



Hungarian Helsinki Committee

**Suggestions for questions
to be included in the List of Issues Prior to
Reporting on Hungary**

**for consideration by
the Human Rights Committee
at its 115th session in October 2015**

When compiling the List of Issues Prior to Reporting on Hungary, the Hungarian Helsinki Committee (HHC) respectfully suggests that the Human Rights Committee consider posing the following questions to the Government of Hungary.

The structure of the present document follows the articles of the International Covenant on Civil and Political Rights (ICCPR), and includes references to the "Concluding observations of the Human Rights Committee" regarding Hungary (CCPR/C/HUN/CO/5, 16 November 2010, referred to as: "Concluding Observations 2010"), issued after considering the fifth periodic report submitted by Hungary.

The Hungarian Helsinki Committee

The Hungarian Helsinki Committee (HHC) is a non-profit organisation founded in 1989 in Hungary. The HHC monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC strives to ensure that domestic legislation guarantee the consistent implementation of human rights norms, and promotes legal education and training in fields relevant to its activities, both in Hungary and abroad. The HHC's main areas of activities are centred on protecting the rights of asylum seekers and foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention, the effective enforcement of the right to defence and equality before the law.

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Article 2 of the ICCPR

WEAKENING THE CONTROL EXERCISED BY THE CONSTITUTIONAL COURT; "COURT-PACKING"

In the past years, the role and the control exercised by the Constitutional Court of Hungary has been weakened through a range of legislative steps. The limitation of the role of the Constitutional Court was criticised, among others, by the Parliamentary Assembly of the Council of Europe and by the Venice Commission, the latter stating for example the this limitation "leads to a risk that it may negatively affect all three pillars of the Council of Europe: the separation of powers as an essential tenet of democracy, the protection of human rights and the rule of law".¹ However, the **concerns included in the respective opinion of the Venice Commission have not been addressed**, and **none of the recommendations made by the Parliamentary Assembly of the Council of Europe** in its respective Resolution 1941 (2013) **have been complied with** by the Hungarian authorities.

Legislative steps pertaining to the Constitutional Court (CC) and criticised by domestic and international stakeholders included the following:

- As concluded also by the Venice Commission in its opinion on the Fourth Amendment to the Fundamental Law of Hungary, it became the governing majority's **"systematic approach" that provisions** of ordinary laws which had been previously **found unconstitutional** and were annulled by the CC **were reintroduced on the constitutional level**, overruling the CC.² (By inserting the respective provisions into the constitution, the Parliament excluded the possibility of a review by the CC.) Thus, the Fundamental Law has ceased to be an effective instrument in limiting the legislator's powers. Furthermore, as stated by the Venice Commission, "constitutionalising" provisions declared unconstitutional "threatens to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances".³
- The **CC's competence has been restricted** by the Fundamental Law **in relation to laws on certain economic matters (central budget, taxes, etc.)**, meaning that these laws are exempt from constitutional review until the state debt of Hungary falls below 50% of the GDP. In addition, the Fourth Amendment to the Fundamental Law shielded these kinds of potentially unconstitutional laws from constitutional review **even when budgetary problems have subsided**, which was also criticized by the Venice Commission. Thus, this restriction is not "temporary" in the sense that acts adopted in the period when the state debt is above 50% of the GDP will not be subject to full and comprehensive supervision by the CC even when the budget situation has improved beyond that target. In addition, it is hard to call the above limitation "temporary" when the state debt of Hungary has been constantly over 50% of the GDP at least in the past 20 years, its lowest rate being 76.9% since the current governing majority came into power in 2010.⁴
- The Fourth Amendment to the Fundamental Law **declared void the CC decisions adopted prior to the Fundamental Law**. This purely arbitrary restriction undermines the CC's

¹ For the related criticism of the Venice Commission in more detail, see: *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, CDL-AD(2013)012, Strasbourg, Council of Europe, 17 June 2013, www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e. For further information in English, see e.g.: http://helsinki.hu/wp-content/uploads/Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary_13032013.pdf, pp. 1–5.

² For examples in English of how e.g. the Fourth Amendment to the Fundamental Law overruled decisions of the Constitutional Court, see: <http://helsinki.hu/wp-content/uploads/Constitutional-Court-vs-Fourth-Amendment.pdf>.

³ For the related criticism of the Venice Commission, see: *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, CDL-AD(2013)012, Strasbourg, 17 June 2013, www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e, § 144.

⁴ See: http://www.ksh.hu/docs/hun/eurostat_tablak/tablat/dsde410.html.

independence, contradicts the CC's former case law, and, as put by the Venice Commission, "unnecessarily interrupts the continuity of the Court's case-law". Accordingly, it may also result in decreasing the level of the protection of fundamental rights (giving CC judges the possibility to deter from important principles established by the CC over the last two decades without any explanation).

- As a result of amending the rules pertaining to the composition of the parliamentary committee nominating CC judges, **the parliamentary majority can nominate and elect judges** of the CC on its own, **without the support of any opposition party**. (Under the new rules, the composition of the parliamentary committee nominating CC judges reflects the number of Members of Parliament in the parliamentary factions of the political parties.) Furthermore, the number of CC members has been increased from 11 to 15.
- A law adopted in December 2013 set out that the mandate of CC judges, including the mandate of the current ones, shall not terminate when they turn 70 years old, but they shall remain in their seats until the end of their 12-year term. As a result, **the length of the mandate of some of the CC judges nominated and elected with the sole support of the current governing majority got extended considerably**.⁵

It has to be added that legal amendments as a result of which the parliamentary majority can nominate and elect judges of the CC without the support of any opposition party, increasing the number of Constitutional Court members and the elimination of the age limit as discussed above led to a situation where **11 of the current 15 judges have been confirmed to the CC by the current governing majority without any negotiations with the opposition**. In addition, there is no "cooling-down" period established by law in respect of Members of Parliament between the end of their political mandates and before they could be elected as judge of the CC, the need for which is not only theoretical: two of the judges elected by the current governing majority were Members of Parliament of the governing coalition until elected as CC judges.

Apart from the serious concerns the latter procedure raises in itself, a research study conducted by NGOs shows that through the above "**court-packing**", the Government has succeeded in shaping the CC into a loyal body, as opposed to the independent and genuine counterbalance to government power it should represent. In the framework of the research 23 high-profile cases were examined, 10 of which were decided before the "one-party" appointed judges constituted a majority, and 13 after. While rulings in all 10 cases decided before the judges selected by the current Government formed a majority had been contrary to the interests of the Government, as soon as the "one-party" judges represented the majority, the imbalance became apparent: in 10 out of 13 cases the ruling favoured the Government's interests. Some judges were found to have voted in support of the Government in 100 percent of cases, while other judges almost always decided in favour of the supposed interests of the Government even before the new judges came to form a majority.⁶

Suggested questions:

- *Please provide information on the constitutional and legislative changes pertaining to the powers and composition of the Constitutional Court, their rationale, and their effect on the independence and role of the Constitutional Court.*
- *Please provide information on steps made to address the concerns raised with regard to the role and powers of the Constitutional Court by the Venice Commission in its respective opinions and to comply with the recommendations made by the Parliamentary Assembly of the Council of Europe in Resolution 1941 (2013).*

⁵ For further details in English, see: <http://helsinki.hu/en/abolishing-the-age-limit-regarding-constitutional-court-judges>.

⁶ An executive summary of the study in English is available here:

http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf.

THREATENING THE INDEPENDENCE OF THE JUDICIARY⁷

As a result of a thorough re-regulation in 2011, the **administration of courts became centralised**: the former judicial body in charge of administrating courts was replaced by a one-person decision-making mechanism, the President of the newly established National Judicial Office (NJO). The reform model chosen and the **extensive powers** of the NJO's President were **criticized by the Venice Commission** in both of its opinions on the judicial laws in Hungary, and it was stated that since the President of the NJO (who is elected by the Parliament) is "an external actor from the viewpoint of the judiciary, it cannot be regarded as an organ of judicial self-government". Despite the criticism, the Fourth Amendment to the Fundamental Law elevated the position of the President of the NJO to a constitutional level. Later on – following the subsequent criticism of the Venice Commission and the Parliamentary Assembly of the Council of Europe – the status of the NJO president was re-regulated and her powers were partly restricted, but many related problems remained unsolved:

- **Neither of the amendments eliminated the basic concern that significant decisions may be made by an "external actor from the viewpoint of the judiciary" which "cannot be regarded as an organ of judicial self-government",**⁸ as put by the Venice Commission.
- Even though some amendments were made to specify the instances when the President of the NJO may annul the outcome of a competition for a judicial position, the main concern regarding the respective power of the President was not addressed. According to the provisions currently in force, if the President of the NJO would like to deviate from the established ranking (shortlist) of candidates for judicial positions and would like to appoint the second- or third-ranked candidate, the so-called National Judicial Council has a right to veto. However, **the President of the NJO may also declare the entire call for applications to a judicial position unsuccessful, which renders the National Judicial Council's disapproval and powers moot** in this respect. In other words, if the President of the NJO does not agree with the decision of the National Judicial Council regarding a deviation from the shortlist, he or she **may easily impede the first-ranked candidate from filling the position by declaring the call for applications unsuccessful**. Furthermore, the President of the NJO is not even obliged to provide reasons for doing so.⁹ Again, the concern in this regard is not theoretical: it was reported that the President of the NJO made use of the above possibility.¹⁰
- Initially, the President of the NJO was vested with the right **to appoint another court to proceed in a given case (i.e. transfer/reassign hand-picked cases to a hand-picked court)** by referring to the caseload of the original court, which resulted in the controversial **transfer of also politically high-profile cases**. The system of transferring cases was strongly criticized both by the Venice Commission and the Monitoring Committee of the Parliamentary Assembly of the Council of Europe for violating the right to a fair trial, and respective legal provisions were also found unconstitutional by the Constitutional Court of Hungary. The possibility of transferring cases was finally abolished in its previous form in 2013, however, **no solution or remedy was offered for the violation of the principle of the lawful judge in cases which had already been transferred** by the President of the NJO earlier on.

