack basic information about the status of their case, about how long they will be detained, etc. The 1999 CPT Report recommended that the Hungarian authorities take steps to ensure that all residents are duly informed about their rights and obligations, as well as the nature and state of the proceedings in their case.[79] According to our information, however, there has not been noticeable improvement in this regard, the main source of such information still being NGOs or other migrants in the shelter.

December, thirty children were transferred from the Nyírbátor community shelter to the refugee reception center in Debrecen.

[79] § 64 of the 1999 CPT Report

In the Hungarian Helsinki Committee's experience, border guards guarding the foreigners very rarely employ physical force against the foreigners, but often resort to degrading and humiliating manner of communication and evidence xenophobia. At the Nyírbátor community shelter, the CPT delegation came across two allegations of physical ill-treatment, but allegations of verbal abuse were more frequent, and it observed by itself that staff-resident relations were strained. As regards border guard staff, the CPT raised its concern about the lack of specific training provided for the staff before taking up their duties, the limited number of staff members who possess a reliable command of a foreign language, and the inexistence of female border guard staff. [80]

In 1999-2001, the Ministry of Interior has launched extensive refurbishment projects in most of the eight border guard community shelters and spent considerable amounts on the improvement of living conditions in these facilities by repainting, renovating and adding new wings to buildings. However, overcrowding and inhuman conditions only partially ceased as a result of refurbishment: the majority of asylum seekers continues their journey west and seeks protection elsewhere, in member states of the European Union.[81]

ii)
With respect to the humane treatment of persons deprived of their liberty as contained in Article 10 (1), we wish to stress that concerning **detention implemented in the penitentiary system**, the most conspicuous problems are related to **unsatisfactory physical conditions**. Even the Government Report acknowledges anomalies related to overcrowding, poor outdoor activity facilities and insufficient daily activity regimes,[82] however under Par. 161 the Government Report states that the "objective circumstances" of detention "do not form part of the treatment". We strongly disagree with this statement, as in our view the physical conditions of detention form an integral part of the overall treatment of incarcerated persons. The Hungarian situation in this respect is far from satisfactory.

The most burning problem facing the Hungarian prison system is **overcrowding**. Over the past 15 years, the number of inmates peaked in 1986 to 24,812 persons. Due to amnesty measures and amendments of the Criminal Code, a significant decrease of the prison population took place at the time of the political transition. The number of inmates seemed to stabilize between 12,000 and 13,000 in the mid-1990's, however, it began to rise again in 1997. The increase was due to the restriction of criminal policy.[83] The Orbán-government, which came into power in 1998, not only sustained but in fact also accelerated the tendency to increase prison sentences. Moreover, alternative forms of punishment introduced after the

[80] §§ 61-62 of the 1999 CPT Report
[81] See Hungarian Helsinki Committee: Protecting or Transmitting Refugees? October 2000. Report prepared by the Hungarian Helsinki Committee for the 51st Session of the Executive Committee of the UN High Commissioner for Refugees www.helsinki.hu
[82] Government Report, Par. 86
[83] Act LXXIII of 1997 on the amendment of the Criminal Code increased the possible length (or in some cases the lower limit) of the applicable imprisonment term for several criminal offenses: the minimum length of imprisonment that could be imposed for negligent homicide (manslaughter) before the amendment was one day (the maximum was five years). The amending statute raised the lower limit to one year, while the upper limit remained five years. The amendment also increased – from one year to two years – the upper limit of the imprisonment that may be imposed for simple battery and trespassing.

political transition (e.g. community service labor[84]) are rarely applied, also contributing to the rise in the number of inmates in prisons.

On 31 December 2000, the total capacity of Hungarian penitentiary institutions was 10,249, whereas the number of inmates amounted to 15,539, resulting in a 152 percent overcrowding rate. In 2001, the situation has further deteriorated, as at present the number of inmates is over 17,000. (For more detailed information, see Annex C.)

The prison system is caught in a peculiar legal deadlock: on the one hand, it is bound by law to execute court sentences on deprivation of liberty, while on the other hand, it has to respect humanitarian-based legal rules concerning accommodation of inmates. As a consequence of the extremely unfavorable financial situation of the prison system, it is often impossible to satisfy the latter. The message this situation carries is very harmful from a criminal policy perspective, as the very institution where violators of certain state-imposed norms spend their sentences is itself breaking the rules.

The Hungarian legal framework complies with the international requirements, such as the UN Standard Minimum Rules for the Treatment of Prisoners and the European Prison Rules. The relevant Hungarian provisions proscribe that "the number of people to be placed in a cell shall be defined in a way that each inmate have six cubic meters of air space and – in the case of adult male inmates – three square meters of moving space. Minors and women shall be provided with three-and-a-half square meters of moving space."[85] It is also provided that "when calculating the moving space, the space covered by equipment and furniture shall not be taken into account."[86]

However, there is hardly one penitentiary in Hungary that abides by this provision. For example, in the Budapest Prison, cells holding 10-13 inmates measure 27.5 square meters. Therefore, the 3 square meters required by law would not be met even if the cells did not contain lockers, beds, etc. Overcrowding is also evident in the Vác Prison: cells originally – in the 19th century – designed to hold one inmate now accommodate three inmates and the distance between beds placed next to the walls is not more than about 25-30 centimeters. Three inmates are also placed in cells originally designed for a single person in the Sopronkõhida National Prison (built in 1884). Overcrowding is confirmed by the fact that in

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[84] Criminal Code § 49 (1) A person sentenced to community service labor is obligated to perform the work defined for him in the court sentence. The personal freedom of the convict may not be otherwise restricted.
(2) Only such work may be ordered as community service labor that the convict, in light of his health condition and education, is presumed to be capable of performing.
(3) Unless otherwise provided for by law, the convict shall perform the community service labor at least on one day per week, on the weekly day of rest or on his day off, without remuneration.
(4) The shortest duration of community service labor shall be one day while its longest duration shall be fifty days. One day of community service labor shall constitute six hours of work.
§ 50 (1) If the convict does not voluntarily satisfy his work obligation, imprisonment shall be substituted for community service labor or for its remaining part. This imprisonment shall be executed in a detention center.
(2) The imprisonment substituting community service or the remaining part thereof shall be established in such a way that one day of community service labor shall correspond to one day of imprisonment. In such cases the term of imprisonment may be less than two months.

[85] Decree 6/1998 (III. 6.) of the Minister of Justice on the Implementation of the Rules of Imprisonment and Pre-trial Detention, Article 137 (1) (hereinafter: Penitentiary Rules)

[86] Penitentiary Rules, § 137 (2)

certain penitentiaries (e.g. the Szeged Prison) cells are equipped with three-level bunk beds. Out of the 565 inmates interviewed during the course of the Hungarian Helsinki Committee's Prison Monitoring Program,[87] 87 (15.4%) were accommodated in cells equipped with such bunk beds. (On the extent of overcrowding, see Annex C.)

It should be noted that on 31 December 1995, when the provision regarding compulsory moving space was being proposed, the number of inmates in the Hungarian penitentiary system totaled 12,455. The system had therefore already significantly exceeded its 10,000-inmate capacity. The conditions prevailing at that time prohibited compliance with the three-square-meter rule. Consequently, the question arises whether this provision was taken seriously in the Ministry of Justice (which was responsible for the drafting of the Penitentiary Rules), or whether the experts drawing up the statute were simply motivated by the desire to verbally comply with international expectations.

The 1999 CPT Report also touched upon the question of overcrowding: "An overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out-of-cell activities, due to excessive workload for the staff and inadequacy of facilities available; overburdened health-care services; conditions conducive to the spreading of transmittable diseases; increased tension and hence more violence between prisoners and between prisoners and staff. [...] It is a fundamental requirement that those committed to prison by the courts be held in safe and decent conditions. For so long as overcrowding persists, the risk of prisoners being held in inhuman and degrading conditions of detention will remain."[88] In our view, this finding by the CPT also refutes the Government Report's above-quoted claim that objective circumstances do not form a part of the treatment.

The dilemma of overcrowding puts a burden on the organs implementing the detention, but it is policy makers – that is, the members of Parliament and the government – that bear primary responsibility for the situation. If these bodies believe that more and longer prison sentences are in line with the public interest, they need to appropriate the budgetary resources necessary for the construction of new prisons and for an increase in the number of penitentiary personnel. (On the other hand, these measures would require a cut from other investments of public interest, such as the building of schools and hospitals). It needs to be noted however that in the CPT's view, building new prisons is not a sufficient solution. The 1999 CPT Report calls on the Hungarian government to reconsider its criminal policy: "[…] the CPT considers it unlikely that providing additional accommodation will, in itself, provide a lasting solution to the problem of overcrowding. Indeed, a number of European States have embarked on extensive programs of prison building, only to find their prison populations rising in tandem with the increased capacity acquired by prison estates. By contrast, in those countries which enjoy relatively un-crowded prison systems, the existence of policies to limit and/or modulate the number of persons being sent to prison has tended to be an important element in maintaining the prison population at a manageable level."[89]

[87] For details of the program see: Hungarian Helsinki Committee: Summary Report of the Prison Monitoring Program www.helsinki.hu – English/detention/reports
[88] § 88 of the 1999 CPT Report
[89] § 89 of the 1999 CPT Report

We therefore believe that **a revision of the current criminal policy would be instrumental in putting an end to the present situation, where penitentiary institutions regularly violate the clearly formulated rights of inmates concerning the circumstances of their accommodation**.

Additional problems are constituted by **treatment of detainees in the narrow sense**. The rather favorable picture painted by the Government Report is not fully in line with the findings of the Hungarian Helsinki Committee. According to Par. 137 of the Government Report "investigations carried out by prosecutors show that in detention facilities [...] the human dignity of detainees is generally respected; only in a small number of cases did the Public Prosecutor's Office discover any problems in this regard." In connection with the **tone used vis à vis detainees** – which constitutes an important aspect of this principle –the Government Report asserts that "the tone used with detainees [...] may generally be described as appropriate, although inquiries have revealed several cases that departed from that pattern".[90] It is questionable whether there is a "generally appropriate" tone if "several" such cases have been revealed.

Out of the 565 inmates interviewed in the Hungarian Helsinki Committee's Prison Monitoring Program, 298 (52.7 percent) claimed that the guards use the 'tu' form (informal form of addressing someone) more or less frequently when talking to them, and 245 (43.4 percent) complained about the use of insulting language.

> An inmate of the Budapest Prison claimed to have been called "stinking Gypsy" by one of the guards. A Dutch citizen inmate of the same penitentiary complained that in December 1998 when he wanted to attend a religious event, he was ordered back to his cell by a guard who in extremely offensive terms referred to him being a foreigner. A guard threatened one of the inmates held in the Kalocsa Prison with a punch in the face when she asked her educator[91] not to place her on the upper level of the bunk bed, because the physician provided her with a certificate saying that she must be placed on the lower level. Not only prison guards use abusive language. The physician prescribed an ointment to an inmate in Kalocsa but the nurses refused to dispense it to her. When she complained about it one of the nurses told her: "What good would it be for you? You will be carried out from here in a coffin, anyway."

The Hungarian Helsinki Committee's observations concerning abusive language coincide with the findings of other organizations. The 1999 CPT Report mentions "A few allegations of verbal abuse by staff were heard at Tököl Prison and Remand Center for Adolescents."[92] According to a survey carried out by the Public Prosecutor's Office, "The tone used by the penitentiary personnel towards the inmates is generally appropriate, but it is not always so. The Metropolitan Chief Prosecutor's Office revealed anomalies concerning the language used by the personnel in all places of detention. In the Budapest Prison [...] it happened that the personnel used the 'tu' form when speaking to the inmates or used other humiliating forms of addressing them. [...] In the Vác prison, the prosecutor witnessed on a number of occasions that the guard used the 'tu' form and when he realized the presence of the

[90] Government Report, Par. 149

[91] The term "educator" is a remnant of the communist concepts about the role of the prison system. Educators were members of the penitentiary personnel responsible for the inmate's education and the facilitation of his/her reintegration. For a discussion of their current functions see our comments under Article 10 (3).

[92] § 91 of the 1999 CPT Report

prosecutor, he switched to the 'vous' form. In the Regional Penitentiary for Juvenile Offenders in Kecskemét, two inmates complained that when in order to call attention to a problem they waved in front of the camera surveilling their ward, a sergeant-major used rude, abusive, humiliating and threatening language towards them."[93]

A more severe infringement of the inmates' right to humane treatment set forth under Article 10 (1) of the Covenant is the **physical ill-treatment of detained persons** (a phenomenon also closely related to Article 7 of the Covenant).

The Government's conclusion that "the past few years have seen a positive change in the behavior of prison staff in relation to detainees"[94] is supported by the 1999 CPT Report, according to which the "delegation heard no allegations of torture or other forms of physical ill-treatment by staff in any of the prison establishments visited or in other prisons in Hungary; nor was any other evidence of such treatment found during the visit. [...] on the whole, the relations between staff and prisoners in all the establishments visited were found to be positive."[95] The overall experience of the Hungarian Helsinki Committee's Prison Monitoring Program shows that ill-treatment is not characteristic in penitentiary institutions – nevertheless, the system is not exempt from such problems altogether. 55 of the 565 interviewed inmates complained of ill-treatment suffered from a staff member of the prison system. 32 inmates (5.7 percent of all interviewed) stated that they had been ill-treated on several occasions. The method of ill-treatment was shoving in 10 cases, hitting in 33 cases and 16 inmates alleged that they had been beaten.

However, according to the Prison Monitoring Program's experience, it is not (the generally low number of) ill-treatment cases that pose a problem within the prison system, but the inadequate methods of recourse for such complaints. This is corroborated by the 2001 Report of the Prosecutor's Office, which claims, "the petitions, complaints and reports are forwarded without delay to the competent authorities and international organizations. However, the investigation revealed anomalies in this respect as well. The Budapest Prison for example delayed on one occasion in filing a report when one inmate made a recorded statement claiming that one of the guards maltreated him. Instead of filing a report on counts of ill-treatment in official procedure, the warden of the institution ordered an investigation. The procedure of the Budapest Military Prosecutor's Office could only be launched when the complainant sent his report directly to the office. Unlawful proceedings were revealed with regard to the Tököl Penitentiary for Juvenile Offenders [as well]. In early 2000 it happened on a number of occasions that when some inmates complained about ill-treatment, instead of hearing the complainants and forwarding the protocols to the competent investigative authority, the institution conducted investigations in its own scope of authority, on the basis of which it filed a report on the count of false accusation with the Investigative Department of the Pest County Prosecutor's Office."[96]

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[93] The Year 2001 Report of the Independent Department for Penitentiary Supervision and Rights Protection of the Chief Public Prosecutor's Office on the Treatment of Inmates (hereinafter: 2001 Report of the Prosecutor's Office) p. 12

[94] Government Report, Par. 139

[95] § 91 of the 1999 CPT Report

[96] 2001 Report of the Prosecutor's Office, pp. 8–9

However, the deficiencies of investigating cases of ill-treatment are not primarily due to the penitentiary institution's failure to forward the complaints of inmates. Two mutually reinforcing factors play key roles in this phenomenon. Firstly, – as pointed out with respect to Article 7 – only a minuscule part of ill-treatment reports lead to the pressing of charges and that the sentences are rather lenient. Secondly, partly due to this and partly in a fear of retaliation, the victims of ill-treatment often refrain from asserting their right to complaint.

In connection with the first factor, the 2001 Report of the Prosecutor's Office sets forth the following: "The low number of charges pressed in procedures launched for unlawful treatment [...] is in several cases due to the fact that the inmates are not able to provide sufficient evidence – many times their statement is the only proof substantiating their allegations." This, however, does not necessarily mean that the ill-treatment has not taken place. A relatively high number of inmates interviewed in the framework of the Hungarian Helsinki Committee's Prison Monitoring Program claimed that inmates are frequently ill-treated in the disciplinary ward, where disciplinary solitary confinement is served. As the inmates are placed in single cells in such wards, they may find it difficult to name witnesses and they are also unable to obtain an official medical report unless the guards allow access to the physician.

> An inmate in Kalocsa claimed that one of her cell-mates who had behaved impertinently to the guards was "beaten up severely and kept in the disciplinary ward until her black eye disappeared." In Vác, a number of inmates claimed that some guards have the habit of sliding their bunch of keys along the corridor at night and beating up the inmates in front of whose cell the bunch stops. It is difficult to decide whether it is true or just a legend.
>
> The 2001 Report of the Prosecutor's Office also provides some examples of ill-treatment: a penitentiary officer who had slapped an inmate, because he shouted from his cell, was fined by the Military Council of the Metropolitan Court. An employee of the Budapest Prison was also fined, when he swept the leg of an inmate in the bathroom and kicked him in the back 5-6 times. A sergeant-major of the Pálhalma National Prison was sentenced to 8 months of imprisonment – suspended for two years – and demotion, because he had for no apparent reason slapped one of the inmates two or three times, as a result of which the inmate's eardrum broke.[97]
>
> The Hungarian Helsinki Committee provided legal assistance to a juvenile suspect who had been placed in a cell together with three adult inmates in the Budapest Prison in September 1999. The 16-year old young man was raped, ill-treated and humiliated by his cell-mates. In addition to filing criminal charges against the perpetrators, the young man also filed a criminal report against the prison authorities who, despite the express prohibition in § 302 (6) of the Criminal Procedure Code, had placed him in the cell together with adults. The prosecutor's office refused to carry out an investigation stating that the failure to abide by the rules on the part of the prison officer in charge was not a criminal offense but only a disciplinary offense. However, as the culpability of the criminal act has ceased a year from its commission due to the statute of limitations, there was no possibility to carry out a disciplinary procedure against the prison officer.

[97] 2001 Report of the Prosecutor's Office, p. 8.

These observations make the Government Report's claim that "no case was reported in which order and discipline were enforced by cruel and degrading treatment"[98] highly questionable.

The other main cause for the lack of proper recourse is the "silence" of aggrieved inmates. Several inmates interviewed during the Prison Monitoring Program claimed that it is not worthwhile to complain as no result may be expected while the prison guards will further increase their difficulties.

> An inmate held in the Budapest Prison said the following about the box for complaints addressed to the warden: "It is worth nothing. Everyone has access to everything. The head of the unit can also check what the inmate throws in for the warden." According to a Tököl inmate: "It's better to shut up. It is not worth complaining, because you will be busted."

The above contradict the Government's assertion that "the inquiries revealed no cases where the detainee was subjected to unlawful treatment because of his/her complaint or information."[99] We rely on experiences rather than opinions formulated by inmates in stating that the Government's statement is not in perfect harmony with the situation on the ground. In the case described below, even the Commander of the National Prison Administration acknowledged the necessity to transfer to another facility an inmate harassed by the penitentiary personnel after having filed a complaint for ill-treatment.

> In the framework of its Prison Monitoring Program, the Hungarian Helsinki Committee – at the request and complaint of B.J., an inmate in Pálhalma – filed a report on account of ill-treatment with the military prosecutor's office. Together with a fellow inmate, B.J. was working on the night shift and was equipped with a flashlight. Pretending to be approaching guards, they flashed the light at the inmates on guard in the tower (in this institution due to the lack of personnel the agricultural plants used to be guarded by inmates until this practice was put an end to following the investigation of the Ombudsman), who in turn reported this to the guards. B.J. and the other inmate were punished with solitary confinement, but prior to this – according to the complainant – were beaten by the guards at the prison's field unit in Bernátkút. The Hungarian Helsinki Committee decided to file a report because independently form each other, B.J and the other inmate gave a similar account of the event, with the difference that while B.J. was willing to repeat his complaint before the investigative authority, the other inmate stated in advance that he would deny having been beaten, as he did not want trouble from the guards. As a result of the Hungarian Helsinki Committee's complaint, the investigative procedure commenced. *Not long after, the Hungarian Helsinki Committee received a letter from the victim, who stated that since the start of the case, the prison guards had been continuously harassing him. At the request of the Hungarian Helsinki Committee, the national commander of the prison administration ordered the transportation of our client to a different prison, thereby preventing future conflicts.* The military prosecution carried out a quite thorough investigation, the conclusions of which came as a surprise and raised the Hungarian Helsinki Committee's concerns.

[98] Government Report, Par. 139.
[99] Government report, Par. 151.

Although during the investigation the cell-mates of the complainant accounted that our client (who gave consistent and credible accounts in support of his allegations throughout the investigation process, even at the confrontations) also informed them about the ill-treatment suffered and showed them various bruises on his body, the military prosecutor's office accepted the statements of the prison guards, who unanimously denied the charges. (Obviously, a further factor was that the other inmate, who was also ill-treated according to our client, denied this and said that he had not seen bruises on our client and did not remember his complaints about the ill-treatment). The military prosecutor's office found that "ill-treatment cannot be proved clearly" and argued that in line with the principle of *in dubio pro reo*, the investigation should be the terminated based on § 139 (1) (b) of the Criminal Procedure Code (because based on the information gathered during the investigation, it could not be established that a crime had been committed and the continuation of the procedure is not expected to bring any result). The Hungarian Helsinki Committee filed a complaint against the terminating decision, but the Chief Military Prosecutor's Office rejected the complaint.

Article 10 (3)

Article 10 (3) requires putting into place in penitentiary institutions treatment programs for detainees that are aimed at their reformation and social rehabilitation. The **lack of effective social rehabilitation efforts and programs** is the third main problem of the Hungarian penitentiary system. The Hungarian legal framework contains institutions that – if applied properly – could be a significant contribution to the successful reintegration of inmates after release. However, the practical application of such institutions is far from satisfactory.

Institutions allowing inmates to leave the prison for shorter or longer periods of time are of extreme importance from the point of view of their reintegration. According to the European Prison Rules, "To encourage contact with the outside world there shall be a system of prison leave consistent with the treatment objectives in Part IV of these rules."[100] In accordance with this requirement, Hungarian law permits inmates to leave the penitentiary institution on various grounds for shorter or longer periods of time. Under Par. 167, the Government Report enumerates some of the relevant legal institutions, including short-term leave, one-day leave, the interruption of detention (enabling the inmate to pay his/her last respects) and the application of semi-liberty enforcement regime (referred to as "lenient executive rules" in our report).

These institutions are designed to facilitate inmates' reintegration following release. According to penitentiary experts, they fulfilled this function, while risks associated with such leaves (failure to return, the committing of criminal offenses, etc.) "remain[ed] within the limits of professional risk."[101] The application of institutions involving leave was for long on the rise, what is more, the scope of such institutions was widened when in 1993 the one-day leave was introduced as a new type of reward (see Par. 167.3 of the Government Report).

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[100] European Prison Rules, 43.2

[101] József Lõrincz – Ferenc Nagy: *Börtönügy Magyarországon* (Penitentiary Affairs in Hungary), Budapest, 1997, BVOP. p. 109.

The situation was changed after the so-called Döcher case:

> György Döcher (who was allegedly involved in organized crime activities and was serving his sentence in the Budapest Prison) was shot dead in the fall of 1999 while on leave from the prison. The penitentiary judge had earlier allowed the application of lenient executive rules with regard to Döcher (which made it possible for Döcher to work outside the prison) in spite of the penitentiary institution's opposing opinion. Döcher had been on work-related leave when he was killed.

In reaction to the Döcher case, the National Commander issued Order 1-1/63/1999 that took effect on 15 November 1999. The Order states that in case inmates serving prison sentences for certain criminal offenses commit a new criminal act while on temporary leave from prison, or cause any other extraordinary event, "disciplinary responsibility of the person having recommended, proposed or permitted [the leave] may be examined". The offences enumerated in the Order are defined in a way that the instrument affects a great portion of the prison population. In our view, a further problematic issue is that the Order instructs decision-makers to pay increased attention to the opinion received from the police headquarters of the inmate's place of residence as well as the municipal government's assessment. The police, however, usually oppose inmates' visits to their families: their job is made much easier if they do not recommend leave, since this way they will only have to pay attention to him/her once he/she is released from prison. The same applies to municipal governments. For these reasons, although the Order does not make the investigation of disciplinary responsibility automatic, since its entry into force, hardly any prison warden has undertaken the risk of permitting leave. Prison wardens find it is easier not to allow inmates to leave the prison as compared to showing in an ensuing procedure that they took all necessary precautions.

In our view, the Döcher case was rather a pretext than the real reason for the significant restrictions of penitentiary policy. This is underpinned by the fact that it had happened prior to the Döcher case (even if not too often) that an inmate on leave committed a severe, violent crime, but these instances did not lead to such a radical cut in permitting leaves (what is more, Döcher did not commit an offense and the application of lenient executive rules was strongly opposed by the prison authorities).

Below we provide a description of how the application of institutions involving leave has been diminished as a result of the restrictions of criminal and penitentiary policy.

The restrictive criminal policy introduced after the change of government in 1998 begun to show its impact already in 1998, when the number of short-term leaves[102] dropped by 20 percent (from 5,503 in 1997 to 4,412) but the real decrease started in 1999. In 2000 (when

[102] § 41 of Law Decree 11/1979 on the Implementation of Sanctions and Measures (hereinafter: Penitentiary Code) provides that short-term leave may be given as a reward for the inmate's exemplary behavior, his/her achievements in work, education, his/her successful participation in the education of other inmates, for the saving of lives or significant material values or for the aversion of some grave danger. The maximum duration of short-term leave for inmates held in maximum-, medium- and low-security prisons (and in temporary groups) is 5, 10 and 15 days respectively.

the number of inmates was 15,539) five times fewer (1,155) short-term leaves were permitted than in 1997, when the number of inmates was lower.[103] (See Table C3 in Annex C.)

Similar tendencies may be observed with regard to one-day leaves, which are a type of reward that may be permitted in the interest of maintaining family contacts, and to facilitate finding employment and housing following release from prison: those inmates may be allowed to go on a one-day leave who served a certain part of their sentence; its duration may not exceed 24 hours. In 2000 (with a higher number of inmates) almost six times fewer one-day leaves were permitted (244) than in 1997 (1,446).[104] (For details see Table C4 in Annex C.)

Under the relevant provisions[105] the implementation of detention may be interrupted for important reasons – in the interest of the public or due to the inmate's health condition or personal or family circumstances. A special case of the interruption of detention is allowed in case of severe illness or funeral of a family member.[106] Depending on the length of interruption, it may be permitted by the warden, the National Commander of the National Prison Administration or the Minister of Justice.

The decrease in the number of fulfilled requests shows an extreme picture. In 1997, almost eight times as many requests were approved (1,158) than in the year 2000 (147).[107] The number of permissions allowing inmates to visit severely ill relatives or attend a relative's funeral also dropped from 213 in 1997 to 155 in 2000.[108] (For more details see Tables C5 and C6 in Annex C.)

From the point of view of reintegration, lenient executive rules (LER) are an institution of key importance.[109] The application of LER provides inmates with significant advantages:: leaving the penitentiary maximum four times per month for not more than 24 hours (exceptionally 48 hours) on days when he/she is not working; receiving money to be spent on personal necessities in cash and being able to spend it outside the prison; receiving visitors outside the prison; being unguarded while working outside the prison.[110]

From Table C7 (see Annex C) it may be concluded that the LER practically "fell victim" to the Döcher case, or rather the restrictions introduced under its pretext. The number of submissions requesting the application of LER was diminished by a 1999 amendment of the

[103] Source: Penitentiary Statistics
[104] Source: Penitentiary Statistics
[105] § 22 (1) of the Penitentiary Code
[106] § 22 (3) of the Penitentiary Code: "The inmate may with or without supervision visit his/her severely ill relative or attend a relative's funeral. The warden may order that handcuffs be used and may – under special circumstances – refuse to permit the visit or attendance at the funeral."
[107] Source: Penitentiary Statistics
[108] Source: Penitentiary Statistics
[109] § 28/A of the Penitentiary Code provides that LER may be applied if the inmate has already served half of the time for conditional release (but at least 3 months in low-security prison, at least 6 months in medium-security prison), and there are well-founded reasons to believe based on the inmate's circumstances (in particular, his/her personality, history, lifestyle, family relations, criminal relations, behavior in prison, the crime committed and the length of the prison sentence) that the purpose of imprisonment may be attained even if more lenient executive rules are applied.
[110] Ibid.

Penitentiary Code. Before 1 January 2000, the inmate or his/her defense counsel was also entitled to request the application of lenient executive rules. In such cases the penitentiary institution formulated its opinion about the application of LER and – attached to the request – forwarded it to the penitentiary judge authorized to decide on the submission. Act CIV of 1999 abolished this provision, so at present neither the inmate nor his/her defense counsel may request the application of LER. The penitentiary judge decides on the issue on the basis of the penitentiary institution's submission.

The dramatic decrease in the number of leaves permitted for LER-inmates is also striking: 19,873 such leaves took place in 1998; this number decreased to as few as 2542 by 2000 – while the number of inmates granted LER decreased from 1,220 in 1998 to 109 in 2000.[111]

In our view, the **radical decrease of the application of institutions permitting leave for inmates for reintegration purposes since November 1999 is contrary to Article 10 (3) of the Covenant**.

A further issue related to the social rehabilitation of inmates is the **overburdening of** "educators" – **penitentiary staff members responsible for facilitating the reintegration of inmates**. According to the Hungarian Helsinki Committee's experience, educators are not able to efficiently fulfill their task, a conclusion confirmed by educators themselves. In the Pálhalma National Prison, one educator is in charge of 100 inmates. Based on December 2000 data from the nine penitentiaries the Hungarian Helsinki Committee has visited, it seems that one educator is in charge of 55 inmates on average. Obviously, the number of educators is insufficient for the achievement of the aims prescribed by law. A great part of their time is spent performing administrative tasks (e.g. checking and distributing letters addressed to inmates); the preparation of personalized education plans or the implementation thereof is simply beyond their means. It is illustrative that the chief educator in the Vác Prison believes that the correct title for this job should be social administrator. Collecting and filing various application forms, i.e. „being an administrator and postman" basically characterizes his daily work.

The low number of educators is partially related to the lack of appropriate financial recognition. (According to an educator in Szeged, the personnel of the penitentiary system receive the lowest remuneration among all law enforcement agency staff.) Additionally, it is partially due to the fact that not enough posts are earmarked for this function in the personnel structure of the penitentiary administration. According to year 2000 personnel figures, there were 6,214 staff members for the total of 6,478 permanent (officer, deputy officer and public employee) posts. Therefore the personnel shortage only amounts to 264 persons. Compared to the high number of inmates per educator, we can conclude that even if all available posts were filled, educators would most likely still not be able to fully achieve all of their tasks prescribed by law. We believe that the **number of educators ought to be considerably increased so that the facilitation of the inmates' social rehabilitation might be performed efficiently**.