⁷ For further information, see the respective opinions of the Venice Commission:

Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, Strasbourg, 19 March 2012, www.venice.coe.int/docs/2012/CDL-AD%282012%29001-e.pdf;

Opinion on the cardinal acts on the judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, CDL-AD(2012)020, Strasbourg, 15 October 2012, www.venice.coe.int/docs/2012/CDL-AD%282012%29020-e.pdf

⁸ *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, CDL-AD(2012)001, Strasbourg, 19 March 2012, <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282012%29001-e>, § 51.

⁹ See: Act CLXII of 2011 on the Legal Status and Remuneration of Judges, Articles 18 (3)-(4) and 19; Act CLXI of 2011 on the Organisation and Administration of Courts, Article 103 (3) c)-d).

¹⁰ See: http://hvg.hu/itthon/20130226_Kezi_vezereses_Hando_Tunde_leleptette_a_ne.

Further steps undermining the independence of the judiciary included the following:

- The **mandate of the former President of the Supreme Court was terminated three and a half years before the end of the regular term**, as of 1 January 2012 by the Transitional Provisions of the Fundamental Law. The government argued that the dismissal was necessary because of the reorganization of the court system, affecting the Supreme Court. On the other hand, several critics stated that the transformation of the Supreme Court had not resulted in such significant changes in the court's duties that would have justified the dismissal of its President, and stressed that apparently the President's mandate had been terminated and new rules to exclude him from being re-elected had been adopted in late 2011 because he publicly criticized several legislative actions of the new government. These concerns were eventually confirmed by the opinion of the **Venice Commission** and by the opinion of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe.¹¹ Furthermore, in its decision issued in May 2014 (see case *Baka v. Hungary*) **the European Court of Human Rights** (ECtHR) held that the premature termination of the President's mandate had **violated the right of access to a tribunal**, because he could not challenge the termination of his mandate. The European Court of Human Rights also found that the **dismissal** "was not the result of a justified restructuring of the supreme judicial authority in Hungary, but in fact **was set up on account of the views and criticisms that he had publicly expressed** in his professional capacity on the legislative reforms concerned". Therefore, the President's right to freedom of expression was also violated. (The judgment is not final.)
- The Fundamental Law **lowered the mandatory retirement age of judges** to the general retirement age, i.e. from 70 to 62 years as of 1 January 2012. The rule affected approximately 270 judges, including a **significant number of judges serving at higher courts and leaders of higher courts, resulting in their dismissal**. The Court of Justice of the European Union delivered a judgment on the matter on 6 November 2012 (*Commission v Hungary, C-286/12*), concluding that **Hungary has failed to fulfil its obligations under Council Directive 2000/78/EC**. Respective lower level legal provisions were also found unconstitutional by the Constitutional Court in Hungary in July 2012, but this decision did not reinstate the legal relationship of the already dismissed judges. In order to remedy the effect of the unlawful dismissals, new legal provisions were adopted, offering judges compensation or reinstatement into their judicial status, but reinstatement into leading administrative positions was not guaranteed. Thus, by decreasing the mandatory retirement age of judges the governing majority could **replace practically the entire leadership of the judiciary**.

Suggested questions:

- *Please provide information on the constitutional and legislative changes pertaining to the judiciary, their rationale, and their effect on the independence of the judiciary. Please provide information on the status of the President of the National Judicial Office and its powers.*
- *Please provide information on the constitutional and legislative changes made in order to address the concerns raised by the Venice Commission in its opinions issued on the Hungarian laws on the judiciary and steps made in order to comply with the recommendations made by the Parliamentary Assembly of the Council of Europe in Resolution 1941 (2013).*
- *Please provide information on the role of the President of the National Judicial Office with regard to the competitions for judicial positions, and how it is ensured that the President's ability to declare the call for applications to a judicial position unsuccessful does not influence the fairness of the application process. Please provide information on the number and proportion of call for applications declared unsuccessful by the President of the National Judicial Office.*

¹¹ Request for the opening of a monitoring procedure in respect of Hungary – Opinion, 25 April 2013, www.assembly.coe.int/Communication/amondoc08_2013.pdf, paras 11.4.1 and 133

- *Please provide information on the situation and status of the cases transferred to another court by the President of the National Judicial Office, and any planned solution or remedy to be provided with regard to these cases.*

Article 2 and Article 7 of the ICCPR

PROBLEMS CONCERNING THE INDEPENDENT LAW ENFORCEMENT COMPLAINTS BOARD

As also reflected by the Concluding Observations 2010, as of January 2008, the Independent Law Enforcement Complaints Board (ICB) was established, which investigates violations and omissions committed by the police, provided that such violations and omissions substantively concern fundamental rights. If in the course of its investigation the ICB establishes the substantive violation of a fundamental right, it shall submit its opinion to the National Police Chief (or the head of the department responsible for internal affairs and the head of the counter-terrorism unit), who then deliver the decision on the individual complaint but may only divert from the ICB's opinion on the basis of detailed argumentation. Judicial review of this latter decision is available, but the court can only quash the decision of the National Police Chief, thus it cannot amend it and deliver an in-merit decision in the case.

The efficiency and accessibility of the ICB is undermined by the following factors:

- The ICB is not vested with the right to hear police officers: the officers are free to decide whether or not they give a statement upon the ICB's inquiry, which sometimes makes it very difficult for the ICB to appropriately clarify the facts of the case.
- The ICB is not vested with the right to intervene in the judicial review of the National Police Chief's decision in cases when the National Police Chief diverts from the opinion of the ICB. Thus, it depends on the complainant whether or not he/she refers to the ICB's decision in a lawsuit.
- The court can only quash the decision of the National Police Chief, but cannot deliver an in-merit decision instead.
- The ICB does not have regional offices, and with the limited number of its personnel it is practically not possible for the staff to carry out investigations on the spot. As a result, the ICB's investigation is restricted to the inspection of the case files.
- Incompatibility of proposed ICB members is not regulated properly: e.g. Members of Parliament may be (and are) elected as members (e.g. the current President of the ICB, elected in 2014, was for a time a Member of Parliament and at the same time a member of the ICB), which undermines the perceived independence of the body. (Earlier, the law set out that those who are or have been Members of Parliament within two years of the election cannot become members of the ICB, but this precondition was abolished, along with the two-year "cooling-down" period for former employees or office-holders of political parties.)
- The publicity and media coverage of the ICB's activities is very low.

Suggested questions:

- *Please provide information on the case-load, as well as the budget and staffing level of the Independent Law Enforcement Complaints Board, along with information on its accessibility for complainants outside of the capital.*
- *Please provide information on the investigative rights of the Independent Law Enforcement Complaints Board concerning complaints, and whether there are any plans to extend its authorizations to make its investigations more effective.*

Article 2 and Article 26 of the ICCPR

ETHNIC PROFILING BY THE POLICE

Along with reports on bias among police officers towards Roma in general, the alleged ethnic profiling practices of the police with regard e.g. to ID checks¹² and petty offences (misdemeanours), as demonstrated by the case below and also referred to by the Concluding Observations 2010 (§ 18), shall also give rise to concerns.

- In 2011 it was reported from the village of Rimóc that the vast majority of fines for the lack of bicycle accessories required by law (such as a bicycle bell, front light and rear reflector) seemed to have been imposed on local Roma Hungarians, although the village was largely non-Roma. The Equal Treatment Authority launched an ex officio investigation against the Nógrád County Police Headquarters on the supposed violation of equal treatment of the Roma. The HHC joined the quasi-judicial proceedings, carrying out *actio popularis* litigation on behalf of the public interest.

The data the Equal Treatment Authority requested and received from the police indicated that in the first nine months of 2011 on the spot fines for the lack of mandatory bicycle accessories had been levied in 36 cases in the village of Rimóc. Using family names (common Roma Hungarian names in the region) and places of residence (located in the segregated Roma neighbourhood of Rimóc) as proxies for ethnicity, the HHC was able to determine that in 35 cases (97%) the bikers stopped and penalized for the lack of bicycle accessories were Roma. Utilizing data from the 2001 census, sociological studies as well as representative samples by the Hungarian Academy of Sciences, the HHC estimated that Roma people made up 15-25% of the population of Rimóc. An analysis of online second-hand bicycle advertisements from the region and a field trip to Rimóc revealed that over 80% of the bicycles observed lacked some mandatory accessories. In addition, non-Roma people were also spotted using bicycles in the village and a significant proportion of bicycles were not adequately accessorized, irrespective of the owner's ethnicity. And yet the proportion of Roma among those fined was significantly higher than their proportion among the general population of the village, therefore, the HHC alleged direct discrimination in the form of racial profiling by the police. The HHC checked also the amount of fines, and found that the highest amount, namely 20,000 HUF was imposed in three cases (in two cases due to lack of a bell and in one case due to the fact that the cyclist did not hold the handlebar) on Roma Hungarians.¹³ While the individual measures by the police were arguably lawful (as the law did require that bicycles be equipped with certain accessories), the sanctioning practice of the police indicated extensive ethnic disproportionality that could not be reasonably justified and were based on ethnic profiling, a form of racial discrimination.