[111] Source: Penitentiary Statistics

ARTICLE 13

With regard to ordering expulsion of aliens, in the vast majority of cases aliens policing authorities have ordered the immediate implementation of execution. While the legal institution of immediate implementation of execution is in general only used in exceptional cases, in expulsion cases the exceptional rule became the general rule.[112] According to both the 1993 as well as the 2001 Aliens Act, immediate implementation of execution may be ordered if the alien is unable to support himself, does not have adequate accommodations, financial means or income or a relative who may be obliged to support him, as well as in the case when the security of the Hungarian Republic, the protection of public order make it necessary.[113] The **wide range of reasons for ordering the expulsion decision's immediate execution extend beyond those permitted under Article 13 of the Covenant**, which only allows the restriction of the right to a remedy where compelling reasons of national security so require.

The Hungarian Helsinki Committee has documented several cases in the period of 1998-1999 where migrants had been actually deported back to their country of origin without having the possibility to submit reasons against their expulsion and having their cases reviewed, without the provision of specific information about compelling reasons of national security.

The above-discussed breach of Article 13 of the Covenant was even more severe when asylum-seekers were removed from the territory of Hungary without having received a final decision in their refugee determination procedure. Between March 1998 and 31 August 1999, the 1997 Asylum Act did not provide suspensive effect for judicial review procedures in cases of refugee determination procedures carried out at the airports. This posed a threat to asylum-seekers of being removed from Hungary without being able to exercise their right to seek legal remedy against the first instance decision rejecting their asylum claim.

Since 1 September 1999, the 1997 Asylum Act[114] provided for the suspensive effect of the request for judicial review against rejection of the asylum claim also in the airport procedure. Therefore, the expulsion of an asylum seeker could not be implemented before a final decision had been taken in the asylum procedure. In terms of the Asylum Law's amendments taking effect on 1 January 2002, asylum seekers may also be expelled by the decision of the asylum authorities.[115] Aliens policing authorities who are in charge of implementing expulsions may order the immediate implementation of the expulsion decision in case the foreigner is unable to provide for him/herself or in the interests of protecting public security.[116] In terms of the legal position of the Office of Immigration and Naturalization of the Ministry of Interior, a request for judicial review against the decision rejecting the asylum claim shall not have suspensive effect on the implementation of

[112] The rate of ordering immediate execution was around 70 percent compared to the total number of expulsions, and was approximately 90 percent compared to the number of expulsions ordered by the Border Guards in 1998 and 1999.
[113] § 35 (1) of the 1993 Aliens Act and § 42 (2) of the 2001 Aliens Act
[114] as amended by Act LXXV of 1999 on the rules of suppressing organized crime and other related phenomena and necessary amendments
[115] § 38 (2) of the Asylum Act
[116] § 42 (2) of the 2001 Aliens Act

expulsion. According to information available to the Hungarian Helsinki Committee, the application in practice of this legal interpretation has not yet taken place, immediate implementation of the expulsion order would clearly violate the right to an effective remedy.

ARTICLE 14

Article 14 (1)

As to Article 14 (1), particularly the independence of the judiciary,[117] it shall be noted that since 1990 Hungary has made very significant progress in creating a truly independent judiciary. Basic guarantees of independence and the functional separation of powers among the branches are firmly established in constitutional jurisprudence; broad powers of administration have been located in an autonomous National Council of Justice. In general, respect for the principles of judicial independence and the role of judges in a free society are accepted by politicians and the public.

However, the positive changes initiated in the early 1990s and advanced by the reforms of 1997 are not yet accomplished, or have even been partly reversed. There is concern that the Government has unduly politicized judicial reform in a manner that undermines its commitment to judicial independence. In particular, **public criticism of the judiciary by Government officials, the delays in establishing appellate courts and unsatisfactory working conditions give cause for concern, as does the executive's continued control of the budget process**.

Judicial reform appears to be increasingly politicized, threatening the social and political consensus necessary to protect the judiciary's separate and independent status. Since passage of the 1997 reforms, Government officials have increasingly complained that this separation of the judiciary from the political branches has not been effective in practice. Members of the executive have criticized judges' decisions for their leniency, blaming them for an increase in crime, and have bemoaned publicly the fact that the reforms cut ties between the judiciary and the executive. While criticism by officials of other branches is perfectly reasonable in a free society, in the context of reasserted executive influence in areas affecting the judiciary, such comments raise questions about the Government's commitment to the judiciary's independence.

The delaying and scaling back of the establishment of appellate courts, a result of the 1999 parliamentary amendment to the 1997 reforms, is a decision whose constitutionality has been questioned. Such delay and backtracking in institutional reform increase the uncertainty the judiciary faces in its relations with the other branches, and can threaten the judiciary's fundamental independence.

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[117] The present section is based on: Judicial Independence in Hungary In Monitoring the EU Accession Process: Judicial Independence, published by the OSI/EU Accession Monitoring Program, Budapest, 2001. For the full text of the report, see http://www.eumap.org/reports/content/20/348

The executive retains strong influence over the financing of the judiciary through its effective control of the budget process. Despite the National Council of Justice's formal right to prepare a draft budget, it is the Government that submits a draft courts budget to Parliament and that has the power to provide supplementary funds to the courts from State reserves when needed. The Government is obliged by law to provide reasons for deviating from the draft budget proposal of the National Council of Justice, however, it failed to do so when submitting the 2000 and 2001 draft budget to Parliament despite the 10 billion HUF discrepancy between the budget versions of the National Council of Justice and the Government.

With regard to working conditions in courts, investment in court infrastructure has not been sufficient, and working conditions are sub-standard. The number of court personnel has not kept pace with the increase in the courts' caseload, and judges are overburdened. The European Commission's 2001 Regular Report also noted that "[o]verall technical facilities at Courts are inadequate and judges have to spend considerable time on administrative matters connected with their cases."[118]

Enforcement of judgments is unsatisfactory. Public criticism of the judiciary is linked to difficulties in executing property rights decisions, while judges complain that the police often fail to implement orders to find defendants. Inadequate enforcement reduces public support for and reliance on judicial processes, which in turn can weaken political support for maintaining an independent judiciary.

Article 14 (3)(d)

As to Article 14 (3)(d) regarding the **provision of free legal assistance for those who do not have sufficient means to pay for it**, we wish to make the following comments. In Hungary, all criminal defendants are granted the right to defense and authorities are obliged to guarantee the accused the capacity to defend themselves.[119] Provision of defense counsel is compulsory if the defendant is in detention or handicapped in some way,[120] or if the offence carries more than five years' imprisonment. If the defendant does not authorize a defense counsel in such cases, the authority must appoint one. However, the **fee of appointed defense counsel is only advanced and not born by the state**.[121] If the defendant is convicted, the state collects the fee and the expenses (travel, accommodation, etc.) of the appointed counsel as "criminal expenses".[122] Although in practice the state is rarely able to collect the totality of criminal expenses, this solution is **clearly contrary to Article 14 (3) (d) of the Covenant**.

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[118] Commission of the European Communities, 2001 Regular Report on Hungary's Progress towards Accession, 13 November 2001, SEC(2001) 1748 http://europa.eu.int/comm/enlargement/report2001/hu_en.pdf

[119] § 6 of the Code of Criminal Procedure

[120] The defendant is detained, or deaf, or dumb, or blind, or mentally handicapped or does not speak Hungarian.

[121] Order 120/1973 of the Ministry of Justice

[122] The Hungarian system does not comply with the relevant international standards in this regard: there have been cases where the European Court of Human Rights jurisprudence would require the state to provide free counsel in order to abide by Article 6 of the European Convention on Human Rights.

In a 1996 report, the Ombudsman for Civil Rights noted a **number of problems with the efficiency of the system of appointed counsel**,[123] including a lack of appropriate sanctions for failure to perform appropriately or at all: if a defense counsel fails to fulfill his/her obligation to appear at a procedural act for which his/her presence is compulsory under the Code of Criminal Procedure, the court may impose a fine on him/her and is obliged to postpone the given act at his/her expense.[124] However, this sanction is of a formal nature, i.e. no sanctions are applicable if the counsel appears in front of the given authority but does not provide effective or any assistance to the defendant. The Hungarian Bar Association is entitled to call its members to account for not abiding by professional rules (which declare that attorneys shall be obliged to perform their profession in the interest of the client), however – in order to secure the independence of the Bar Association – the state has very restricted rights to control the Bar Association's activities, which means that it lacks proper instruments to compel, if necessary, defense counsels to provide defendants with substantive assistance.

It is not compulsory for appointed counsels to appear at any pre-trial stage of the procedure, save for the case of minors. Since appointed defense counsels' fees are very low,[125] there is little incentive to appear unless required. Appointed counsels are not eligible for fees for meeting with their client. Moreover, in case of foreign defendants interpretation is only available at procedural acts and not in case of meetings held with counsel. The Civil Rights Ombudsman pointed out that "the counsel may not be expected to advance such amounts" and suggests exemption for appointed defense counsels, but the proposal has had no response.[126] Should the defendant be convicted, appointed counsels may request courts to oblige the defendant to pay a sum equivalent to a private commission,[127] but this is rarely applied as it is considered a compromise of professional ethics. The system of appointed defense counsels does not therefore appear to offer adequate protection for defendants who cannot afford private counsel.

Article 14 (5)

The Government Report Par. 45 on the incomplete system of legal remedies in the area of the law on regulatory offences (misdemeanors) reflects a legal situation prior to 1 March 2000. On this day a new Regulatory Offences Act[128] came into effect that opened the way for judicial remedy against all decisions on regulatory offences.

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123 *A kirendelt védõvel rendelkezõ fogvatartott személyek védelemhez való jogának érvényesülése a büntetõeljárás nyomozási szakaszában.* (The realization of the right to defense of detained persons with appointed defense counsels in the investigative phase of the criminal procedure), Budapest, Office of the Ombudspersons, 1996

124 §§ 113 and 192 of the Code of Criminal Procedure

125 Decree 1/1974 of the Ministry of Justice prescribes fees of HUF 1,000 (€ 4) for the first hour of the given procedural act and HUF 500 (€ 2) for every subsequent hour This compares with 'market' fees of HUF 10,000–15,000 (€ 39-58). A related problem is that appointed defense counsels have to pay a very high sum for copies of files (one page costs HUF 100 (€ 0.4), i.e. 10 percent of the fee they are paid for the first hour).

126 See *A kirendelt védõvel rendelkezõ fogvatartott személyek védelemhez való jogának érvényesülése a büntetõeljárás nyomozási szakaszában* (The realization of the right to defense of detained persons with appointed defense counsels in the investigative phase of the criminal procedure), Budapest, Office of the Ombudspersons, 1996

127 According to § 219 of the Code of Criminal Procedure

128 Act LXIX of 1999 on regulatory offenses

In a 1997 decision[129], the Constitutional Court had rules that the incomplete system of judicial remedies is in violation of several provisions of the Hungarian Constitution[130] which declare that courts shall control the lawfulness of administrative decisions. The Constitutional Court called on Parliament to pass by not later than 31 December 1998 a new act on regulatory offences to replace the old Act[131] dating from 1968. Furthermore, the Constitutional Court also decided that with regard to transmutation into confinement of a fine on grounds of non-payment, the role of the court couldn't be limited to testing the legality of the decision.[132] Based on the right to a due process before an independent and impartial court, the Constitutional Court declared that even in case of regulatory offenses, the offender has the right to a full review procedure on the merits of the case.

The new **Regulatory Offences Act**, as passed by the Parliament on 15 June 1999 essentially fulfilled the requirements set by the Constitutional Court. The new act was an important step forward, however, the **delay in its implementation resulted in unlawful and long-term confinement of prostitutes**.

Just one week after its vote on the Regulatory Offences Act, on 22 June 1999, Parliament voted for the so-called Anti-Mafia Act,[133] which also amended the 1968 Regulatory Offences Act. According to the Anti-Mafia Act, which came into effect on 1 September 1999, prostitution is basically legal even on the streets with the exception of protected areas. Protected areas are all areas close to a main road (minimum distance is 50 meters) or to a church, a school, a court or any building used by public authorities, diplomatic or consular services etc. (minimum distance is 300 meters). Soon thereafter, it turned out that in the traditional 'red-light' districts in Budapest, is there not one spot not in a protected area in terms of the Anti-Mafia Act.

The Anti-Mafia Act, with a slight difference in its wording basically restored the two paragraphs of the 1968 Regulatory Offences Act that had been declared unconstitutional and had been abolished by the Constitutional Court in 1997. Consequently, the courts' scope of action again became limited to testing the legality of the transmutation of a fine into confinement. The administrative authority, i.e. the police fine took the decision about the fine (ranging from 1,000 to 100,000 HUF) and the length of confinement (calculated as 1,000 to 2,000 HUF per day while the courts had no other functions but reviewing the legality of the police decision.

It should be noted that Parliament voted for the Anti-Mafia Act with more than a two-thirds majority and not one MP protested that the Constitutional Court had already declared the above-mentioned provisions null and void. Moreover, punishments for misdemeanors under the Anti-Mafia Act are much harsher and less humane than punishments under the new Regulatory Offences Act. The new Act forbids, for example, transmuting a fine into confinement if the offender is pregnant or if she is taking care of a child less than sixteen

[129] Decision no. 63/1997 (XII. 12.) of the Constitutional Court
[130] § 50 (2), § 57 (5) and § 70/K of the Constitution
[131] Act I of 1968 on regulatory offenses
[132] § 18 and § 71/A of Act I of 1968 as amended by § 7 of Act XXII of 1990
[133] Act LXXV of 1999 on the rules of suppressing organized crime and other related phenomena and necessary amendments

years of age. In terms of the new Act, the maximum length of imprisonment is sixty days or ninety days in case of multiple offenses. The Anti-Mafia Law Act does not set any time limit for confinement. Finally, as the entry into force of the new Regulatory Offences Act will annul the old Act on Regulatory Offences, the provisions concerning the punishment of misdemeanors were effective for less than six months (1 September 1999 – 1 March 2000).

As of 1 September 1999, police started raiding areas where prostitutes were traditionally soliciting clients, arrested hundreds of them, and in a fast-track procedure fined them an average of 50,000 HUF (currently, the gross minimum monthly wage). Some prostitutes were find two or three times in one night. In case of non-payment, the police immediately transmuted the fine into confinement: fifty days for 50,000 HUF. By the end of the year, some prostitutes had collected fines amounting to three to five million HUF and were threatened by 3-5,000 days in prison. This excessive amount of money was obviously beyond the capacities of the prostitutes. The offender prostitutes usually did not believe they could really be imprisoned, because in previous years, no prostitute had been placed in any kind of confinement for longer than a few hours. Some prostitutes even stated that the police officer assured them that need not fear confinement.

This unfounded belief was destroyed in early 2000, as courts in review procedures started rubber-stamping the police decisions of the last four months of 1999. This practice continued even after the new Regulatory Offences Act had entered into force, as § 165 (2) of the Act declared it should be applied only to offences committed after its entry into force, while offenses committed before 1 March 2000 were to be adjudicated according to the old Act which was no longer in effect. This latter provision was evidently unconstitutional and the Constitutional Court annulled it[134] with retroactive effect as of 1 March 2000.

Nevertheless, even this decision did not help the prostitutes, who had been in the meantime in prison in confinement for six-seven months already and had not been properly informed as to the foreseeable length of confinement. In a single day, some judges upheld three police decision against one person, thereby approving 150 days of confinement although the new Act limited confinement to a maximum of 90 days. Not one offender had been asked if she had any children to take care of, and no judge had protested against the provision that delayed the implementation of the new Act although it was clearly contradictory to basic principles of criminal procedure.

According to the statute of limitations, no decision in a regulatory offence case can be executed two years from the day it became final, therefore prostitutes did not need to serve five years in prison but "only" 18-20 months in average. Supposedly they were freed a bit earlier than expected, as the Hungarian Helsinki Committee reported about these women serving lengthy confinements for an offence (prostitution) that is not even considered an offense in terms of the new Act on Regulatory Offenses.