The case eventually ended in a settlement between the Nógrád County Police Headquarters and the HHC. The police acknowledged that the cumulative effect of the lawful police measures *might* have led to ethnic disproportionality, but asserted that such disproportionality could not have been substantiated or recognized by the police for the lack of data on the offenders' ethnic affiliation – a trait that in the majority of cases is highly visible.

As a response to the continued reports on alleged ethnic profiling, six human rights **NGOs initiated the establishment of a working group against ethnic profiling** with the participation of civil society organizations and police authorities on 15 July 2014, referring to the fact that a discriminatory practice is present particularly in the poorest regions of the country, cases of ethnic profiling have been reported to the NGOs on a regular basis, and the Independent Law Enforcement Complaints

¹² See e.g.: András Kádár – Júlia Körner – Zsófia Moldova – Balázs Tóth: *Control(l)ed Group – Final Report on the Strategies for Effective Police stop and Search (STEPSS) Project*. Hungarian Helsinki Committee, Budapest, 2008, available at: http://helsinki.hu/wp-content/uploads/MHB_STEPSS_US.pdf.

¹³ For the data, see: http://helsinki.hu/wp-content/uploads/EBH_eljaras_adatok.pdf. For an article on the issue in English, see: <http://www.opensocietyfoundations.org/voices/fined-being-roma-while-cycling>.

Board has also proceeded in a number of relevant cases.¹⁴ Nevertheless, the **National Police Chief rejected** the above proposal in his response dated 15 August 2014, stating that ethnic profiling is not present in the sanctioning practice of the police.¹⁵

Suggested questions:

- *Please provide information on the measures taken in order to reduce bias against the Roma among police forces.*
- *Please provide information on the steps taken to counter ethnic profiling practices by the police with regard to ID checks, petty offence procedures, etc.*

PROBLEMS RELATED TO HATE CRIMES

With regard to the application of the legal provisions pertaining to hate crimes – more strictly to Article 216 of Act C of 2012 on the Criminal Code penalizing “violence against a member of a community” –, the following concerns may be raised according to NGOs.¹⁶

The problem of “under-qualification”: One of the reasons for the low number of criminal offences officially qualifying as hate crimes may be that the authorities fail to take into consideration the bias motivation of crimes in the course of the criminal proceedings, which results in qualifying the given crime as a less serious criminal offence than hate crime. This may happen due to the lack of training, or intentionally, the reason behind the latter being e.g. that proving the bias motivation may be difficult, so going for the qualification which is easier to substantiate (e.g. a simple “bodily harm” instead of “violence against a member of a community”) is safer from the point of view of the success rates of authorities. Under-qualification may also have an effect on the investigations, since international experiences show that the proper qualification as early as possible in the investigation plays a crucial role with regard to effectiveness. As a related problem, it has to be mentioned that **there is no legal possibility to submit a complaint against the legal qualification** of a given criminal offence.

It has to be added that apart from actual ill-treatment, Article 216 of Act C of 2012 on the Criminal Code also penalizes if someone shows such provocatively anti-social behaviour towards another person because of his or her membership or perceived membership in a group which is capable of inciting alarm in the member of the given group, or if someone constrains another person with force or threat to do, not to do, or to endure something also with bias motivation. However, practice shows that these forms of hate crime are not established by authorities. In addition, Act C of 2012 on the Criminal Code **does not penalize e.g. offences committed against the property with a bias motivation.**

The omission of investigative steps on behalf of the police and the **lack of using all available means of investigation** is also a frequent phenomenon regarding hate crimes. Such shortcomings include the lack of interrogating witnesses, the delay in obtaining CCTV recordings, neglecting to explore the personal background of the defendants by house search and exploring his/her personal connections, etc. This is also related to the **lack of investigation protocols** available to the Hungarian police and the prosecution with regard to hate crimes.

It has to be added as a positive development though that as of 1 January 2012 the National Police Headquarters established **a professional stream to deal with hate crimes**, consisting of those police officers at county/capital police departments who are responsible for investigating these incidents in county/capital police departments. However, it seems that the workload of the members of the network is so significant that it does not allow for real specialization as they deal with several other kinds of criminal offences as well.

¹⁴ The letter is available at: <http://tasz.hu/files/tasz/imce/orfkszabsertmunkacsop0715.pdf>

¹⁵ The letter is available at: <http://police.hu/sites/default/files/document.pdf>.

¹⁶ See e.g. a related summary in Hungarian here: http://www.gyuloletelten.hu/sites/default/files/ejk_esetosszefoglalo.pdf.

Suggested questions:

- Please provide information on the number of reports, indictments and convictions due to the criminal offence of "violence against a member of a community".
- Please provide information on the measures taken to counter the problem of "under-qualification", i.e. the omission on behalf of authorities to take into consideration the bias motivation of a criminal offence.
- Please provide information on whether there are any investigation protocols, guidelines, etc. used by the police and the prosecution with the aim of increasing the effectiveness of investigations into hate crimes.
- Please provide information on training received by the police, prosecutors and judges in order to be able to detect hate and racially motivated crimes, as recommended by § 18 of the Concluding Observations 2010.

Article 7 of the ICCPR

AMENDMENT OF THE ASYLUM LEGISLATION ENDANGERS REFUGEES' ACCESS TO PROTECTION

The number of asylum claims submitted in Hungary has multiplied since 2013, with over 103 000 claims registered between January and early August 2015. However, the vast majority of asylum-seekers leave the country towards Western Europe within a few days. At the time of writing, over **75% of asylum-seekers arriving in Hungary are refugees from Afghanistan, Syria and Iraq.**

Amendments to the Hungarian asylum legislation, which entered into force on 1 August 2015, are likely to **prevent refugees from having access to international protection** in Hungary. Several rules are in breach of EU law, the principles established by the European Court of Human Rights, and **may expose asylum-seekers to a risk of torture, inhuman or degrading treatment.**¹⁷

Main problematic amendments include:

- **Serbia has been designated as a "safe third country"** in a new national list of safe countries. This designation allows the Office of Immigration and Nationality (OIN) to *prima facie* **reject as inadmissible almost all asylum claims**, since over 99% of asylum-seekers enter Hungary through Serbia. Serbia is by no means a safe country for asylum-seekers because access to effective international protection does not exist, as confirmed by the official and currently valid position of the UNHCR,¹⁸ various NGO reports¹⁹ and the previous guidance by the Hungarian Supreme Court (*Kúria*).²⁰

¹⁷ For further information see: Hungarian Helsinki Committee, Building a Legal Fence – Amendments to the Hungarian Asylum Law Seriously Endanger Access to Protection, Information note, 7 August 2015

<http://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf>

¹⁸ UNHCR, *Serbia as a Country of Asylum*, August 2012

<http://www.unhcr.rs/media/UNHCRSerbiaCountryofAsylumScreen.pdf>

¹⁹ See for example: Amnesty International, *Europe's Borderland – Violations against Refugees and Migrants in Macedonia, Serbia and Hungary*, 2015

http://www.amnestyusa.org/sites/default/files/ser-mac_migration_report_final.compressed.pdf

Hungarian Helsinki Committee, *Serbia as a Safe Third Country: Revisited*, June 2012

<http://helsinki.hu/wp-content/uploads/Serbia-report-final.pdf>

²⁰ Supreme Court of Hungary (*Kúria*), *Opinion No. 2/2012 (XII.10) KMK on certain questions related to the application of the safe third country concept*, 10 December 2012

- **Asylum procedures will become hasty and lack essential safeguards.** Under the new procedural rules, **basically all asylum decisions by the OIN are to be taken within 15 days.** Inadmissibility decisions and accelerated procedures are likely to represent the rule, rather than the exception, resulting in slight chances for asylum claims to be considered in a regular procedure. 15 days is **unreasonably short and insufficient** to guarantee applicants' effective access to indispensable safeguards, such as legal aid or psychotherapy in case of torture victims or other vulnerable persons. Also, 15 days is insufficient for properly establishing the relevant facts and circumstances in an individualised manner (obtaining expert evidence, hold subsequent hearings, etc.).
- **The judicial review of asylum decisions is deprived of crucial procedural safeguards.** Personal hearing at the court is no longer mandatory, and in some cases **no automatic suspensive effect** against the rejection and the removal decision will be in place. The **time limit of 3 days** to file a request for judicial review against negative decisions under an accelerated procedure or on inadmissibility grounds and **8 days** to deliver a judgment are **insufficient and in violation of EU law** and the jurisprudence of the European Court of Human Rights. They impose **excessive difficulties** on asylum-seekers and judges to make necessary arrangements, such as interpreters, and to obtain crucial evidence. As a result, the single-instance **judicial review is at the risk of being reduced to a mere formality.**
- The amended law now **explicitly allows the OIN to tolerate overcrowding** in asylum jails, converting the minimum standard regarding the moving space for each detainee into a mere recommendation (inserting the term "if possible" into the relevant provision) – thus eliminating any mandatory standard in this respect. A similar provision was introduced into parallel rules concerning pre-trial detention in 2010, which the Hungarian Constitutional Court later quashed on the ground that, among others, it violated the prohibition of torture, inhuman and degrading treatment.²¹
- Due to the unprecedentedly high number of asylum-seekers, reception centres have become extremely overcrowded, and fall short of important hygienic standards. The government fails to properly extend the country's reception capacities. In addition, the amendment has **cancelled the OIN's obligation to accommodate asylum-seekers** in reception centres, thus potentially contributing to increasing **refugee homelessness** in Hungary.
- **Asylum-seekers can now be obliged to contact their country of origin** in order to establish identity and obtain documentary evidence. This goes against the **most basic prohibition in asylum law**, as it may expose asylum-seekers and their families and friends to **inhuman treatment, torture or even death.** Moreover, it is **unrealistic** to obtain genuine documents **within a few days** from a war-torn country like Syria or Iraq, which asylum-seekers are now obliged to do under the aforementioned amendments.