As all actors (parliamentarians, police officers, judges) maintain that all procedures against prostitutes had been in accordance with the law, it is very unlikely that victims of an unconstitutional Act and an unfair procedure may ever receive compensation for the long period they had spent in prison.

[134] Decision no. 29/2000 (X.11.) of the Constitutional Court

Article 14 (6)

We wish to discuss the issue of **compensation for miscarriages of justice** as provided by Article 14 (6). NEKI has extensive experience in representing persons claiming compensation for prison terms served on the basis of a final court decision that was subsequently reversed.

> In a highly publicized 1997 case, NEKI provided representation to Mr. Dénes Pusoma, a young and mentally unsound Roma man in his claim for criminal compensation (i.e. compensation for unlawful or unjustified deprivation of liberty). Mr. Pusoma was deprived of his personal liberty for 26 months on the grounds of fabricated evidence. However, he was not entitled to compensation because he had failed to appeal against his conviction on the first instance.

A claim for criminal compensation may be submitted within six months or a year following the delivery of the final decision. Practice makes it clear, however, that this seemingly sufficient limitation of time is fairly short for the potential claimants to learn about their right to criminal compensation, to find a lawyer and launch their claim. Related to the tight time restrictions is the question whether all persons entitled to criminal compensation are able to learn about their right to sue. In many cases, the claimants turned to NEKI well beyond the six months limitation but rightfully asked why a citizen unfamiliar with the law is expected to be aware of these restrictions. Many others complained that they had not been informed about their right to claim criminal compensation. It would be **crucial to codify the competent authorities obligation that upon acquittal or the receipt of the decision terminating a procedure clients should be informed about their right to claim compensation**.

The Code of Criminal Procedure enumerates a number of conditions,[135] which prevent claimants from seeking criminal compensation, thus keeping the number of claims as low as possible. Such conditions include the following: (i) the procedure was terminated because the act involved posed a limited extent of danger to the society; (ii) the defendant hid, attempted to or absconded from the authorities; (iii) the defendant strove to prevent successful investigation by misleading the authorities or culpably directed suspicion against his/herself; (iv) the defendant was acquitted but was remanded to compulsory mental treatment; (v) the defendant withheld in the principle case evidence that led to acquittal pursuant to the reopening of the proceedings; (vi) the defendant failed to appeal against the judgment brought in the principal case. This **wide range of exclusionary clauses from criminal compensation is in contradiction with the Covenant** that provides for only one such condition: "the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him".

One of the most disputed aspects of the exclusionary clauses is the issue of culpability. The state is often exempted from its responsibility due to the lack of a clear

[135] §§ 383–385/A of the Code of Criminal Procedure

definition/interpretation of culpability. Neither the law itself nor the general comments clarify whether the claimant's culpability relates to acts committed before or after s/he is informed about the suspicion pending against her/him, or whether it only relates to declarations made during interrogation. Why should mere non-cooperation or not absolute cooperation of a criminal defendant with the authorities result in his/her exclusion from criminal compensation? A procedure against a person is often in progress, at least for a while, without his/her knowledge. In such cases it is simply impossible for a convict to cooperate with the authorities. It is no surprise then, that the unintentional acts of convicts may also give rise to arguments based on the exclusionary clauses. In order to surmise these situations, **an amendment is necessary in terms of which only intentional acts or behavior shall be taken into account when assessing the grounds for criminal compensation.**

Criminal compensation is a special form of damages at civil law. The method and quantum of the damages shall be assessed under the provisions of the Civil Code on liability for non-contractual damages, but unlike in procedures for damages, here the law exempts the claimant from having to establish the legal grounds for the claim. Thus, if the legal grounds are established, a claimant has "only" to provide evidence concerning the quantum of pecuniary and non-pecuniary damages.

In current Hungarian court practice, plaintiffs are liable to establish both pecuniary and non-pecuniary damages. This is entirely acceptable with regard to pecuniary damages, but not at all so with regard to non-pecuniary damages. In the latter case, plaintiffs themselves are required – perhaps relying on forensic medical or other expert opinions – to provide evidence for the psychological trauma and the mental shock they suffered while being deprived of their personal liberty. It is generally known that the deprivation of personal liberty results in psychological damages, thus this should not be required to be proven. Furthermore, a procedure in which the court searches for evidence years after release from prison and hears close relatives, neighbors or even colleagues in order to assess how, and to what extent has the personal life of the plaintiff been effected by the unlawful arrest may be humiliating and unpleasant. It is evident, that in most cases the deprivation of personal liberty – even if only few days long – violates the right to human dignity.[136]

Bearing this in mind, courts might well be required to automatically consider all instances of the deprivation of personal liberty as grounds for awarding non-pecuniary damages. The amount of non-pecuniary damages would evidently depend on the circumstances of individual cases, and plaintiffs would be entitled to claim further compensation on the basis of their submissions of medical expert opinions or witness statements. It is difficult for judges to rule on non-pecuniary damages. **Due to the lack of a proper definition given by**

[136] In its decision No. 64/1991 the Constitutional Court emphasized, "Dignity is a quality inherent in human life, which is indivisible and unlimited, therefore being equal for every human being. The right to equal human dignity in conjunction with the right to life ensures that the law might non differentiate amongst the quality of different human lives. Every person's right to life and human dignity is inviolable. This holds true for all human beings, independent of their physical and mental development or state, furthermore, of how much they have realized from their abilities and why they have realized that much. One cannot consider the right of one human being to life without including in this consideration his/her basic right of life and dignity".

law,[137] and the lack of further guidelines and case law, courts are left to assess the quantum of non-pecuniary damages on an overtly subjective basis.

Following numerous discussions with judges and based on comprehensive case studies the following conclusions may be drawn. The amount of non-pecuniary damages awarded by Hungarian courts is extremely low, and judges are free to consider numerous subjective criteria in the assessment process. On the one hand, this is an obvious result of the subjective nature of damages, but on the other hand, it seriously impedes the formulation of uniform case law. The interviewed judges were almost unequivocally of the opinion that the deprivation of personal liberty causes less damage to person with a criminal record than to one who was innocently imprisoned for the first time in his/her life. Another typical example of the Hungarian court practice is that judges make "implicit" differentiation in ruling for non-pecuniary damages dependent on whether the claim is based on an acquittal due to the lack of evidence, or the lack of crime.

The general concept that all cases are different, therefore each shall be assessed following careful consideration of all aspects seems to provide too much room for the subjectivity of judges. When handling cases of Romani plaintiffs, we frequently experience that the authorities are much more "eager" to arrest or detain persons with previous convictions than those with no criminal record. Acquittals flowing from the lack of evidence often seem to result from insufficient investigations, a fact that should also be considered by courts.

ARTICLE 17

i)

Hungarian **Police have very wide-ranging powers to check the identity of persons**, to search their clothes and belongings in the street and to search their vehicles. According to the Act on Police, a police officer "may check the identity of a person whose identity needs to be established".[138] No suspicion of a crime or any offense is required for stopping and checking people driving a car or walking in a street. The police assert that the regular checking of a great number of people and cars is an effective tool in finding wanted criminals or stolen cars, to filter out people carrying stolen goods or drugs or to control drunk drivers. Those who cannot or will not identify themselves can be taken to the police station.

During an identity check the police officer is entitled to search the clothes, the bags, the parcel and/or the vehicle of the person checked. Once the check is completed, the person subjected to the check may inquire from the police officer about its reasons, however, the answer may be denied "in interest of public security".[139] **Roma, poorly dressed persons and non-white foreigners are likely to be checked more often than middle-class citizens.** Identity checks, especially if combined with a search of the clothes in the street can

[137] § 355 (1) of the Civil Code: The person responsible for the damage shall be liable for restoring the original state, or, if this is not possible or if the aggrieved party refuses restoration for a substantiated reason, he shall indemnify the aggrieved party for pecuniary and non-pecuniary damages.

[138] § 29 (1) of the Act on Police

[139] § 29 (3) of the Act on Police

be very humiliating, and can lead to conflicts between the police officer and the person checked. A good part of cases of violence against official persons start by a regular identity check.

Drivers after 10 p.m. are regularly checked, their driving license and other documents are controlled and they are often called on to use a breathalyzer. If it indicates the consumption of even the smallest amount of alcohol or if the police officer is not satisfied with how the driver blew into the breathalyzer, the driver can be taken to the police station and has to undergo a blood test. If it turns out that the driver did not consume alcohol, he/she is not entitled to any compensation, as the measure of the police was lawful.

A high number of identity checks is regarded as a sign of a given police department's diligence. Exact figures as to the yearly number of identity checks performed cannot be provided because police officers in the major part of the checks do not register the name and personal data of the persons checked. (If they do so, the data will be stored in the database of the police for two years.[140]) Still, experts estimate **the number of identity checks to be between 1.2 and 1.5 million per year** – in a small country of ten million people.

The Police Act provides the police with the power in the interest of preventing crime or finding perpetrators to execute mass identity checks and to carry out searches in public places (bars, restaurants, etc.) or public premises (markets, streets).[141] The Police Service Regulations issued by the Minister of the Interior[142] give a broader interpretation of this provision.[143] "Increased control" can be ordered for larger areas as entire cities, counties or eventually – at the order of the national chief of police or his deputies – for the whole territory of the country.

ii)
As to Par. 302 of the Government Report **(**"Police officers may enter private homes only in possession of a warrant as well as in the exceptional cases enumerated under § 39 [of the Act on Police]."), the quoted provision does not refer to non-Hungarian citizens. The 2001 Aliens Act[144] entitles members of the **alien policing authorities and members of the Border Guard to enter without a warrant private homes or private premises in order to control the observance of alien policing provisions**.[145] If an alien cannot establish his/her identity or the legality of his/her stay, he/she can be taken to the premises of the alien policing authority.[146] Although this Act came into effect on 1 January 2002, the 1993 Aliens Act included the same provisions.[147]

[140] § 84 of the Act on Police
[141] Increased control: § 30 (1) and (2) of the Act on Police
[142] Decree no. 3/1995 (III. 1.) of the Ministry of the Interior
[143] § 33 of the Service Regulations
[144] Act XXXIX of 2001 on the entry and stay of foreigners
[145] § 61 (2) of Act XXXIX of 2001 on the entry and stay of foreigners
[146] § 61 (5) of Act XXXIX of 2001 on the entry and stay of foreigners
[147] § 28 (3) and (4) of Act LXXXVI of 1993 on the entry, stay in Hungary and immigration of foreigners

iii)
As regards Par. 303 of the Government Report which states that "[t]he aim of the Data Protection Act [Act LXIII of 1992] is to guarantee the protection of human dignity…" The Anti-Mafia Act[148] declared that prostitution as such is neither a crime, nor an offence. The Act also prescribes that prostitutes are to carry medical certificates attesting that they do not suffer from venereal diseases. Based on the authorization included in the Act, the Minister of Health issued a decree on the **medical certificate for prostitutes**.[149] Because the text of the certificate refers to this decree and the medical booklet prostitutes have to carry with them bears the same title, this may be considered degrading in our view. Moreover, the measure is **manifestly in breach of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others** (New York, 21 March 1950), to which Hungary is a party,[150] as that Convention's Article 6 expressly forbids the establishment of special registration or certificates for prostitutes.

iv)
Par. 308 of the Government Report states that "[o]ne of the key guarantees of exercise of the right of self-determination in the field of information is attachment to a purpose – i.e. it is permissible to handle personal data only for a specifically stated and legitimate purpose, and only to the extent and for the length of time required by the attainment of this purpose." The Police Act[151] authorizes the police to collect information from several organizations that process sensitive personal data. For the purpose of detecting any intentional crime that is punishable by at least two years imprisonment, the police, with the approval of the public prosecutor, may request information from the tax authority, telecommunication services, medical services and any organization processing financial secrets or other business secrets. As most crimes are punishable by at least two years of imprisonment, this provision gives an almost **unlimited authorization to the police to access information pertaining to business life, financial position and the health status of citizens**. In urgent cases, if the felony is related to terrorism, organized crime, drug dealing, arms trafficking or money laundering, the approval of the prosecutor can be obtained after the information has already been collected.

The organizations mentioned above are obliged to supply the information requested by the police. The police may handle data obtained in this manner for two years even if no criminal procedure is launched on its basis.

As the consumption of all kinds of drugs (including soft drugs) can be punished with at least two years of imprisonment, drug users and even drug addicts prefer not to seek medical assistance from a doctor, as they know that even physicians are obliged to disclose their sensitive medical data to the police. The number of individuals newly registered for drug therapy decreased by 20.2 percent (from 5770 to 4701) between 1999 and 2000. Even more significant is the decrease in the proportion (from 51 percent in 1997 to 36 percent in 2000) of newly registered patients compared to the total number of people under medical

148 Act LXXV of 1999
149 Decree no. 41/1999 (IX. 8.) of the Minister of Health
150 The Convention was promulgated in Hungary by Law-decree no. 34 of 1955
151 § 68 (1) and (2) as amended by § 40 of the Act LXXV of 1999

treatment for drug consumption (see Annex D for details).[152] It is highly likely that this decrease is related to drug users' fear to seeks medical help, because they know how easily their sensitive data may be accessed and handled by the police.

v)
As to Government Report Par. 53-55, ("Measures relating to individuals who, in the pre-1990 period, acted as agents of the state security agencies") and as to Government Report Par. 306 (**the right of self determination in the field of information**: the right of individuals to know the information collected about them unlawfully by the state security agencies before 1990.), we wish to make the following comments.

Government Report Par. 53-55 present legal provisions which, in this form, had never been in force. Acts LXVII of 1996, XCIII of 2000 and XLVII of 2001 have amended act XXIII of 1994 described in the Government Report.

The most fundamental amendment was passed in 1996 as a result of the Constitutional Court's 1994 decision[153] that is of historic importance. Referring to the fundamental right of self-determination in the field of information and everyone's right to know and to decide about his/her personal data, the Court ruled the Parliament had to restore the right of self-determination of individuals and had to guarantee their right to become aware of information that state security agencies of the pre-1990 regime had collected on them. This right may only be limited in a "necessary and proportional manner" for the protection of national security interests and others' personal data. The Constitutional Court also decided the purpose of lustration is to promote the transparency of the "public life". The public has the right to know about public figures' past. In this sense, their former activities that had been contrary to the rule of law are information of public interest.

Following the ruling of the Constitutional Court, Parliament decided to establish the Historical Office, an archives where victims of secret surveillance as well as researchers of contemporary history may access the files of the former security forces.

Amending the 1994 Act, Parliament in 1996 strongly narrowed down the categories of individuals whose lustration is compulsory.[154] Members of Parliament, Government and civil servants, judges, public prosecutors who hold high positions are to undergo screening. As a result of the 1996 amendment, the number of persons subject to lustration decreased from over ten thousand as according to the Act of 1994 to less than two thousand. Consequently, the government in office since May 1998 submitted an additional amendment to increase the categories of individuals subject to lustration.[155] The 2000 amendment made screening mandatory for all judges, public prosecutors as well as journalists who by virtue of their position are capable of influencing political opinions. There is also an optional screening for lawyers, public notaries and for clergymen.[156] Interestingly, screening – unlike in 1994 – was

[152] Source: Hungarian Civil Liberties Union
[153] Decision no. 60/1994 (XII.24.) of the Constitutional Court
[154] Act LXVII of 1996
[155] Act XCIII of 2000
[156] This provision concerning lustration of members of the clergy led to a public debate. The Roman Catholic Church rejected any kind of screening for its priests, while several pastors of the Reformed (Calvinist) Church called on all their colleagues to undergo the screening.

not extended to the police, border guards, national security services or the army. Consequently, officers of the former Communist state security agencies were allowed to serve in the law enforcement agencies operating today.