These amendments have the potential to massively prevent refugees from being able to duly present their protection claim, and thus from access to international protection in Hungary. As a result, Hungary may **violate its obligation of non-refoulement** and may indirectly expose refugees to **torture, inhuman or degrading treatment.**

Suggested questions:

- *In light of the amended rules, how does the Government envisage to guarantee that asylum-seekers have access to a meaningful and fair asylum procedure in Hungary?*
- *On what concrete grounds does the Government consider Serbia a safe third country, in light of the concrete conditions stipulated by EU and Hungarian law? On what grounds and factual*

<http://helsinki.hu/wp-content/uploads/HU-Supreme-Court-on-S3C-Dec-2012.pdf>

²¹ Constitutional Court resolution No. 32/2014 of 3 November 2014

evidence does the government question the guidance given by the UNHCR and the Hungarian Supreme Court in this respect?

- *Through what concrete steps does the Government wish to ensure that asylum-seekers returned to Serbia have access to an adequate asylum procedure and that refugees are not returned from Serbia to elsewhere, considering that among tens of thousands of asylum-seekers only 22 have been granted protection in Serbia since 2008?*
- *Through what concrete measures does the Government wish to ensure that asylum-seekers returned to Serbia have access to accommodation and basic services while their asylum procedure is pending?*
- *How does the Government wish to ensure the effectiveness of the legal remedy in asylum procedures? On what concrete grounds does the Government consider sufficient the 3-day deadline for the submission of an appeal against a negative asylum decision, in light of the fact that similarly short deadlines have already been considered insufficient by the European Court of Human Rights,²² and that the vast majority of asylum-seekers do not have access to free-of-charge legal aid in Hungary?*
- *How does the Government wish to carry out an in-merit and high-quality examination of asylum claims within an extremely short 15-day deadline, considering its obligation under EU law to conduct an individualised assessment, collect relevant and up-to-date country of origin information and hold at least one personal hearing with a suitable interpreter?*
- *Through what specific safeguards does the Government wish to ensure that specifically vulnerable asylum-seekers are not negatively affected by accelerated procedures and the lack of an automatic suspensive effect of appeals on removal measures?²³*
- *Why did the Government introduce a rule allowing for overcrowding in the detention facilities for asylum-seekers, in light of the fact that a similar provision has already been considered unlawful (in violation of the prohibition of torture and inhuman or degrading treatment) and was consequently quashed by the Constitutional Court? Please explain, how, in the views of the Government, it is compatible with rule of law standards to re-introduce a measure that has already been quashed by the Constitutional Court?*
- *How does the Government wish to ensure that the amended regulation will not lead to overcrowding and inhuman detention conditions in "asylum jails"?*
- *Through what concrete measures does the Government wish to ensure that the amended regulation allowing for the designation of a county as place of residence (instead of a reception centre) will not lead to increasing homelessness among asylum-seekers?*
- *Does the Government plan to apply in practice the provision that allows for obliging asylum-seekers to contact their country of origin while their asylum claim is still pending? If yes, in which cases? How will the necessity of using this measure be assessed? How does the Government expect to receive meaningful information from the main countries of origin (Afghanistan, Syria and Iraq) with the 15-day procedural deadline? Through what measures does the Government wish to ensure that neither asylum-seekers, nor their family members left behind are going to be exposed to risk as a result of applying this provision?*

²² For instance, in the I.M. v. France judgment the Court found that 2 days for the submission of an appeal was insufficient (AFFAIRE I.M. c. FRANCE, requête no 9152/09, 2 février 2012). Also, in Austria and the Czech Republic, the Constitutional Court found insufficient the 2 and 7-day deadline (respectively) for the submission of an appeal in asylum cases.

²³ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Recital 30

- *Did the Government consult the UNHCR and relevant civil society organisation during the preparation of this major legal amendment? If yes, did the Government share with these organisations the draft text of the legal acts to be amended? How much time was made available for the latter to comment?*

Article 7 and Article 10 of the ICCPR

OVERCROWDING IN PENITENTIARIES AND DETENTION CONDITIONS

The problem of overcrowding in penitentiary institutions, remarked also by the Concluding Observations 2010 (§ 16) continued to be an issue of concern: in the past years, **the average number of detainees has constantly increased, until 2013 in parallel to the average overcrowding rate**, and as shown by the table below, the rise of the latter was stopped only because in 2014 the capacity of the penitentiary system increased by almost 300 places.

Average prison population and average overcrowding rate

Year	Average prison population	Capacity of the penitentiary system	Average overcrowding rate
2009	15,373	12,042	128%
2010	16,203	12,335	131%
2011	17,195	12,604	136%
2012	17,517	12,573	139%
2013	18,042	12,584	143%
2014	18,204	12,869	141%

Source: data published by the National Penitentiary Headquarters (<http://bv.gov.hu/sajtoszoba>)

In addition, data requested from the National Penitentiary Headquarters by the HHC showed that the average overcrowding rate of penitentiary institutions accommodating mainly pre-trial detainees was higher than the average overcrowding rate of the penitentiary system: 135% in 2009, 142% in 2010, and 145% in 2011. It shall also be added that the overcrowding rate in some penitentiaries is much higher than the average, and institutions accommodating mainly pre-trial detainees tend to be especially crowded. (This was also underpinned by the Hungarian Helsinki Committee's prison monitoring visits: for example in the course of the monitoring visit to the Bács-Kiskun County Penitentiary Institution in 2013 the data provided by the institution showed an overcrowding rate of 207% in the section of pre-trial detainees,²⁴ and in the same year overcrowding rate was 179% in the section of the Baranya County Penitentiary Institution for pre-trial detainees.²⁵) It has to be added that overcrowding affects pre-trial detainees even more adversely than convicts: since most pre-trial detainees do not have access to work, it may easily happen that they spend 23 hours a day (i.e. all day apart from the one-hour open air exercise) in their severely overcrowded cells, behind closed doors.

As demonstrated by the data above, the overcrowding of the Hungarian penitentiary institutions remained a systemic problem, as also supported by the – now final – **pilot judgment of the ECtHR reached in 2015** in the *Varga and Others v Hungary* case (Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, Judgment of 10 March 2015):

²⁴ See: *A Magyar Helsinki Bizottság jelentése a Bács-Kiskun Megyei Büntetés-végrehajtási Intézetben 2013. április 29–30-án tett látogatásról* [Report of the Hungarian Helsinki Committee about its visit to the Bács-Kiskun County Penitentiary Institution on 29–30 April 2013], available at: <http://helsinki.hu/wp-content/uploads/HHC-Kecskem%C3%A9t-jelent%C3%A9s-int%C3%A9zet-v%C3%A1lasz%C3%A1val-BVOPmegjegyz%C3%A9seivel-v%C3%A9gleges-anonimiz%C3%A1lva.pdf>.

²⁵ See: *A Magyar Helsinki Bizottság jelentése a Baranya Megyei Büntetés-végrehajtási Intézetben 2013. augusztus 12–13-án tett látogatásról* [Report of the Hungarian Helsinki Committee about its visit to the Baranya County Penitentiary Institution on 12–13 August 2013], available at: http://helsinki.hu/wp-content/uploads/MHB_jelentes_Baranya_Megyei_Bv_Intezet_2013_vegleges.pdf.

- In the pilot judgment the ECtHR concluded that the **detention conditions of the six applicants** – including the overcrowding and the inadequate moving space per person – **amounted to the violation of the prohibition of inhuman or degrading treatment, included in Article 3 of the European Convention on Human Rights.**
- One of the applicants in the case, Lajos Varga, the client of the HHC, spent for example 8 months in a cell where he had only 1.8 square meters of personal living space, he was granted only 30 minutes of outdoor stay per day in the course of his solitary confinement, and he suffered from skin disease due to the poor sanitary conditions. Personal living space in the cells of the remaining five applicants varied between 1.5 to 3.3 square metres, poor ventilation in certain cases lead to unbearable temperatures in the cell, in certain cases only a curtain separated the rest of their cell from the lavatory, access to shower was limited, and some cells were infected with cockroaches and bedbugs.
- According to the judgment, there are at present approximately 450 such applications before the ECtHR in which the applicants complain about similar detention conditions as described above and about the overcrowding of Hungarian penitentiary institutions, and the ECtHR had previously condemned Hungary for overcrowded cells in more cases.
- On the basis of the above, the ECtHR concluded that the **overcrowding constitutes a structural problem**, and, therefore, set out that **Hungary should, within six month, produce a plan to reduce overcrowding**, i.e. "a time frame in which to make appropriate arrangements and to put in practice preventive and compensatory remedies in respect of alleged violations of Article 3 of the Convention on account of inhuman and degrading conditions of detention".
- Furthermore, the ECtHR decided not to adjourn the examination of similar pending cases in spite of the fact that a pilot judgment was adopted. Rather, the ECtHR found that continuing to process all conditions of detention cases in the usual manner will remind Hungary on a regular basis of its obligation under the European Convention on Human Rights and in particular resulting from the judgment in the *Varga and Others v. Hungary* case.