Still, the most problematic element of the Act is that it **only covers one sub-department of the huge state security organization.** The entire state security organization was department III of the Ministry of Interior: a homogeneous agency composed of five sub-departments and seven other divisions and twenty county divisions. All sub-departments and divisions had a common (secret) Service Order,[157] and the top secret commands issued by the Minister of Interior or more often by his first deputy responsible for state security matters referred to the entire organization. (Military intelligence was a separate part of the system, subordinated to the Minister of Defense while military defense was a sub-department to department III.) Mr. József Végvári, a major of the state security service leaked secret documents to the opposition parties at the end of 1989 demonstrating that the organization, four months prior to the free elections, had destroyed tons of documents about its previous covert operations, still carried on observing the new, legally operating political parties. In the scandal nicknamed "Duna-gate affair", anger was focused on sub-department III/III (internal security), an organization similar to Orwell's thought police. III/III was immediately disbanded, while other sub-departments as III/II (counter-espionage) or III/I (foreign intelligence) were whitewashed as services doing their tasks as all similar agencies throughout the world. These latter sub-departments had been transformed into four separate national security agencies. The new, freely elected government accepted the situation, the legal successors of the sub-departments of the old state security organization were maintained and legitimized as national security services operating according to the rules of a democratic state. Consequently, all lustration laws referred only to officers, covert officers or confidential informers of the former sub-department III/III. Government and Parliament rejected all motions by some MP's to screen informers of sub-department III/I for foreign intelligence who had spied against e.g. Hungarian emigrants in the West or informers of the sub-department III/IV (military defense) who reported about drafted soldiers reading the Bible or a prayer book in a military barrack. This limitation not only refers to the lustration but also to access documents of the aforementioned sub-departments. Preserved documents of sub-department III/III were transferred to the Historical Office but of documents of the other sub-departments only those had to be transferred that are no longer needed for the performance of the tasks of national security services as indicated in the Act on National Security Services.[158]

Before the opening of the Historical Office in September 1997, the Office had taken over 102,380 files from the former State Security Recording Office in the Ministry of Interior. An estimated 107,000 files of the Recording Office had been destroyed in the last period of the old regime between December 1989 and January 1990. ("Active" files that were still in use by sub-departments, particularly those in use by sub-department III/III, were presumably fully destroyed in the fall of 1989.) The new national security services, established on 14 February 1990, examined the archives of the Ministry of Interior and indicated 24,248 files as necessary for their future operations. This number consisted of 10,706 "operative" files (covert investigations against persons "posing a threat to the social-political order"), 8,803

[157] Service Order of the Ministry of Interior Department III. Top Secret nr. 10-1837/1967
[158] § 25/A (2)(b) of the Act XXIII of 1994 on lustration and the Historical Office

files containing reports of individual secret service agents and personal documents and files of 4,339 agents. Approximately 70,000 of the altogether 102,000 files in the Historical Office were files of public criminal procedures, the contents of which were already well known to those who had been suspected of anti-state activities. The full amount of files maintained in the Historical Office in 1998 totaled 3,200 running meters.[159]

Based on the provisions of § 25 (2) (a) and (b) of Act XXIII of 1994, the national security services returned 2,559 files to the Historical Office, which comprises 10.5 percent of the files they took with them before the first freely elected government was set up in May 1990 (i.e. 367 running meters compared to the 3,200 meters in the Office.)[160] Individual requests from former victims of secret surveillance to the security services have been consistently rejected by the following reasons: "The service has not been and is not processing any of your data in an unlawful manner."[161]

Until today this refusal has not been challenged before a court, as no victim was able to give any evidence that his/her data had been processed by the security services. Therefore, unlike in Germany, self-determination in the filed of information has been imperfectly realized.

ARTICLE 18

Several international and foreign bodies have voiced concerns regarding the policies of the Hungarian government vis à vis minority religions.

The first intervention took place at the OSCE Review Conference at Vienna in September 1999, where an official statement by the European Union[162] and the United States,[163] and the report prepared under the auspices of the Office for Democratic Institutions and Human Rights of OSCE (ODIHR)[164] expressed concerns about the policies of the Hungarian government. At the OSCE Review Conference at Warsaw in October 2000 Hungary was criticized repeatedly by the United States. The 2001 report on international religious freedoms of the US Department of state also voiced concern about the treatment of religious minorities.[165] The International Helsinki Federation in its 2001 Annual Report[166]

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159 Report of the Historic Office 1997-98 www.th.hu/beszamolo/tev98irattv.html
160 Report of the Historic Office, 2000
161 Supplement to the Decision 511/B/1994/24 of the Constitutional Court
162 Statement of the European Union to the OSCE Review Conference, Vienna, Austria, 20 September 20 – 1 October 1999 „Religious Liberty in OSCE Countries." RC.DEL/103/99, 23 September 1999
163 Statement of the U.S. Delegation to the OSCE Review Conference, Vienna, Austria, 20 September 20 – 1 October 1999, „Freedom of Thought, Conscience, Religion, and Belief" http://www.csce.gov/state_query.cfm?state_id=23
164 "Freedom of Religion or Belief: Laws Affecting the Structuring of Religious Communities", OSCE Review Conference, September 1999, ODIHR Background Paper 1999/4 http://www.osce.org/odihr/documents/background/religion/
165 2001 Annual Report on International Religious Freedom: Hungary. Released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, 26 October 2001 http://www.uscirf.gov/dos01Pages/irf_hungary.php3
166 Religious Liberty in the OSCE Countries. Report Prepared by the *International Helsinki Federation* for the OSCE-ODIHR Seminar on Freedom of Conscience and Religion, 26 June 2001, The Hague p. 17.

and Human Rights Without Frontiers (HRWF)[167] in its annual reports on 1999 and 2000,[168] as well as the International Association for Religious Freedom (IARF)[169] in a common statement with HRWF[170] and several press statements[171] also warned against restrictions on the principle of freedom of conscience and religion.

Among the most problematic current issues is **the attempted restriction of state registration of religious communities, discrimination in granting financial benefits for churches as well as the issue of "sects."**

With regard to the registration of religious communities, we wish to recall that implicit in the norms of Covenant is that one should be able to engage in religious life in authentic community with others of like beliefs, and that the type of communal experience should be determined in accordance with religious beliefs, and should not be dictated, monitored or otherwise "impaired" by coercive requirements of the state. Stated differently, many aspects of religious life have an associational dimension, but if anything, they deserve far stronger protection than other associational rights, because of the intimate connection between religiously motivated association and core religious beliefs and practices.

Besides symbolic gestures and financial benefits granted for its privileged "historical churches," the main target of the government's discriminatory policy is the registration of minority religions. The 1990 Law on the Freedom of Conscience[172] regulates the activities and benefits enjoyed by religious communities and establishes criteria by which they attain that legal designation. Formal registration allows religious groups to practice their faith in community with others without state intervention. International human rights standards stress the importance of religious groups being able to attain legal personality as part of their right to freedom of religion or belief.

Recently, the current government and the "Historical churches" have made enormous efforts to restrict church registration. In April 2001, the government amendment aiming at three highly contentious points (i) a definition of religion, ii) a listing of religious activities that would be used to determine what groups could be excluded from registration, iii) the principle of legal differentiation among churches based on their so-called "real social role") did not receive the required two-thirds majority vote in Parliament. These points in practice were intended to allow wide discretionary powers for reviewing state authorities to exclude

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[167] A Brussels based international human rights NGO, a cooperating partner of the International Helsinki Federation http://www.hrwf.net

[168] „Deterioration of Freedom of Conscience and Religion in Hungary" HRWF Annual Report 1999 http://www.hrwf.net/newhrwf/html/hungary1999.html ; "Freedom of Conscience and Religion" HRWF Annual Report 2000. http://www.hrwf.net/newhrwf/html/hungary1999.html

[169] An Oxford, UK based international human rights NGO with an official consultative status with the UN http://iarf-religiousfreedom.net

[170] Common Statement of Human Rights Without Frontiers and the International Association for Religious Freedom on the Government Amendment to the Budgetary Support of Churches, 28 October 2001

[171] „Religious discrimination in Hungary", HRWF Press Statement, 11 July 2000 http://www.hrwf.net/newhrwf/html/hungary2000.html#Religious; HRWF Statement on the Government Amendment to the 1990 Law on the Freedom of Conscience 13 February 2001; HRWF Statement on the government amendment to the *Tax Law*, 18 December 2000

[172] Act IV of 1990 on freedom of conscience and religion and churches

religions not favorable for state ideology. Notwithstanding its failure, government declared its intention to tighten registration regulations.

With regard to financial issues, various recent legal provisions in force allow for unreasonable differential treatment against minority churches. Besides extraordinary pacts with “historical churches” granting them financial sources not available for other registered religions, in Parliament adopted an amendment to the personal income tax law taking effect on 1 January 2001,[173] which only allows donors to `socially significant' religious bodies to get tax relief on contributions. The consequence of the amendment is that only religious bodies that are able to prove they have existed in an organized form for at least 70 years or have the support of 1% of all taxpayers will be eligible to issue receipts for donations entitling the donor to gain tax relief up to a maximum of 50,000 HUF (US$ 80). New and minor churches are automatically excluded from this benefit and the principle of “real social role” is converted to historical presence.

Regrettably, the sect issue can also generate an atmosphere in society that would allow promoting a discriminatory policy. However, abuse of religious status is not a characteristic problem encountered in Hungary’s church and state relations, and on the other hand, the law in force sets out effective measures to protect against such abuse.[174] The official statement of the European Union[175] at the 1999 OSCE Review Conference states that the restrictions planned in Hungary – similar to those taken by governments of other countries - are motivated not by the desire to fight more effectively against these abuses but rather by "discriminating and unnecessarily restrictive tendencies against religious beliefs". As regards the actions of these governments, the statement continues, "this legislation and practice should not be allowed and should either be abandoned or made to comply with international norms". The recent rapid multiplication of religious communities should not be dealt with in a way "which results in privileging the dominant churches", adds the statement. It also calls on governments to "put an end to discrimination and violation of rights" rather than using legislation which in an unnecessary and discriminatory way restricts registration. Reasons for this, according to the document, may be "ignorance of other beliefs, the monopolization of truth and the search for a scapegoat to blame for social-economic turmoil". As a solution, the statement urges the states to encourage a "flexible and tolerant approach through dialogue and education".

The approach taken by the government with regard to minority religions will result in the progressive marginalization of these churches both in a legal and sociological field, running contrary to those international norms that explicitly forbid this tendency.

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[173] Act CXIII of 2000 amending Act CXVII of 1995 on personal income tax

[174] See e.g. IHF Report above. § 20 (2) of the Act IV of 1990 freedom of conscience and religion and churches empowers the Prosecutor General’s Office with the right to initiate a lawsuit against churches that abuse religious status and courts may deregister churches found to be abusing such status. General legal instruments are also available for state authorities in case of public crime committed by clerics or church employees.

[175] ibid 162.

ARTICLE 19

i)
Although Par. 336 of the Government Report asserts that the Media Act (Act I of 1996 on Radio and Television Broadcasting) "is aimed at eliminating political or government interference", since the 1998 change of the government, it seems that the governing parties and the Hungarian Justice and Life Party (MIÉP – a xenophobic, extremist right wing party, which in most cases supports the government's stance) have seen fit to forsake a tacit agreement made with the opposition for unconstitutional oversight of the media by all political parties, and return to the no less unconstitutional situation of **media control by the governing parties**. This process began at the end of December 1998, when the governing parties and those parties backing the government – not least, MIÉP – managed to see the proportion of their nominees on the boards of trustees at Hungarian Radio, Duna Television and the Hungarian News Agency (MTI) exceed two-thirds. This majority affords them the opportunity to pass the most important decisions as they see fit – among these, the selection and dismissal of the presidents of these media – without the need for backing by their fellow trustees nominated by the opposition parties (or those more firmly in the opposition than is MIÉP).

The next breach of the Media Act occurred over the course of about six months, when the governing coalition used its majority in Parliament to appoint its nominees to the all-important presidium of the board of trustees at Hungarian Television and to prevent the nominees of the opposition from being appointed. According to the Media Act, one half of the members who may be elected by Parliament to the board of trustees shall be nominated by the government parties' factions, while the other half shall be nominated by the opposition factions in such a way that at least one candidate of faction shall be elected.[176] In the spring of 1999 the government side nominated four persons to the presidium, however, the opposition was not able to agree on the delegates because MIÉP claimed that two of the four opposition places ought to be filled by its candidates (although the number of its representatives in the Parliament is much smaller than that of the MSZP, which is the second largest party). According to the Media Act the presidium of the board of trustees is formed when all the members have been elected, however, it is not an obstacle to the formation of the presidium of the board of trustees if *either the government party or the opposition side does not nominate candidates.*[177] As a result of the hypocritical governmental interpretation of this provision (namely that voting on the opposition's candidates may only take place if the opposition factions have agreed on the candidates and the Parliament cannot simply vote one by one about the opposition's nominees), the presidium has been functioning with only four members nominated by the government side.

The opposition parties turned to the Constitutional Court, which declared[178] the politically unbalanced operation of public broadcasters constitutional and validated the violation of freedom of expression that exists owing to the absence of a guarantee of balanced broadcasting. The Constitutional Court came to the surprising conclusion that the debated provision is not unconstitutional, since the interest vested in the functioning of the

[176] § 55 (5) of the Media Act
[177] § 55 (8) of the Media Act
[178] Decision no. 22/1999 of the Constitutional Court

presidium is more important than the requirement of equilibrium (which – in our opinion – is one of the most fundamental preconditions of the undisturbed implementation of the freedom of expression). The Court claimed that the opposition's inability to compromise is simply a political and not a constitutional question, although earlier[179] the Court had claimed that with respect to the national public service radio and television "the legislature is obligated to enact such a law whose financial, procedural and organizational regulations make possible a comprehensive, balanced and accurate reporting by these institutions and ensure their continued operations in such a manner." Therefore the Court in its earlier decision made the constitutionality of a provision dependent upon whether it can force the media to function in a balanced manner, while in the latest decision the body (or rather its Conservative wing) declared that the fact that the system does not work properly does not have anything to do with constitutionality.

The situation has been criticized by a number of prestigious sources. According to a 2001 media release of the International Federation of Journalists the government-inspired interference with the operation of Hungarian public media "amounts to a circle of improper political influence, which threatens freedom of expression in Hungary."[180] The European Commission also expressed its concern: "The supervision of the public service media by the Presidium of the Boards of Trustees is still not properly ensured. The three Presidiums continue to be composed solely of pro-government members."[181]

ii)
With regard to Article 19 (2) of the Covenant that protects the freedom of information and with respect to Par. 337 of the Government Report, we wish remark that the present ruling **government is reluctant to disclose the data of public interests** from the public by neglecting the Act on Data Protection[182] and the recommendations of Parliamentary Commissioner for Data Protection and Freedom of Information.

An example of this government's practice is that cabinet sessions are no longer documented either on video/audiotapes nor on abstracts. In 1999 two citizens asked the Parliamentary Commissioner for Data Protection to examine the case from the point of view of accessing data of public interest. According to the ombudsman's recommendation,[183] the Orbán-cabinet broke away from a hundred and fifty-year tradition by not documenting the cabinet sessions either on audiotapes, verbatim minutes or abstracts, even when the decisions made have great influence on the country's economy, social and public life. The Parliamentary Commissioner recommended the Minister of the Prime Minister's Office and the Minister of Justice rules on the legislative level that guaranteed the documentation of the government activities and thereby the right of researchers as well as the public to access data of public interest. On behalf of the cabinet, the Minister leading the Prime Minister's office refused to accept the ombudsman's recommendation. The fact that in 2001 after the Parliamentary

[179] Decision no. 37/1992 of the Constitutional Court
[180] IFJ Report Accuses Hungary Over "Improper Political Influence" As Public TV Faces Bankruptcy. IFJ Media Release, 26 March 2001
[181] Commission of the European Communities, 2001 Regular Report on Hungary's Progress towards Accession, 13 November 2001, SEC (2001) 1748 http://europa.eu.int/comm/enlargement/report2001/hu_en.pdf
[182] Act no. LXIII of 1992 on the protection of personal data and the freedom of public interest information
[183] Recommendation no. 144/A/1996 (16 July 1999) of the Parliamentary Commissioner for Data Protection

Commissioner's mandate expired his reappointment did not even occur among the governing parties is hardly independent from his activity in this field.

In another case concerning non-disclosure of data of public interest, the court approved the government's practice because of loopholes of the statutory regulation. A free speech NGO asked the Ministry of Finance (which represents the proprietor Hungarian State) in a case concerning a previously state-owned bank to let them access to public data referring to the daily newspaper Magyar Nemzet (Hungarian Nation). The NGO wanted to know how much (budgetary) money the bank spent on the private-owned, right-wing newspaper until it was sold. The Ministry of Finance refused to comply with this request, saying that the entirely state-owned Postabank Rt. (Post Bank Joint Stock Company) is a business organization the data of which are not processed by the Ministry, so it cannot transfer them. The NGO turned to court by referring to the Act on Data Protection. The court of first instance (the Metropolitan Court) in its judgment of January 2001 obliged the Ministry of Finance to comply with its statutory obligation of transferring data of public interest within 15 days. In the reasoning, the court held that the Ministry would not be able to act in the interest of the hundred percent proprietor Hungarian State without having and processing the required data of public interest. The Supreme Court, however in its final judgment refused the claim of the NGO, arguing that the Ministry of Finance does not have an obligation to process these data, and the Postabank as a business company does not have a duty to disclose the required data of public interest.

ARTICLE 20

We wish to call the attention of the Human Rights Committee to the increasing tendency of Hungarian public figures to openly use hate speech, most often targeted against the Roma minority, "illegal" migrants or often with a coded but well understandable anti-Semitic content – a phenomenon paralleled and enhanced by the ineffective system of sanctions.

The new statutory regulation of incitement referred to under Government Report Par. 346 was enacted in the spring of 1996, after a ruling in early March of that year by the Penal Division of Budapest Metropolitan Court acquitting the infamous neo-fascist party leader Albert Szabó and his associates of charges of public incitement and of the public display of symbols of autocratic rule (another crime that had meanwhile been added to the Criminal Code). The reasoning of the decision was more or less in line with that of the Constitutional Court's 1992 decision: „Public incitement is realized only when someone incites passions to a degree capable of summoning hatred and of leading to the disturbance of the public peace."[184]

The acquittal generated public furor of a magnitude not seen in Hungary in a long time. Numerous civic organizations and even the prime minister himself expressed their displeasure with the verdict, or rather, with the legal regulation whose considerable lenience

[184] Decision no. 30/1992 (26 May 1992) of the Constitutional Court

allowed this to occur.[185] Parliament, where ire ran high over the fact that a clear instance of neo-nazi hate speech had gone unpunished, now amended the legal provision against public incitement, supplementing the crime of incitement to hatred with that of „another action capable of inciting hatred." The answer was three years in the waiting – namely, in the Constitutional Court's decision[186] based on a petition concerning this amendment filed before the Court directly after Parliament amended the incitement law and. Applying the criterion of „defamation" and rounding this out with the argument that „indefinite utterances" violate legal security, this decision annulled the new text that had been introduced in the law, thus reviving the situation of 1992.

As a result of the above outlined – relatively restrictive – interpretation of the offense of incitement to hatred, the number of recorded criminal offenses relating to hate speech (§ 269 of the Criminal Code) is minuscule, with charges pressed in 7 cases out of the 29 brought in three years[187] There were four convictions in 1998 and 13 in 1999.[188] There were some highly publicized cases in which the authorities refused to launch a criminal procedure, although they themselves acknowledged that the expressions used in public are degrading and humiliating with respect to a certain group of society.

> When the vice-president of the Hungarian Truth and Life Party (MIÉP) described the purchase of the country's most popular football team by a businessman associated with liberal and Jewish circles as a "transaction directed against the nation" and the Association of Hungarian Jewish Communities filed a report with the Public Prosecutor's Office, the office claimed that although the aggrieved statements are "very degrading and debarring towards the Jewry, they are not inciting to effective exclusion realized in the form of concrete actions."[189]

In connection with this case even the Chief Public Prosecutor formulated the opinion that the legal provisions and the decisions of the Constitutional Court allow too wide a space for extremist statements. Therefore he turned to the Minister of Justice and initiated discussions about how the legal loopholes could be eliminated. The Minorities Ombudsman also raised the necessity of restricting the offense of incitement to hatred. The Minister of Justice claimed that the preparatory works of the amendment had been completed, however, no modification will take place during this parliamentary term[190] (elections will be held in April 2002).

A **thoroughly considered amendment of the pertinent legal provision seems desirable as more and more racist opinions find their way into public speech**. Even **high-ranking public figures resort to racist (primarily anti-Roma) sentiments in**

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185 One positive effect of the passions this argument stirred anew was the quasi intellectual debate that transpired in the influential daily *Népszabadság* in spring 1996 in the wake of an essay by the political philosopher János Kis on the relationship between nazi discourse and the freedom of expression.

186 Decision no. 12/1999 (21 May 1999) of the Constitutional Court

187 Figures for 1998, 1999 and 2000 from the Public Prosecutor's Office. See Annex E for full details.

188 Statistical Department of the Ministry of Justice, 2000. The probable reason that these figures do not align with those of pressed charges is the long processing time of these cases. See Annex E.

189 See: *Kirekesztõ beszéd: marad a szabályozás* (Hate speech: no changes in the regulations) *Népszabadság*, 29 January 2002. p. 1.

190 Ibid. p. 4.

Hungarian society for political purposes.[191] Invoking stereotypes, such as Gypsy idleness to explain regional poverty, is widely accepted in the public, and does not invite critical response, although the major newspapers appear increasingly willing to publish opinions that deviate from or object to this logic.[192]

> Relatively recent examples of the public degradation of Roma are provided in the case of the Zámoly Roma, who had successfully sought asylum in France. Social and Family Affairs Minister Péter Harrach said on 5 August 2000 that "some were going abroad to discredit Hungary, not only demanding compensation but making groundless allegations against the state and government." On 9 August 2000, Hungarian Prime Minister Viktor Orbán backed Mr. Harrach's statement in an interview on Hungarian Radio, suggesting that Hungarian Roma should "try to study and work more."[193]
>
> In March 2000, a leading member of the government committee for coordinating the Roma program suggested supplying free contraceptives to Hungarian Roma, with the assertion that "at the current rate of reproduction, the resources of the Hungarian budget will be wasted on useless activities, since the disadvantaged classes will keep pushing themselves back, both financially and spiritually." Due to widespread protest, the official resigned from his committee post, and an internal government investigation is still under way. Former Prime Minister Gyula Horn (in office in 1994-1998) regularly referred to the Roma as lazy potential criminals, stating "it is unacceptable for people to continue organizing their lifestyles as being without income", and that „crime continues to spread rapidly in areas where Gypsies live."[194]
>
> Prime Minister Viktor Orbán also offered an example of how spending on Roma can be presented so as to contribute to stereotypes and increase general anti-Roma sentiments, in a January 2001 radio broadcast of his weekly Wednesday interview. Referring to a Roma housing scheme he stated that "the real issue was whether we could find a way to ensure that these flats will not end up in so sad a state as those previously constructed, [where] Roma families moved in and […] within less than a year, the flats had completely fallen apart, the hardwood floors were ripped up, and the doors and windows destroyed. In other words, people felt that the state had provided support from their taxes to those in need in vain..." [195]

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[191] The discussion of official hate speech is based on: Minority Protection in Hungary In: *Monitoring the EU Accession Process: Minority Protection*. Published by OSI/EU Accession Monitoring Program, Budapest, 2001 (Hereinafter: EUMAP Report). pp. 211–263 For the full text of the report, see http://www.eumap.org/reports/content/10

[192] András Bíró, *Népszabadság*, 24 August 2000; János Nyíri, *Magyar Nemzet*, 17 August 2000; Ottó Neumann, *Magyar Hí rlap*, 17 August 2000; János Orsós, *Népszabadság*, 16 August 2000; György Csepeli, *Népszava*, 12 August 2000; István Szász, *Népszava*, 14 August 2000

[193] European Roma Rights Center, *Roma Rights*, No. 3/2000 www.errc.org

[194] *Chronicle of Everyday Events*, 1997. Hungarian Helsinki Committee–Roma Press Center, Budapest, 1998

[195] Kossuth Rádió, the regular Wednesday morning radio interview with Prime Minister Viktor Orbán, 17 January 2001

ARTICLE 26[196]

i)

The lack of a clear definition of discrimination in Hungarian law hinders effective protection for victims of discriminatory acts. Until 1 July 2001, there was no statutory definition of either direct or indirect discrimination in the Hungarian legal system. Interestingly – and characteristically of the chaotic nature of Hungarian anti-discrimination legislation – this changed when – as a result of the Minorities Ombudsman's lobbying – a definition of indirect discrimination was introduced into Act XXII of 1992 on the Labor Code (hereinafter referred to as Labor Code).[197] At present, while there is a definition of indirect discrimination, still no definition of direct discrimination exists. Another anomaly is that the definition of indirect discrimination is only valid with regard to labor law, while in other fields of law this institution is still unknown. This is especially problematic, because the Roma community is frequently subjected to indirect discrimination, as the experiences of NEKI show. However, when litigating such cases, the authorities do not accept lawyers' arguments invoking the definition of indirect discrimination as illustrated in the following case.[198]

> In the town of Tiszatarjány, the counselors of the local government adopted a local decree on public cleanliness and collection of solid waste. According to § 9 (2) of the decree, the collection of litter from public waste bins and dumps is forbidden. According to Section 17, those violating the decree commit petty offense and may be fined up to 10,000 HUF. On 11 November 1999, the counselors increased this amount to 20,000 HUF. Based on the decree, the authorities launched proceedings against waste collectors and imposed fines on the mainly Roma offenders. The impoverished offenders could not pay the fine and were therefore detained in exchange for the payment.
>
> The given provision is obviously directed against people whose financial situation compels them to gather and re-sell garbage, thereby earning their living. The counselors must have been aware that the prohibition was only seemingly blank; in practice it threatened certain social groups. Moreover, the counselors must have known well that the majority of the groups concerned were Roma. One may then conclude that the rationale behind the local decree was to keep garbage pickers from coming into the T. town from the neighboring villages.

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196 In discussing issues related to this Article we greatly rely on the EUMAP Report.

197 § 5 (2) of the Labor Code: "Under this Act indirect discrimination shall be taken to occur if the employees concerned may – on the basis of the characteristics enlisted under Paragraph (1) [sex, age, nationality, race, social origin, religion, political views or membership in organizations representing employees or activities connected therewith, as well as any other circumstances that have no relation to employment] – be regarded as a mostly unified group and the measure, instruction or condition related to the employment relationship [the legal relationship between employer and employee] and formally setting the same requirements for everyone or guaranteeing the same rights to everyone is disproportionately detrimental to them, unless it is justifiable with appropriate, necessary and objective reasons

198 *Fehér Füzet: A Nemzeti és Etnikai Kisebbségi Jogvédõ Iroda beszámolója 2000* (White Booklet: Report of the Legal Defence Bureau for National and Ethnic Minorities 2000), NEKI, Budapest, 2000 (hereinafter: White Booklet 2000); p. 39

NEKI filed a constitutional complaint on behalf of three Roma, requesting the Constitutional Court to retrospectively declare the decree null and void as it concerns a great number of people and has not ceased to have an impact on these people. In 1999, based on the incriminated provision, 273 proceedings were conducted in the county added to those investigated by the notary of T. These proceedings violated the rights of the individuals concerned. Furthermore, NEKI requested the Constitutional Court to abolish the decisions that were based on the given provision of the local decree. The competent petty offense authority proceeded in several hundred cases over the years, imposing fines on mainly Roma garbage pickers who, due to their living conditions, could not pay these fines, are case of indirect discrimination.

NEKI is planning to launch a civil proceeding[199] against the local government as long as the Constitutional Court finds the decree unconstitutional and retrospectively declares it null and void. The Court, however, may need years to deliver its decision in the case.

ii)

The majority of anti-discrimination provisions, scattered throughout the legal system, are not backed by appropriate sanctions, and therefore remain to be of a declarative nature. The Constitutional provision rendering all instances of discrimination to be strictly punished by law remains ineffectively implemented.

This is the case for instance in the field of education,[200] minority protection,[201] the rights of disabled persons[202] and health care.[203] The lack of a comprehensive and coherent system of anti-discrimination sanctions is partly compensated for by two paragraphs of the Civil Code (Act IV of 1959), which in combination provide victims and attorneys with a relatively flexible and useful weapon against discriminating entities.[204] However, the sanctions available in this way are not really specific to the field in which the discriminative act was committed (e.g. education, labor, access to services) and the reversal of the burden of proof (which exists in labor law for example) does not apply if the claim is based on these civil law provisions.

A good example of the above is **discrimination the field of education**. Segregation of Roma students is deeply seeded in the Hungarian educational system, according to investigations carried out by the Minorities Ombudsman in 1997 and 1998. The investigations revealed three common forms of **segregation**: 'auxiliary schools' established for children with mental disabilities, often predominantly attended by Roma students; segregated 'Gypsy schools'; and segregated classes within 'mixed' schools, usually of a lower standard in terms of teaching materials and quality. Funds available to local educational authorities for the establishment of 'catch-up' or remedial classes to improve educational

[199] The civil proceeding may be launched for damages caused in an official capacity, i.e. by proceeding and detaining people on the basis of the unconstitutional local decree

[200] § 4 (7) of Act LXXIX of 1993 on Public Education (Public Education Act)

[201] § 3 (5) of Act LXXVII of 1993 on the Minorities (Minorities Act)

[202] Act XXVI of 1998 on the Rights and Equal Opportunities of Disabled Persons

[203] § 7 of Act CLIV of 1997 on Health Care

[204] § 76 of the Civil Code provides that discrimination against private persons on the grounds of gender, race, ancestry, national origin, or religion; violation of the freedom of conscience; any unlawful restriction of personal freedom; injury to body or health; contempt for or insult to the honor, integrity, or human dignity of private persons shall be deemed as violations of inherent rights. The possible remedies – including punitive damages – are listed under § 84 of the Civil Code.

opportunities for Roma children are widely believed to be misused or abused; in reality, Roma children are often simply relegated to separate classes with a lower quality of teaching. This is so despite the provisions of § 4 (7) of the Public Education Act banning all forms of discrimination in public education on any basis, especially on grounds of color, gender, religion, national or ethnic identity, political or other conviction, national, ethnic or social origin, financial condition, age, birth or other situation of the child or the child's relatives. However, there is no system of sanctions (not even an incoherent or imperfectly implemented one as in the case of the labor market) that could be relied upon in order to secure the implementation of this Article.