According to the pilot judgment, the solution would be the reduction of the number of prisoners by more frequent use of non-custodial punitive measures and minimising the recourse to pre-trial detention, which is in line with the conclusions of the Concluding Observations 2010 saying that Hungary "should consider not only the construction of new prison facilities but also the wider application of alternative non-custodial sentences" (§ 16). However, **the Government's communication shows that for the time being it wants to solve the situation solely by building prisons**, even though even simplified calculations clearly show that the construction of new prisons and/or units is a very time-consuming exercise, which may offer some kind of a solution only in the long run, but only if the increase of the prison population comes to a halt. (See also comments on Article 9 of the ICCPR below with regard to pre-trial detention.)

As also shown by the pilot judgment above, overcrowding and inadequate living space are often **accompanied by inadequate detention conditions**, such as toilets separated from the rest of the cell only by a textile curtain, inadequate number of toilets and sinks per inmate, widespread presence of bedbugs, and poor sanitary conditions in general. In addition, efforts to counter overcrowding, such as the so-called "balancing program", in the framework of which National Penitentiary Headquarters re-allocates prisoners nationwide to ensure a more even distribution of inmates, has negative "side effects" e.g. on the frequency of family visits while not ensuring a long-term solution.

(For further information on the causes of overcrowding and on why the governmental measures announced so far of are inadequate and insufficient, see the related communication of the HHC submitted to the Committee of Ministers of the Council of Europe.²⁶)

Suggested questions:

- *Please provide statistics (i) on the average overcrowding rate of the penitentiary system and the number of the total prison population in the last five years, (ii) on the average*

²⁶ Available at: <http://helsinki.hu/en/submissions-to-the-com-about-overcrowding-in-prisons>.

overcrowding rate of institutions/units for pre-trial detainees, and (iii) on the average overcrowding rate of each penitentiary institution.

- Please provide data on the lowest per person moving spaces in the Hungarian penitentiary institutions and the number and proportion of detainees affected by it.
- Please provide information on measures taken and planned to overcome overcrowding in penitentiary institutions with a view to comply with the pilot judgment of the European Court of Human Rights delivered in the *Varga and Others v. Hungary* case, including measures beyond building new prison facilities.
- Please provide the countrywide number and proportion of prison cells without separated toilets and the number and proportion of detainees affected by it. Please provide information on sanitary measures taken against the widespread presence of bedbugs.

ACTUAL LIFE SENTENCE

Hungary is one of the few European countries where life-long imprisonment without the possibility of parole ("actual life-long imprisonment") exists. Even though this possibility was criticized by several stakeholders, including the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in the report on its 2007 ad hoc visit to Hungary,²⁷ the possibility of actual life-long imprisonment was included both in the new constitution of Hungary (the Fundamental Law, in force since 1 January 2012²⁸) and the new Act C of 2012 on the Criminal Code, in force since 1 July 2013.

Subsequently, as a significant related development, **the ECtHR concluded in its decision** reached in the *László Magyar v. Hungary* case (Application no. 73593/10, Judgment of 20 May 2014) that by sentencing the applicant to actual life-long imprisonment, **Hungary violated Article 3 of the European Convention on Human Rights**. The ECtHR argued that Article 3 of the European Convention on Human Rights "must be interpreted as requiring reducibility of the sentence, in the sense of a review" which allows the domestic authorities to consider in case of all convicts whether further detention is justified, and all detainees are entitled to know "what they must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought". The decision concluded that Hungarian rules on actual life-long imprisonment do not ensure the possibility of such a review and the possibility of a release. Therefore, **actual life-long imprisonment as existing in Hungary constitutes inhuman and degrading punishment**. In the procedure before the ECtHR the Hungarian Government claimed that the possibility of a pardon (clemency) by the President of the Republic means that the sentence of actual lifers is reducible. However, the ECtHR concluded that the institution of presidential clemency does not allow an actual lifer "to know what he or she must do to be considered for release and under what conditions" and "does not guarantee a proper consideration of the changes and the progress towards rehabilitation made by the prisoner, however significant they might be". Thus, the applicant's life sentence could not be regarded as reducible for the purposes of Article 3 of the European Convention on Human Rights.

After the judgment delivered by the ECtHR in the *László Magyar v. Hungary* case, the Hungarian legislator introduced a new pardon mechanism for actual lifers. However, **the new mechanism introduced by the Hungarian legislator for actual lifers does not comply with the standards set by the ECtHR**, and especially the standards included in *Vinter and Others v. the*

²⁷ 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 30 January to 1 February 2007, CPT/Inf (2007) 24, § 33. The CPT invited the Hungarian authorities to introduce a regular review of the threat to society posed by "actual lifers", on the basis of an individual risk assessment, with a view to establishing whether they can serve the remainder of their sentence in the community and under what conditions and supervision measures.

²⁸ Article IV (2): "No one shall be deprived of liberty except for reasons specified in an Act and in accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences."

United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10, Judgment of 9 July 2013): it **does not provide a real prospect of release**, and **the mandatory pardon procedure introduced concludes with a pardon decision being merely a discretionary favour granted by the President of the Republic** (cf. *Bodein v. France*, Application no. 40014/10, Judgment of 13 November 2014), and it is launched only after 40 years of the sentence have been served.

The new mechanism designed for actual lifers is regulated by Articles 46/A–46/H of Act CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement, and is called “**mandatory pardon procedure**”, which is to be conducted ex officio after 40 years of detention, and does not exclude that actual lifers submit a pardon request under the general rules. The new procedure includes the following steps:

- The penitentiary institution where the actual lifer is detained shall inform the Minister of Justice when the convict has served 40 years of his/her sentence, after taking a statement from the detainee that he/she gives his/her consent to carrying out the mandatory pardon procedure.
- Subsequently, the Minister of Justice shall gather a range of data and documents on the convict and shall notify the President of the Curia about the commencement of the mandatory pardon procedure, who shall appoint a so-called Pardon Committee, consisting of five judges. The judges shall consent to the appointment, and certain incompatibility rules apply.
- The Pardon Committee shall examine on the basis of the data and documentation submitted to it by the Minister of Justice whether it may be presumed that the aim of the punishment may be achieved without further depriving the convict of his/her liberty, taking into consideration (i) the convict’s irreproachable behaviour in the course of the execution of his/her punishment and his/her willingness to lead a law-abiding life, and/or (ii) the convict’s personal or family circumstances and his/her state of health.
- In the course of its procedure the Pardon Committee may obtain further necessary data and documents, may involve an expert in the procedure or may obtain an expert opinion, and may also hear the convict in person.
- The Pardon Committee shall prepare a reasoned opinion in the case, which shall include a recommendation on whether the detainee should be released or not. The Pardon Committee shall reach a majority decision.
- The above opinion shall be submitted to the Minister of Justice with the accompanying documentation. The Minister of Justice shall prepare another submission for the President of the Republic with the content in line with the Pardon Committee’s opinion, which also includes the reasoning of that opinion.
- The President of the Republic shall decide on the issue on the basis of the general rules regarding pardon decisions, i.e. in a fully discretionary manner, without any deadline. **The new legal provisions do not regulate the decision-making of the President of the Republic in any way.**
- If the President of the Republic grants or refuses a pardon, his/her decision still has to be countersigned by a member of the Government, i.e. the respective Minister (the Minister of Justice) to become valid, according to the general rules on presidential pardons as included in Article 9 (4) g) and (5) of the Fundamental Law of Hungary. Similar to the proceeding to be followed by the President of the Republic, the decision-making of the Minister at this point is not regulated in any way by the law. Thus, there is no provision which would oblige the Minister to decide in line with the decision of President of the Republic or, for that matter, the Pardon Committee. In addition, the Minister is not obliged to provide reasons for granting or refusing the countersignature.
- If the detainee is not granted pardon as a result of the procedure above, a new mandatory pardon procedure shall be conducted two years after the previous procedure terminated.

It is already telling that the law does not call the new mechanism a “review” mechanism, but calls it a “mandatory pardon procedure”. **Since the final decision in the new mandatory pardon procedure is still made by the President of the Republic, similar concerns may be raised in relation to the present regulation as the ones raised by the European Court of Human Rights in the *László Magyar v. Hungary* case (§§ 57-58) in relation to presidential pardons:**

- Even though the Pardon Committee shall provide a reasoned opinion on whether a pardon should be granted or not, **the President of the Republic is not bound to give reasons** for his/her pardon decisions (even if his decision is not in line with the opinion of the Committee).
- Domestic **legislation does not oblige the President of the Republic to assess whether the detainee's continued imprisonment is justified on legitimate penological grounds.**
- Also, the law **does not provide for any specific guidance as to what kind of criteria or conditions are to be taken into account by the President of the Republic** in the assessment of the case.
- **The President** is not obliged in any way to reach a decision complying with the opinion of the Pardon Committee, and **does not have to provide any reasoning if deviating from the opinion of the Pardon Committee.**

In addition, as already referred to above, under the Fundamental Law of Hungary **the President's pardon decision is only valid if it is countersigned by the respective Minister**, and the new **mechanism does not determine any aspect or consideration the Minister of Justice shall take into account** when deciding on whether to countersign the pardon decision of the President, **nor does the Minister of Justice have to provide reasons** for his/her decision, which is also in contradiction with the case law of the ECtHR. The countersignature is not a mere formality: since by countersigning the decision the Minister takes over political responsibility, it may very well happen that the Minister refuses to countersign a pardon decision, as it happened e.g. in an actual, politically sensitive case. This means that the actual granting of a pardon is dependent not only on the President of the Republic, but also on the holder of a position that is much more closely linked to politics, which further reduces the likelihood of actual lifers being granted a presidential pardon. To substantiate this, we refer to a recent press conference from July 2015, held on actual life sentence by one of the state secretaries of the Ministry of Justice, who said that the Government has trust in the independent institutions, in the President of the Republic and the judiciary, and trusts that although they would have the possibility to do so, **"they will never release murderers who killed children, old and helpless persons, innocent victims"**.²⁹

In addition, publicly available official statistics show the number of pardons granted in criminal cases in general has been very low in the past years, strengthening the view that the presidential pardon is not likely to be an available avenue for actual lifers. At the same time, the data on the nature of cases in which a pardon was granted have proven to be unavailable for the public in any format, leaving detainees (thus, potential petitioners) even more in the dark as to the considerations of decision-makers.

In addition to the above concerns, the mandatory pardon procedure **shall first take place after 40 years of imprisonment served**, which is a much longer period than what was deemed acceptable by the ECtHR e.g. in the *Vinter and Others v. the United Kingdom* case, stating the following: "the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter" (§ 120).

Based on the above considerations, the current situation of actual lifers is also in violation of Article 3 of the European Convention on Human Rights.

In addition, as shown by the table below, **the number of actual lifers detained has been constantly increasing in the last years.**

²⁹ See: http://hvg.hu/itthon/20150719_Repassy_a_kormany_kitart_a_tenyleges_elet.

Number of actual lifers

Year	Actual lifers, non-final sentence	Actual lifers, final sentence	Actual lifers, total number
2010	0	16	16
2011	2	17	19
2012	4	21	25
2013	17	29	46
2014	13	36	49

Source: data published by the National Penitentiary Headquarters (<http://bv.gov.hu/sajtoszoba>)

It also has to be mentioned that **due to a form of the “three strikes rule”**, under Article 44 (2) of Act C of 2012 on the Criminal Code, **it is obligatory for judges** to exclude the possibility of parole, i.e. **to sentence the perpetrator to actual life imprisonment if he/she qualifies as** a so-called **“violent multiple recidivist”**.³⁰ This also restricts the right of judges to balance the circumstances of the case and so violates the principle of individualized decision-making.

Suggested questions:

- *Please provide information on the number of defendants convicted by a final and a non-final judgment to actual life-long imprisonment.*
- *Please provide information on the rules pertaining to the mandatory pardon procedure for actual life-long imprisonment and the basis for the presumption that the current legal rules comply with the case law of the European Court of Human Rights and the CPT’s respective recommendations.*

ILL-TREATMENT BY OFFICIAL PERSONS

A) Low success rate of reporting ill-treatment and of indictments

Even though the Concluding Observation 2010 also set out that Hungary “should ensure that allegations of torture and ill-treatment are effectively investigated and that alleged perpetrators are prosecuted” (§ 14), the respective data show that the success rate of reporting ill-treatment and of indictments has remained low: there is a high degree of latency in cases where officials are allegedly responsible for abuses, and very few reports of ill-treatment result in the pressing of charges. As shown by the tables below (based on official data received by the HHC from the Chief Prosecutor’s Office for research purposes) 0% to 6% of the procedures launched because of an alleged ill-treatment or forced interrogation resulted in an indictment throughout the years 2007–2013, and the vast majority of the investigations was closed or the reports made by the alleged victims were rejected.

³⁰ Article 459 Section 31 of Act C of 2012 on the Criminal Code sets out the following:

a) a recidivist is the perpetrator of an intentional criminal offence, if he/she was earlier sentenced to an executable term of imprisonment for committing an intentional criminal offence, and less than three years have passed since the last day of serving the term of imprisonment or the day when it ceased to be enforceable until committing the new criminal offence; (...)

b) a multiple recidivist is a person who was sentenced to an executable term of imprisonment as a recidivist prior to committing the intentional criminal offence, and less than three years have passed since the last day of serving the term of imprisonment or the day when it ceased to be enforceable until the committing the new criminal offence punishable with imprisonment;

c) a violent multiple recidivist is a recidivist who commits a violent criminal offence against the person three times.”

Ill-treatment in official proceeding³¹									
	Rejection of the report		Termination of the investigation		Indictment		Other outcome		Total
2007	73	9%	649	83%	49	6%	12	1.53%	783
2008	94	14%	556	80%	35	5%	11	1.58%	696
2009	82	10%	691	86%	24	3%	3	0.38%	800
2010	148	14%	879	81%	44	4%	15	1.38%	1086
2011	173	20%	667	76%	33	4%	10	1.13%	883
2012	197	22%	649	72%	36	4%	20	2.22%	902
2013	219	23%	709	74%	21	2%	12	1.25%	961

Forced interrogation³²									
	Rejection of the report		Termination of the investigation		Indictment		Other outcome		Total
2007	32	21%	116	76%	4	3%	1	0.65%	153
2008	30	17%	141	78%	9	5%	0	0.00%	180
2009	29	20%	113	78%	3	2%	0	0.00%	145
2010	56	28%	135	68%	8	4%	1	0.50%	200
2011	44	26%	126	74%	0	0%	0	0.00%	170
2012	68	34%	128	63%	5	2%	1	0.50%	202
2013	77	36%	133	62%	2	1%	2	0.93%	214

In comparison, procedures launched because of the criminal offence "violence against an official person" resulted in an indictment in 60% to 72% of the procedures in the last seven years.

Violence against an official person³³									
	Rejection of the report		Termination of investigation		Indictment		Other outcome		Total
2007	24	3%	275	33%	510	60%	35	4.15%	844
2008	14	2%	234	29%	539	66%	33	4.02%	820
2009	14	2%	193	25%	520	67%	44	5.71%	771
2010	23	3%	158	20%	555	69%	66	8.23%	802
2011	20	3%	117	18%	462	72%	39	6.11%	638
2012	14	2%	136	22%	419	69%	37	6.11%	606
2013	10	2%	119	19%	434	71%	50	8.16%	613

Furthermore, even when an indictment takes place, the official success rate of the prosecution – which on average exceeds 95%, including with regard to procedures launched because "violence against an official person" – was e.g. only 55.7% in 2013 and 69.53% in the first six month of 2014 in cases of abuses committed by official persons (ill-treatment, forced interrogation and unlawful detention taken together). Further data in this regard are presented in the table below.³⁴

³¹ Act IV of 1978 on the Criminal Code (in force until 1 July 2013), Article 226; Act C of 2012 on the Criminal Code (in force since 1 July 2013), Article 301

³² Act IV of 1978 on the Criminal Code, Article 227; Act C of 2012 on the Criminal Code, Article 303

³³ Act IV of 1978 on the Criminal Code, Article 229; Act C of 2012 on the Criminal Code, Article 310

³⁴ Data received by the HHC from the Chief Prosecutor's Office for research purposes.

	Success rate of prosecution (ill-treatment in official proceeding)	Success rate of prosecution (violence against an official person)
2007	72.1%	96.7%
2008	65.3%	97.0%
2009	68.0%	97.6%
2010	54.5%	96.8%
2011	61.1%	97.8%
2012	65.7%	96.9%
2013	65.0%	96.6%

B) Leniency towards police officers with regard to sentencing

Also, even though the Concluding Observations 2010 sets out that Hungary should ensure that if alleged perpetrators of torture and ill-treatment are convicted, they are "punished with appropriate sanctions" (§ 14), the data on sentencing in cases of ill-treatment versus cases of "violence against an official person" show that judges are definitely more lenient towards official persons ill-treating civilians than the other way round. This is clearly indicated by the tables below, which show that officials are rarely sentenced to effective imprisonment.

	Ill-treatment in official proceeding				Forced interrogation		
	Effective imprisonment	Suspended imprisonment	Fine		Effective imprisonment	Suspended imprisonment	Fine
2007	0.00%	15%	57%		0.00%	40%	30%
2008	1.39%	21%	35%		0.00%	0%	43%
2009	0.00%	18%	46%		0.00%	50%	0%
2010	0.00%	24%	39%		0.00%	0%	33%
2011	5.56%	41%	17%		0.00%	67%	0%
2012	0.00%	34%	23%		0.00%	100%	0%
2013	1.67%	30%	20%		0.00%	50%	0%

	Violence against an official person		
	Effective imprisonment	Suspended imprisonment	Fine
2007	23.11%	45%	18%
2008	17.53%	48%	25%
2009	20.73%	48%	17%
2010	21.05%	51%	15%
2011	27.01%	47%	10%
2012	24.90%	49%	9%
2013	19.61%	56%	7%

C) Eligibility of convicted police officers

In addition to the above, as a negative legislative development, the adoption of Act CLXXXIV of 2011 can be mentioned with regard to the situation of police officers committing a criminal offence. The law above entered into force on 1 January 2012, and amended Act XLIII of 1996 on the Status of Members of the Armed Forces. According to the provision reintroduced into the latter act (which was not in the text of the act for the previous two years), the Minister of Interior became entitled again to decide upon the eligibility of those police officers who were convicted. The new rule makes this possible in case the court imposed a sentence of suspended imprisonment and the criminal act

committed by the police officer presumably does not hinder his/her further services.³⁵ Thus, the amendment entitles the Minister of Interior to allow police officers to continue their work even if they have been convicted for a criminal offence involving ill-treatment, which points into the direction of factual impunity, especially taking into consideration the relatively high proportion of those official persons convicted for ill-treatment or forced interrogation who are sentenced to suspended imprisonment (see the previous section above), and raises serious concerns with regard to the service of the affected police officers.