This is why when – citing public sanitation concerns (a high degree of pediculosis among Roma students) – the elementary school of Tiszavasvári (Szabolcs-Szatmár county) organized a separate graduation ceremony for Roma students and forbid them to use the school's gymnasium, the students could not resort to sanctions set forth by the Public Education Act. Thus the students' families brought a civil lawsuit based on § 76 of the Civil Code against the local government of Tiszavasvári, which on December 2, 1998 was ordered by the Nyíregyháza town court to pay compensation in the sum of 100,000 HUF per capita to the plaintiffs.

As regards discrimination and sanctions in the field of employment, in 1994, employment among Roma males stood at 26.2 percent compared to 63.4 percent among non-Roma, whereas the respective figures for women were 16.9 percent and 63.1 percent.[205] Due to the Communist-era commitment to full employment, no such difference was detectable. On the contrary, in order to maintain a compulsory average wage level and still be able to pay higher salaries to qualified workers, it was in the interest of factories to employ high numbers of badly aid unskilled labor. This practice, which was necessary to maintain full employment assisted in preserving masses of unskilled laborers, mainly Roma. Since the mid-80's, when economic crisis forced the communist leadership to accept market economy principles, Roma began to drop out of the labor market. This process accelerated after the political changeover, due partly to external economic factors, such as privatization and an agricultural crisis, but also to discriminatory practices, as reported by Roma themselves.

Discrimination in the field of employment (especially with regard to recruitment, i.e. not employing someone due to his/her Roma ethnicity) **is widespread**, in spite of the relatively extensive system of anti-discrimination sanctions in labor law. This demonstrates that this system is not free from deficiencies and that the competent authorities are often reluctant to implement the applicable sanctions.

An example is offered by the **procedure of labor inspectorate authorities**, which are vested with the task of making sure that employers abide by the employment-related laws. If not, inspectorates are entitled to impose a fine on the employer.[206] As a rule, the labor

[205] Gábor Havas, István Kemény, Gábor Kertesi: *Beszámoló a Magyar Tudományos Akadémia Szociológiai Intézete által 1993/94-ben végzett reprezentatív cigánykutatásról.* (Report on the representative Roma research conducted by the Institute of Sociology of the Hungarian Academy of Sciences in 1993-94), Hungarian Academy of Sciences Institute of Sociology, 1994

[206] Under § 3 of Act LXXV of 1996 on the Supervision of Labor Affairs (hereinafter: Labor Supervision Act)

authority launches its investigations *ex officio*. However, under the relevant provisions,[207] cases involving discrimination are among the few instances in which the inspectorates may only act on the basis of a motion submitted by the victim of the violation. This practically paralyses the use of the above sanction, since most concerned individuals are not aware of the possible legal remedies (most of them come from a social group in which, owing to the relatively low level of education, information about the available legal possibilities is not widely known) and – owing to the difficulty of getting employed – are too afraid to stand up for their rights vis-à-vis the employers. The Minorities Ombudsman came to the same conclusion in his 1998 investigation into discrimination in the field of employment, [208] and recommended that the Ministry of Social and Family Affairs prepare a legislative amendment enabling the labor authorities to proceed against employers applying discriminative practices upon notification from entities other than the ones actually concerned by the discrimination. Although in theory the Ministry accepted the recommendation, no such proposal for amendment has been put forth yet, which remains a severe obstacle to effective anti-discrimination protection.[209]

Discrimination among employees (including potential employees) also constitutes a petty offense and further sanctions may also be applied against discriminating employers.[210] However, this apparently extensive system of sanctions does not function properly in practice. Partly due to the reasons enumerated above (lack of awareness among the victims, fear to act against the employer, lack of willingness on the part of the authorities) **the number of discrimination cases brought before the competent authorities** (including court cases, petty offense procedures and labor supervision procedures) **remains very small**.[211]

Another good example of the practically failing implementation of seemingly progressive institutions is the issue of the **reversed burden of proof**.[212] Being a relatively new and still unfamiliar institution in the Hungarian legal system, the reversed burden of proof sets a very

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[207] § 3 (2) of the Labor Supervision Act

[208] *Beszámoló a Nemzeti és Etnikai Kisebbségi Jogok Országgyûlési Biztosának tevékenységérõl, 1998. január 1. – december 31.* (Report on the Activities of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities, 1 January – 31 December 1998) (hereinafter: *Ombudsman Report 1998*), Office of the Parliamentary Commissioners, 1999, Budapest, pp. 210-230

[209] *Beszámoló a Nemzeti és Etnikai Kisebbségi Jogok Országgyûlési Biztosának tevékenységérõl, 1999. január 1. – december 31.* (Report on the Activities of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities, 1 January – 31 December 1999) (hereinafter: *Ombudsman Report 1999*), Office of the Parliamentary Commissioners, 2000, Budapest, p. 150.

[210] Under § 93 of Government Decree 218/1999 on Petty Offenses, the employer who a) refuses to employ a person owing to his/her gender, age, nationality, race, origin, religion, political opinion, affiliation with organizations representing employees or activities performed in connection therewith, or any other circumstance not related to the employment relationship, b) exercises negative discrimination among the employees owing to circumstances listed under point a), shall be punished with a fine up to HUF 100,000 (USD 350).

[211] *Ombudsman Report 1998*, p. 225. See also: ECRI Report, p. 14: "[...] the Parliamentary Commissioner for National and Ethnic Minorities notes that, to the best of his knowledge, over the period 1997 and 1998 no cases were brought concerning ethnic or racial discrimination in employment. In fact, it does not appear that any cases have as yet been brought on such grounds." Although this information is not accurate, the number is indeed very small.

[212] § 5 (8) of the Labor Code: In the event of any dispute concerning the employer's action, the employer shall be required to prove that his actions did not violate the provisions on the ban of discrimination

difficult task for even experienced judges and it is difficult for them to handle this question appropriately. The judgment in the case of Katalin F proves that the existence of pertaining legal norms does not mean *per se* that proper their application is guaranteed.[213]

> Katalin F., a young Roma woman works as a nurse in an Old People's Home maintained by the Catholic Church. In April 2000, she resolved to look for a second job. She found a job advertisement seeking a chambermaid in a hotel in Budapest. She called the hotel and was told that their vacancy had not been filled. As arranged over the telephone, she appeared for a job interview on 19 April 2000. While waiting for the interview, she overheard the receptionist telling the manager: "Some Gypsy girl is looking for you with regard to the vacancy". The manager replied as follows. "I do not hire Gypsies here, I hate them all". The door to the manager's office was then closed and the client could not hear more. A couple of minutes later the manager went up to her and said there were no more vacancies. The vacancy in fact, was filled in May. The client was not asked about her education, skills and abilities. It was on the basis of her ethnic origin that the manager made his decision. On the way home, she recalled having heard about the Minorities Ombudsman and resolved to seek assistance from his office. Not knowing the address, however, she sought assistance from two social workers of the local government to whom she told her whole story.
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> NEKI represented her in the legal procedures both before the Labor Inspectorate and the Labor Court. The counsel filed a labor suit based on § 5 of the Labor Code, requesting the court to establish that Katalin F. had suffered discrimination and – pursuant to § 174 (1) and § 177 (2) of the Labor Code – to order the employer to pay her HUF 300,000 in non-pecuniary damages. Despite the fact that the reversed burden of proof serves the victim's interests – the burden of proof rests on the employer, who therefore is under the obligation to prove that his/her actions were not contrary to provisions prohibiting discrimination –, there are a number of concerns relating to the procedure. Because of the lack of case law it is yet unknown how different courts and other state authorities will interpret the given provision. What should serve as a starting point? Is it enough to establish that a certain employer had vacancies when the victim applied for the job? In the present case, the employer himself admitted that he was looking for chambermaids and that the job was only taken in May. He, however, denied ever seeing the applicant or making any comments about her ethnic background. Other employees present at the time corroborated his statements. In order to establish the violation of Katalin F's right, the classic method of putting forward evidence had to be chosen, i.e. the applicant had to prove that she had been to the hotel and met the manager.
>
> In spite of the relatively solid indirect evidence put forth by Katalin F. (such as the testimony of the two social workers who provided the young woman with the address of the Minorities Ombudsman), the court of first instance turned down the claim of the applicant, arguing that before the reversed burden of proof could be applied, the plaintiff has to prove that she came into contact with the employer which, in this case, could not be successfully proven. Katalin F. appealed. Upholding the decision of the court of first instance, the appellate court decided on 15 February 2002 that the plaintiff could not successfully prove the establishment of contact with the employer.

[213] White Booklet 2000, p. 25

This case highlights the difficulties that the person who suffered discrimination may face in such instances: job interviews are usually conducted behind closed doors. Likewise, in the case of Katalin F., the manager, the secretary and the applicant were present. Others could not hear their conversation, so obviously there are no direct witnesses. The court refused to accept the logically presented indirect pieces of evidence supporting the applicant's allegations. This case might serve as a "negative" precedent for future cases because the burden of proof could be easily reversed by the respondent, who might claim that he/she had never come into contact with the plaintiff, therefore he/she could not have shown discriminatory behavior. This could disproportionately effect the Roma population due to their high unemployment rates and the degree of discrimination they face in the field of employment.

iii)
We also wish to stress our concerns about the **over-representation of Roma in correctional institutions** and the related issue of **the situation of Roma in the criminal procedure.** While the number of Roma living in Hungary is estimated to be around 461,000, or 4,2 percent of the total population,[214] the percentage of inmates who identified themselves as Roma was 30 percent in 1995 and 40 percent in 1996, compared with 44 percent as observed by the researchers and 61 percent estimated by the heads of the penitentiary institutions.[215]

There are two extreme explanations for the phenomenon. According to one, Roma (for ethnic, socio-cultural or economic reasons) commit crimes more often than non-Roma and the number of convicted Roma offenders is still lower than that of all Roma who transgress the law. The other explanation argues that: actors of the criminal procedure (policemen, judges and even witnesses) tend to be biased against Roma. Consequently, when the offender of a crime is unknown, the first suspects will be Roma. The Roma will be convicted on the basis of less evidence and will be sentenced to longer terms of imprisonment. For the same offense, a non-Roma will only be fined, while a Roma will be sentenced to lengthy imprisonment. Both explanations are somewhat prejudiced. Systematic research is needed to reveal the possible causes of Roma overrepresentation in prisons.

A 1997 survey involving 1,530 police officers,[216] initiated and financed by the Ministry of Interior found that 54 percent of respondents believed criminality to be a key element of the Roma identity, all but 4 percent terming it genetic. The committing of criminal offenses connected to disrespect for private property was considered to be characteristic of the Roma by 88 percent of respondents. Revealing in terms of the high incidence of police brutality is the 74 percent of respondents who believed the population expects the police to be hard on the Roma. According to the Office for National and Ethnic Minorities (NEKH) continuous efforts are made to eliminate anti-Roma bias within the police, such as the agreement of

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214 Source: Kertesi, Kézdi: *A cigány népesség Magyarországon* (The Gypsy Population in Hungary), Socio-typo, Budapest, 1998

215 Figures from László Huszár, '*Roma fogvatartottak a büntetés-végrehajtásban* (Roma detainees in the correctional system)', *Belügyi Szemle* (Review of the Ministry of the Interior), 1999. The research was conducted by the National Prison Administration's Methodology Department.

216 György Csepeli, Antal Örkény, Mária Székelyi, "*Szertelen módszerek*', In: *Szöveggyûjtemény a kisebbségi ügyek rendõrségi kezelésének tanulmányozásához* (Textbook for the examination of how the police handle cases involving minorities) ed. Dr. Klára Csányi, OSI-COLPI, Budapest, 1997, pp. 130–173

cooperation between the National Police Headquarters and the National Roma Minority Self-government, the introduction of Romology into the curriculum of police training and the police's effort to recruit Roma policemen.[217] The effect of these relatively new efforts may only be judged on the long term.

In order to see whether anti-Roma biases influence the outcome of criminal procedures, in early 2001 the Hungarian Helsinki Committee launched the project "Equality before the Law in the Criminal Justice System – for Roma and Non-Roma Suspects". Based on the examination of 146 cases of petty theft, theft and robbery (involving altogether 69 Roma and 77 non-Roma suspects), the project's pilot phase seemed to support the opinion that a certain degree of discrimination may be traced in the criminal procedure. Preliminary findings of the research showed that the average length of pre-trial detention was longer in the case of Roma suspects than in that of non-Romas (385 as opposed to 232 days) and the average length of effective (i.e. not suspended) prison sentences imposed by courts also tended to be longer when Romas were involved (504 as opposed to 319 days). Due to the small number of cases surveyed, these figures must be handled with caution. Based on the conclusions of the pilot phase, the Hungarian Helsinki Committee refined the research methods and is about to launch the second phase of the project, during which an additional 1,000 cases will be examined. This will provide a better basis upon which to formulate well-founded conclusions concerning the implementation of the "equality before the law" principle.

ARTICLE 27[218]

Hungary has a highly elaborate legal and institutional framework for the protection of minorities. Act LXXVII of 1993 on the Rights of National and Ethnic Minorities (1993 Minorities Act) recognizes 13 national minorities,[219] and provides them with a degree of cultural autonomy as well as with a wide range of educational and linguistic rights. The Act also sets up a unique system of local and national minority self-governments, vested with the task of preserving minority culture and articulating special minority interests. Rights are further assured by the Parliamentary Commissioner for the Rights of National and Ethnic Minorities (hereinafter referred to as Minorities Ombudsman), who is entitled (and obliged) to monitor the implementation of minority rights standards and to investigate complaints of minority rights violations.

In our view, the above outlined **framework satisfies the needs of most minority groups living in Hungary, however, its implementation is not without problems in the case of the Roma** who constitute the largest ethnic minority group of Hungary.

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[217] Comments of the Office for National and Ethnic Minorities to the draft of the country report prepared in the framework of the OSI/ EU Accession Monitoring Program (hereinafter: NEKH Comments) p. 21.

[218] In discussing issues related to this Article we greatly rely on the EUMAP Report.

[219] Under § 61 of the Minorities Act, the following minority groups qualify as groups native of Hungary:: Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serb, Slovakian, Slovenian and Ukrainian. It is problematic that in terms of § 2 of the Minorities Act, the statute does not apply to refugees, immigrants, foreign citizens settled in Hungary or to stateless persons.

Apart from the widespread discrimination facing Roma in Hungary (and described in detail in our comments under Article 26 of the Covenant), there are numerous problems concerning the **operation of minority self-governments** as well.

Minority self-governments, established by the 1993 Minorities Act, exist at the local and national levels to represent the rights and interests of recognised national minorities, a system unparalleled in the region, but beset by difficulties of funding and implementation. A basic conceptual difficulty is that whereas the primary tasks and rights of minority self-governments are related to the preservation of the given community's cultural identity[220] (which is perfectly justifiable in the case of well-integrated minorities, such as the Germans or Slovaks living in Hungary), the problems Romani groups must face (discrimination, social hardships, poverty, etc.) are of a completely different nature. This may undermine the legitimacy of the self-governments for the Roma populations whom they should represent, as noted by the president of the Nyíradony Roma minority self-government, in Szabolcs-Szatmár-Bereg county: "they expect us to solve the situation, and keep asking what [changes] they will experience. They put great pressure on us and even ask what we've done with our HUF 580,000 [yearly operating stipend]."[221]

The budgetary allocations earmarked in the annual state budget for local minority self-governments are transferred through the local governments, whose task in this regard is – in theory – restricted to forwarding the support in two installments due by January 31st and July 31st respectively and on the basis of an agreement of cooperation concluded with the minority self-government. However, as the Minority Ombudsman points out,[222] in practice this system does not always function properly, which can impact the minority self-governments' independence, sometimes defining their loyalties and undermining their capacity to represent Roma interests effectively. The Office of the Prime Minister has also acknowledged that the present system may not be regarded as optimal and that a more efficient regulation ought to be developed.[223] The Ombudsman has also warned about the lack of mechanisms for monitoring the performance of minority self-governments, and recommends that the legality of their operation be regularly assessed.[224] An expert report produced for the Council of Europe goes further, recommending broadening their competence, increasing independence, and training representatives.[225] NGOs and the Ombudsman have conducted some training for minority self-governments.