D) Lack of independent medical examination

The recommendation of the Concluding Observations 2010 that Hungary “should consider establishing an independent medical examination body mandated to examine alleged victims of torture” (§ 14), has not been implemented.

It remained the situation regarding the **placement in police cells** in Hungary that in many cases **physicians employed by the police** are the ones who examine detainees before their placement in the police detention facilities and record their health status, including potential injuries. Thus, a detainee making allegations of ill-treatment by police officers does not have the right to be examined by an independent medical expert or physician; consequently, the chance of undue pressure put by the physicians on detainees presenting injuries still exists. As it is formulated in the CPT’s 2013 report: “the right of access to a doctor as from the outset of deprivation of liberty [...], *including a doctor of one’s own choice*, [emphasis added] is still not formally guaranteed. The CPT recommends that this shortcoming be remedied.”³⁶

In the report of its visit to Hungary in 2013 the CPT also recommended that the decree on the order of police jails is “amended so that a protocol is drawn up and forwarded to a prosecutor whenever injuries are recorded by a doctor which are indicative of ill-treatment, even if the person concerned makes no allegations of ill-treatment”,³⁷ but this recommendation was not complied with either.

E) Presence of officials at medical examinations

Even though the Concluding Observations 2010 also expressed concerns with regard to “the presence of law enforcement personnel during the conduct of medical examinations even when such presence is not requested by the examining medical personnel” (§ 14), no development has been made in this regard. In turn, **the presence of police officers at medical examinations became the main rule**, as presented below, even though the presence of police officers at medical examinations of detainees is a factor which may strongly contribute to the latency of ill-treatment cases and may prevent that police officers committing ill-treatment are called to account.

The problem was originally noted by the CPT, which recommended in the report on its 2009 visit that “all medical examinations are conducted out of the hearing and – unless the health-care professional concerned expressly requests otherwise in a given case – out of the sight of police officers”.³⁸ Allegedly in response to the above recommendation, Order 22/2010. (OT 10.) on the Implementation of the Recommendations of the Council of Europe Committee for the Prevention of Torture (CPT) was adopted by the National Police Chief, which in fact contradicts the CPT’s relevant recommendations, since the National Police Chief made medical examinations in the absence of law enforcement staff an exception and not the rule. Article 8 of the above order runs as follows: “If it does not violate the requirements of the safety of guarding and of personal safety, upon the request of the doctor or the detainee it shall be arranged that the medical examination or treatment be out of the hearing and – if possible – out of the sight of police officers. Compliance with such a request shall be decided by [...] the senior guard supervisor.”

³⁵ Act XLIII of 1996 on the Status of Members of the Armed Forces, Article 56 (6a)

³⁶ *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 3 to 12 April 2013*, CPT/Inf (2014) 13, § 25.

³⁷ *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 3 to 12 April 2013*, CPT/Inf (2014) 13, § 17.

³⁸ *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 24 March to 2 April 2009*, CPT/Inf (2010) 16, § 15.

The CPT criticised this situation in its report on its 2013 visit to Hungary as well, stating the following: "However, the findings of the 2013 visit clearly indicate that police officers were present during virtually all medical examinations carried out on detained persons, irrespective of whether they took place at police establishments or in civil hospitals where detained persons had been sent for an independent medical examination. Moreover, it would appear that medical examinations in hospitals could be carried out in the presence of the same police officers who had allegedly inflicted the ill-treatment. In a few cases, the detained persons claimed that they had been subsequently intimidated. The CPT recommends that the Hungarian authorities amend the relevant instructions to ensure that medical examinations (whether they are carried out in police establishments or in hospitals) are conducted out of the hearing and – unless the health-care professional concerned expressly requests otherwise in a given case – out of the sight of staff with no health-care duties. In order to facilitate the preservation of the confidentiality of medical examinations and treatment, it should be ensured that police holding facilities and the hospital structures concerned have a room available which provides appropriate security safeguards. Further, the Committee recommends that the necessary steps be taken to ensure that the police officers charged with escorting a detained person to hospital for an independent medical examination are not the apprehending officers or other staff dealing with that person's case."³⁹ However, these recommendations of the CPT have not been complied with either.

As far as **penitentiary institutions** are concerned, presence of security personnel at the medical examinations is much less frequent. However, even in 2013 the CPT found "that the practice still persists in certain establishments. This practice violates medical confidentiality and can clearly deter prisoners from drawing health-care professionals' attention to injuries and/or from making allegations of ill-treatment."⁴⁰

Suggested questions:

- *Please provide statistics on the success rate of reports and indictments related to the criminal offences of ill-treatment in official proceeding and forced interrogation. Please provide information on the measures taken to counter the allegedly low success rates of these reports and indictments.*
- *Please provide statistics on the sanctions imposed in cases conducted on the basis of the criminal offences of ill-treatment in official proceeding and forced interrogation. Please provide information on the measures taken to counter the allegedly lenient sentencing practice.*
- *Please provide information on the development of the legal regulation pertaining to the eligibility of convicted police officers and its rationale. Please provide data on the number of police officers in the case of whom the Ministry of Interior decided that they are eligible to continue their service even though they were convicted for ill-treatment in official proceeding or forced interrogation, or any other intentional criminal offence.*
- *Please provide information on whether independent medical examination of detainees allegedly ill-treated by official persons is available in police cells and in penitentiary institutions, and if not, please provide explanation as to why the related recommendations of the Concluding Observations 2010 and the CPT have not been complied with.*
- *Please provide information on the rules and practice of presence of penitentiary staff members at medical examinations. Please provide explanation as to why the presence of police officers at medical examinations was regulated in contrast to the related recommendations of the CPT and the Concluding Observations 2010.*

³⁹ 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 3 to 12 April 2013, CPT/Inf (2014) 13, § 19.

⁴⁰ 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 3 to 12 April 2013, CPT/Inf (2014) 13, § 17.

- Please provide information on the status of complying with the CPT's recommendation that a protocol is drawn up and forwarded to a prosecutor whenever injuries indicative of ill-treatment are recorded by a doctor, even if the person concerned makes no allegations of ill-treatment.
- Please provide information as to whether law enforcement personnel receive training on the prevention of torture and ill-treatment by integrating the Istanbul Protocol of 1999 in all training programmes for law enforcement officials, as recommended by the Concluding Observations 2010 (§ 14).

Article 9 of the ICCPR

PRE-TRIAL DETENTION AND THE UNDERUSE OF ALTERNATIVE COERCIVE MEASURES (ARTICLE 9 (3) AND (4))

Up until 2013 the **number of pre-trial detainees** detained in Hungarian penitentiary institutions **had increased constantly**, and in the last years, **pre-trial detainees constituted almost one-third of the prison population**, contributing to the overcrowding of the penitentiary system. However, in 2014 there was a rather significant drop in the number of pre-trial detainees, which is in correlation with the decrease in the number of prosecutorial motions aimed at the ordering of pre-trial detention and in the number of court decisions ordering pre-trial detention.

The number of pre-trial detainees, their proportion as compared to the total prison population and their number per 100,000 inhabitants

Date	Number of pre-trial detainees*	% of pre-trial detainees as compared to the total prison population*	Number of pre-trial detainees per 100,000 inhabitants**
31 December 2009	4,502	29.3%	45
31 December 2010	4,803	29.6%	48
31 December 2011	4,875	28.4%	49
31 December 2012	4,888	27.9%	49
31 December 2013	5,053	28.0%	51
31 December 2014	4,400	24.6%	44

**Source: data published by the National Penitentiary Headquarters (<http://bv.gov.hu/sajtoszoba>)*

***Own calculation based on the data published by the National Penitentiary Headquarters*

At same time, the **"success rate" of prosecutorial motions aimed at ordering pre-trial detention has remained very high, over 90%** for years. However, as shown by the table below, there has been a significant decrease of 20-21% in the number of motions aimed at ordering pre-trial detention (and, accordingly, in the number of court decisions ordering pre-trial detention) in 2014.