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[220] Under the Media Act, local minority self-governments have the right to solicit information from and submit initiatives to any public administrative authority in connection with minority issues and to establish and maintain institutions in the areas of education, media and the preservation of traditions. Their consent is required before local governments adopt decrees affecting minorities in those areas; on the collective use of language; and before the appointment of leaders to minority institutions. Self-governments at the national level are also entitled to establish and maintain cultural institutions, and to express opinions on acts, statutes and decrees affecting minorities.

[221] Interview with the president of the Nyíradony Roma minority self-government, August 2000.

[222] Report on the 1998 Activity of the Parliamentary Commissioner for the Rights of National and Ethnic Minorities, Office of the Parliamentary Commissioners, Budapest, 1999 (hereafter 'Ombudsman 1998'); pp. 99-102

[223] NEKH Comments, p. 9

[224] Ombudsman 1999, p. 86. He suggests that this task should be vested in the Minister of Justice, the Office for National and Ethnic Minorities or the Public Prosecutor's Office

[225] Jean-Pierre Liégeois: *Roma politika: Országos és települési cigány kisebbségi önkormányzatok - Magyarország. Szakértõi tanulmány a Európa Tanács számára.* (Roma Politics: National and Local Gypsy Minority Self-governments -

The **election of minority self-governments** differs from other local elections in requiring fewer nominations and fewer votes for election.[226] However, the lower threshold has encouraged nominees to stand and run on the basis of spurious claims to belong to a minority.[227] Since majority votes can also be cast in minority elections and as the Minority Act guarantees the right of self-identification, virtually anyone can be legally elected to office on such grounds.[228]

> In Hajdúhadház (Hajú-Bihar county) two non-Roma members were elected to the minority self-government and, according to the president of the minority self-government, have prevented the minority self-government from condemning educational segregation.

According to information provided by the Ministry of Justice this "cuckoo phenomenon" will be eliminated by the modifications of the Minority Act that are currently in progress. The Ministry wishes to find a solution to the problem by introducing some "partial form" of registration, which allegedly supported by the representatives of minorities.[229] Combined with the effect of the legal provision requiring a high – 75 percent – quorum for the election of national and metropolitan minority self-government elections, conflicts over the "true" national identity of the nominees prevented the election of the Roma and Romanian self-governments for Budapest, and a Romanian national self-government.[230] A 1999 amendment lowered the quorum to 50 percent plus one, but Budapest lacks a Roma self-government to this day, a situation which necessarily impacts the interests of the large Roma community there.

An elimination of these problems may greatly enhance the (Roma) minority self-governments' capacity to take effective steps against discrimination in the different fields of life (see comments under Article 2).

A final electoral problem concerns the unresolved right to parliamentary representation of minorities. The 1993 Minorities Act[231] entitles recognized ethnic and national minorities to have representation in the Hungarian Parliament, stipulating that a separate act shall govern

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Hungary. Study for the Council of Europe 1996). In: *Válságkezelés és jövõépí tés – A cigányság társadalmi integrációjáért* 1994-1998 (Crisis-management and building a future – For the social integration of the gypsies 1994-1998), eds. Dr. Csaba Tabajdi, Antal Heizer (eds.)

[226] Act LXIV of 1990 on the Election of Mayors and Local Government Representatives

[227] Ombudsman 1998, pp. 32-34. A brief analysis of the so-called 'cuckoo phenomenon' can be found in the same report on p. 17. The situation is produced by the stipulation in the Minorities Act that the right to choose one's identity is a fundamental and inalienable human right, and thus everyone is entitled to regard him or herself as belonging to one or more ethnic minorities.

[228] The Ombudsman has suggested measures to address this problem, such as holding separate election days for local and minority self-governments, or providing ballot sheets only on the basis of requests by citizens. An amendment of the Minority Act is underway and the Ombudsman's recommendations are reportedly under consideration. Ombudsman 1998, pp. 32-34

[229] NEKH Comments, p. 5

[230] Minority self-governments for Budapest are elected according to the same precepts as national minority self-governments. In the case of the Romanian Minority Self-government for Budapest, the electoral body was given an irregular third attempt with a lowered quorum, in order to obviate political tension. No third chance, however, was given to the Roma minority for the election of their Self-government for Budapest.

[231] § 20 of the Minorities Act

the procedure. No such law has been passed since 1993; therefore the issue of parliamentary representation for minorities remains unresolved, although the Constitutional Court called on the legislature to end the unconstitutional situation in 1992.[232] A compromise proposed by the present government was attendance without the right to vote, a move which was labeled hypocritical by the opposition, who – when in power – also failed to solve the problem.

[232] Decision no. 35/1992 (VI. 10.) of the Constitutional Court

ANNEX A (Article 7)

The tables below show the number of "official crimes" reported in 1998, 1999 and 2000, the number of refused or terminated[233] investigations, the number of cases where the prosecutor's office pressed charges and the number of defendants convicted for official crimes in 2000.

A1: Punishments for official crimes in 2000

Type of offense	Number convicted	Imprisonment	Suspended imprisonment	Public labor	Fine	Other measures (e.g. probation)
Ill-treatment in official proceedings (§ 226 of the Penal Code)	69	2	12	0	41	14
Forced interrogation (§ 227)	24	0	14	0	9	1
Unlawful detention (§ 228)	8	0	4	0	4	0

Source: Statistical Department of the Ministry of Justice

[233] According to § 139 of Act I of 1973 on the Criminal Procedure, the investigation has to be terminated if (a) the act is not a criminal offense, or it was not committed by the suspect, (b) the committing of a criminal offense or the identity of the offender may not be concluded from the data of the investigation and no result may be expected from the continuation of the procedure, (c) the suspect is not or ceased to be punishable, (d) the act has already been decided upon by a court.

A2: Police abuse: reported crimes, investigations and charges pressed

2000

Type of offense	Cases reported	Investigation refused	Investigation terminated	Charges pressed
Ill-treatment in official proceedings (§ 226 of the Penal Code)	850	303	442	94
Forced interrogation (§ 227)	283	130	128	23
Total	**1133**	**233**	**570**	**117**

Source: Public Prosecutor's Office

1999

Type of offense	Cases reported	Investigation refused	Investigation terminated	Charges pressed
Ill-treatment in official proceedings (§ 226 of the Penal Code)	787	249	455	77
Forced interrogation (§ 227)	281	126	131	23
Total	**1068**	**375**	**586**	**100**

Source: Public Prosecutor's Office

1998

Type of offense	Cases reported	Investigation refused	Investigation terminated	Charges pressed
Ill-treatment in official proceedings (§ 226)	858	282	467	103
Forced interrogation (§ 227)	389	157	202	30
Total	**1247**	**439**	**669**	**133**

Source: Public Prosecutor's Office

ANNEX B (Article 9)

B1: Distribution of the duration of pre-trial detentions, 1997–2000

Year	Total no. of pre-trial detentions	Within 1 month	Between							Exceeding 1 year
			1 and 6 months	6 and 7 months	7 and 8 months	8 and 9 months	9 and 10 months	10 and 11 months	11 and 12 months	
1997	8524	1708	5785	329	232	156	120	53	52	89
1998	8319	1704	5580	354	203	179	101	50	48	100
1999	7872	1517	5248	325	192	184	119	85	59	143
2000	7392	1666	4557	368	221	189	137	67	59	128

Source: Annual Prosecutorial Statistical Bulletins, 1997–2000

B2: Distribution of the duration of pre-trial detentions, 1st half of 2000 and 1st half of 2001

Year	Total no. of pre-trial detentions	Within 1 month	Between							Exceeding 1 year
			1 and 6 months	6 and 7 months	7 and 8 months	8 and 9 months	9 and 10 months	10 and 11 months	11 and 12 months	
2000 1st half	3742	801	2414	165	94	81	54	37	35	61
2001 1st half	3477	692	2229	169	92	78	72	50	31	64
Change in percentage	–7.1%	–13.6%	–7.6%	+2.4%	–2.1%	–3.7%	+33.3%	+35.1%	–11.4%	+4.9%

Source: Annual Prosecutorial Statistical Bulletin, 1st half of 2001

B3: Types of arrest applied in 1998-2001

Year	Short arrests	72-hour detentions	Pre-trial detentions
1998	112,505	17,239	7,269
1999	119,427	17,172	6,797
2000	110,401	15,743	5,267
2001	119,299	14,787	5,850

Source: Public Prosecutor's Office

ANNEX C (Article 10)

C1: The number of inmates 1986–2000

Year	Pre-trial detention	Convicted	Compulsory treatment	Petty offense detention	Other*	Total
1986	3,834	17,194	231	1,709	1,844	**24,812**
1987	3,131	15,950	225	1,646	1,591	**22,543**
1988	2,829	15,178	223	1,236	1,455	**20,921**
1989	2,402	12,632	199	155	540	**15,928**
1990	3,246	8,819	146	30	78	**12,319**
1991	4,264	10,240	152	68	86	**14,810**
1992	4,272	11,424	143	74	–	**15,913**
1993	3,557	9,390	130	119	–	**13,196**
1994	3,433	8,944	121	196	–	**12,694**
1995	3,183	8,928	128	215	–	**12,455**
1996	3,455	8,989	147	174	–	**12,763**
1997	3,660	9,408	165	172	–	**13,405**
1998	3,909	10,171	173	113	–	**14,366**
1999	4,114	10,800	181	15	–	**15,110**
2000	4,105	11,201	173	60	–	**15,539**

** This category contains institutions that have been abolished: e.g. restricted educational labor, work therapy for alcohol addicts, restricted detention, etc.*
Source: József Lõrincz – Ferenc Nagy: Börtönügy Magyarországon *(Penitentiary Affairs in Hungary), BVOP, 1997; Penitentiary statistics*

C2: Rate of overcrowding in the penitentiary institutions visited in the Hungarian Helsinki Committee's Prison Monitoring Program

	1998			1999			2000		
	Capacity	**Total number**	**Overcrowding rate**	**Capacity**	**Total number**	**Overcrowding rate**	**Capacity**	**Total number**	**Overcrowding rate**
Budapest Prison	1,168	1,741	**149%**	1,168	1,654	**141%**	1,168	1501	**128%**
Kalocsa Prison	216	310	**143%**	214	347	**162%**	214	370	**172%**
Pálhalma National Prison	1,234	1,539	**129%**	1,234	1,960	**158%**	1,186	1798	**151%**
Szeged Prison	540	758	**150%**	504	886	**175%**	504	906	**179%**
Sopronkõhida National Prison	590	676	**114%**	399	718	**179%**	399	689	**172%**
Penitentiary for Juvenile Offenders (Tököl)	582	544	**93%**	582	518	**89%**	582	586	**101%**
Regional Penitentiary for Juvenile Offenders (Kecskemét)	30	29	**96%**	30	30	**100%**	30	30	**100%**
Bács-Kiskun County Penitentiary (Kecskemét)	150	150	**100%**	150	138	**92%**	150	167	**111%**
Vác Prison	608	903	**148%**	608	1051	**172%**	608	1,037	**170%**
Total	5,118	6,704	**131%**	4,889	7,302	**149%**	4,841	7,084	**146%**

Source: Penitentiary Statistics

C3: The number of short-term leaves, 1997–2000

	1997		1998		1999		2000	
	Person	Instance	Person	Instance	Person	Instance	Person	Instance
High-security prison	270	409	217	300	87	105	18	22
Medium-security prison	1,809	3,010	1,663	2,601	867	1,187	428	648
Medium-security prison for juveniles	16	26	20	35	7	22	6	16
Low-security prison	502	1,077	420	765	250	422	180	308
Low-security prison for juveniles	23	29	25	38	7	20	6	14
Temporary group	204	952	93	673	474	735	86	147
Total	**2,824**	**5,503**	**2,438**	**4,412**	**1,692**	**2,491**	**723**	**1,155**

Source: Penitentiary Statistics

C4: The number of one-day leaves, 1997–2000

	1997		1998		1999		2000	
	Person	Instance	Person	Instance	Person	Instance	Person	Instance
High-security prison	108	202	48	66	10	12	10	10
Medium-security prison	444	823	432	791	168	290	98	158
Medium-security prison for juveniles	9	16	6	7	5	6	2	6
Low-security prison	126	318	108	276	46	87	32	57
Low-security prison for juveniles	7	9	7	10	1	2	2	2
Temporary group	43	78	18	15	1	1	9	11
Total	**737**	**1,446**	**619**	**1,165**	**231**	**398**	**153**	**244**

Source: Penitentiary Statistics

C5: Decisions on requests concerning the interruption of detention, 1997–2000

	1997		1998		1999		2000	
Person entitled to permit interruption	**Request**	**Permission**	**Request**	**Permission**	**Request**	**Permission**	**Request**	**Permission**
Minister	136	70	116	28	63	4	41	3
National Commander	501	103	462	77	305	13	187	6
Warden	2,985	985	2,682	785	1,762	316	1,051	138
Total	**3,622**	**1,158**	**3,260**	**890**	**2,130**	**333**	**1,279**	**147**

Source: Penitentiary Statistics

C6: Visiting a severely ill relative and attendance at a relative's funeral, 1997–2000

	1997	1998	1999	2000
Without supervision	213	254	218	147
With supervision	–	–	6	8
Total	**213**	**254**	**224**	**155**

Source: Penitentiary Statistics

C7: The changes in the application of lenient executive rules, 1997–2000

	1997			1998			1999			2000		
	Sub-missions	Per-missions	No. of leaves	Sub-missions	Per-missions	No. of leaves	Sub-missions	Per-missions	No. of leaves	Sub-missions	Per-missions	No. of leaves
Medium security prison	1,465	942	11,045	1,811	1,035	14,493	1,474	606	7,140	110	79	1,627
Medium security prison for juveniles	14	12	166	26	18	133	12	6	54	3	1	3
Low-security prison	214	201	5,210	201	158	5,124	149	107	2,647	29	29	879
Low-security prison for juveniles	15	13	97	12	9	123	12	3	53	0	0	33
Total	**1,708**	**1,168**	**16,518**	**2,050**	**1,220**	**19,873**	**1,647**	**722**	**9,894**	**142**	**109**	**2,542**

Source: Penitentiary Statistics

ANNEX D (Article 17)

D1: The number of newly registered drug patients and their proportion compared to the total number of drug patients, 1997–2000

	Total number of registered patients	Newly registered patients	Proportion of newly registered patients as compared to the total number of registered patients
1997	8,494	4,368	51 %
1998	9,458	5,275	55 %
1999	12,765	5,770	45 %
2000	12,789	4,701	36 %

Source: Ministry of Health, National Institute of Psychiatry and Neurology

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ANNEX E (Article 20)

D1: Incitement to hatred (§ 269 of the Criminal Code): Reported crimes and convictions, 1998–2000

Year	Cases reported	Investigation refused	Investigation terminated	Charges pressed
1998	14	0	11	3
1999	9	0	6	3
2000	5	0	4	1

Source: Public Prosecutor's Office

D2: Number of defendants found guilty of incitement to hatred

Type of offense	1998	1999	2000
Incitement to hatred	4	13	0

Source: Database of the National Council for Justice, Statistical Department of the Ministry of Justice