Prosecutorial motions aimed at ordering pre-trial detention and court decisions ordering pre-trial detention prior to filing the bill of indictment

Year	Prosecutorial motions aimed at ordering pre-trial detention	Pre-trial detentions ordered upon a prosecutorial motion	Proportion of prosecutorial motions granted (%)
2009	5,960	5,591	93.8%
2010	6,355	5,885	92.6%
2011	6,245	5,712	91.5%
2012	5,861	5,334	91.0%
2013	6,673	6,098	91.4%
2014	5,319	4,836	90.9%

Source: *Ügyészégi statisztikai tájékoztató (büntetőjogi szakterület) 2013* [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], p. 49, Table 57, <http://mklu.hu/repository/mkudok2832.pdf>; and as to the year 2014 data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee

With regard to the prosecutorial motions it shall be highlighted furthermore that even though the success rate of prosecutorial motions is high in general, certain counties stand out: for example in 2013, 100% of the prosecutorial motions aimed at ordering pre-trial detention were successful in Vas county and 99% of them were successful in Békés county, while in 2014 the success rate was 100% both in Vas and Komárom-Esztergom counties. As to the other end of the scale: in 2013, the success rate of prosecutorial motions was 79.3% and 79.4% in Fejér and Zala counties, respectively, while in 2014 the lowest rates applied in Heves and, again, Zala counties, the rates being 81.8% and 80.6%, respectively.⁴¹

The high success rate of prosecutorial motions seems to support the critical remark often made, along with the criticism that pre-trial detention is used excessively, by defence counsels, namely that courts **accept the reasoning of the prosecution almost automatically**, court decisions on pre-trial detention often **fail to assess** or to give due weight to the defendant's **individual circumstances** and the concrete circumstances of the case, and often fail to consider the possibility of applying alternative coercive measures. Experiences show that court decisions on pre-trial detention are often **custom-made, repetitive** as compared to each other, or basically repeat the submission of the prosecution.

When reviewing the **recent judgments of the ECtHR concerning Hungary in which the violation of Article 5 (3) of the European Convention on Human Rights was established with regard to pre-trial detention issues**, it may be concluded that in all such cases Hungarian authorities were condemned for more or less the same reasons as outlined above: the deprivation of liberty which may be considered justified in the beginning is upheld for an unreasonably long time, in a way that the personal circumstances of the procedure and the defendant are not taken into account, they refer to the risk of frustrating the procedure and/or the risk of absconding automatically (with regard to the latter, usually taking into account exclusively the gravity of the punishment that may be imposed), and do not consider in reality the possibility of applying a less restrictive coercive measure even if the individual circumstances would make it reasonable. Besides, almost all judgments of the ECtHR condemning Hungary in relation to pre-trial detention mention among the grounds for establishing the violation of the Convention that the Hungarian court decisions examined in the given cases do not reflect on the arguments of the defence counsel, do not provide detailed information on the reasons of dismissing them, on taking into account the individual circumstances of the case and the defendant, and on the way these factors have been assessed. The result of this practice is that in many cases the right to a reasoned decision as flowing from Article 5 (4) of the European Court of Human Rights is violated.

Relevant judgments of the ECtHR referred to above include the following:

- *X.Y. v. Hungary* (Application no. 43888/08, Judgment of 19 March 2013)
- *A.B. v. Hungary* (Application no. 33292/09, Judgment of 16 April 2013)
- *Baksza v. Hungary* (Application no. 59196/08, Judgment of 23 April 2013)
- *Hagyó v. Hungary* (Application no. 52624/10, Judgment of 23 April 2013)

At the same time, alternative **coercive measures, such as house arrest or geographical ban, have been heavily underused**: the numbers and proportion of these alternative coercive measures remain very low, even though e.g. in May 2013 the police put into operation the "electronic monitoring system", thus it has become possible also in practice to supervise defendants under house arrest or geographical ban by using an electronic monitoring device following the movement of the

⁴¹ Source: *Ügyészégi statisztikai tájékoztató (büntetőjogi szakterület) 2013* [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], p. 49, Table 57, <http://mklu.hu/repository/mkudok2832.pdf>; and as to the year 2014 data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee.

defendants. (Before that, this possibility existed only theoretically – i.e. it was in the law, but the technical conditions were not in place.)

Alternative coercive measures ordered instead of pre-trial detention prior to filing the bill of indictment

Year	Prosecutorial motions aimed at ordering pre-trial detention	Coercive measures ordered by the court		
		pre-trial detention	geographical ban	house arrest
2009	5,960	5,591	97	57
2010	6,355	5,885	136	97
2011	6,245	5,712	168	104
2012	5,861	5,334	140	141
2013	6,673	6,098	169	148
2014	5,319	4,836	120	114

Source: *Ügyészeti statisztikai tájékoztató (büntetőjogi szakterület) 2013* [Statistical information note of the prosecution (criminal law)], Legfőbb Ügyészség Informatikai Főosztály [IT Department of the Chief Prosecutor's Office], p. 49, Table 57, <http://mklu.hu/repository/mkudok2832.pdf>; and as to the year 2014 data submitted by the Chief Prosecutor's Office upon the data request of the Hungarian Helsinki Committee

Number of coercive measures when the bill of indictment was filed and when the first instance judgment was delivered

When the bill of indictment was filed					
Year	Number of persons accused	Total number of coercive measures	Type of coercive measure*		
			Pre-trial detention	Geographical ban	House arrest
2009	91,263	3,084	2,532	192	56
2010	90,937	3,250	2,668	182	42
2011	93,592	3,322	2,650	151	47
2012	82,948	3,346	2,497	166	61
2013	79,186	3,174	2,509	161	74
When the first instance judgment was delivered					
Year	Number of persons accused	Total number of coercive measures	Type of coercive measure *		
			Pre-trial detention	Geographical ban	House arrest
2009	91,263 (100%)	2,823	2,413 (2.64%)	187	39
2010	90,937 (100%)	2,954	2,468 (2.73%)	233	32
2011	93,592 (100%)	3,089	2,509 (2.71%)	191	44
2012	82,948 (100%)	3,043	2,270 (2.74%)	211	59
2013	79,186 (100%)	2,925	2,358 (2.98%)	216	54

Source: *A büntetőbíróság előtti ügyészi tevékenység főbb adatai I. – 2013.* [Main data on prosecutorial activity before criminal courts – Year 2012], Legfőbb Ügyészség [Chief Prosecutor's Office], pp. 51 and 54, <http://www.mklu.hu/repository/mkudok403.pdf>

*Detailed data on 72-hour detention and temporary mandatory mental treatment are not included in the table, but are included in the total number of coercive measures as included in the table.

As a development giving rise to serious human rights concerns also in light of the case law of the ECtHR, as of 18 November 2013 **the length of pre-trial detention became unlimited in certain cases**, i.e. no upper time limit applies to pre-trial detention if the criminal procedure is conducted against the defendant for a criminal offence punishable with up to 15 years of imprisonment or life-long imprisonment, pending a first instance judgment. Thus, in these cases the first instance criminal procedure may be conducted for as long as the authorities want, while the defendant remains in pre-trial detention. The amendment introducing this possibility was a politically motivated reaction to an individual case, the escape of the members of the "Ároktő gang". Two members of the latter gang, accused of criminal offences against life, spent four years in pre-trial detention, i.e. the statutory maximum time period possible at the time, and during this time no first instance judgment was reached in their case, so their pre-trial detention had to be lifted. They were put under house arrest, from which they escaped on 4 October 2013, but were captured a few days later. As a reaction to this case (which triggered wide media coverage), the Government submitted already on the day of the

gang members' escape – on 4 October 2013 – a draft Bill aimed at abolishing the four-year upper time limit which applied in these cases earlier. In order to prevent that a third gang member is released on the basis of the statutory maximum four-year time limit (which was due on 22 November 2013), the above Bill was adopted already on 11 November by deflecting from the House Rules of the Parliament, and the amendment came into force already on 19 November 2013.⁴² In January 2014 the HHC and the Eötvös Károly Institute turned to the Commissioner for Fundamental Rights (the Ombudsperson of Hungary), requesting the Commissioner to initiate that the Constitutional Court abolishes the above new rule, violating the right to personal liberty. Upon the above request, in March 2015 the Commissioner for Fundamental Rights motioned the Constitutional Court to abolish the respective provisions of Act XIX of 1998 on the Code of Criminal Procedure (CCP), taking up the standpoint in its motion that it flows from the principle of the rule of law and the fundamental right to personal liberty that it is necessary for pre-trial detention to have a statutory maximum length.⁴³ The Constitutional Court has not delivered a decision in the case yet.

As far as the issue of execution is concerned, it shall be highlighted that the **pre-trial detention of juveniles between the age of 14 and 18 may also be executed in a penitentiary institution instead of a juvenile reformatory** (having a less strict regime) upon the decision of the court if the interests of the criminal procedure require so, even if the defendant's personality and the nature of the offence he/she is charged with would not require this. Due to the fact that the number of juvenile reformatories is low, this provision serves as the basis of the quite regular practice that if there is no juvenile reformatory at the seat of the proceeding investigation authority, prosecution or court, the juvenile pre-trial detainee is placed in a penitentiary institution. Thus, considerations related to procedural economy may overrule the best interests of the child, theoretically having priority. This is especially problematic because the conditions in juvenile reformatories are significantly better than those in juvenile penitentiaries in several aspects (physical conditions, access to education, number of staff, etc.)⁴⁴

Suggested questions:

- *Please provide statistics on the total prison population and the number and proportion of pre-trial detainees compared to convicted prisoners.*
- *Please provide information on the measures taken in order to address the deficiencies of the practice pertaining to pre-trial detention decision-making as highlighted by recent judgments of the European Court of Human Rights concerning Hungary in which the violation of Article 5 of the European Convention on Human Rights was established.*
- *Please provide information on the number and proportion of pre-trial detentions compared to alternative coercive measures (house arrest, etc.) applied. Please provide information on the law and practice of applying electronic monitoring device following the movement of the defendants (used for supervising the defendants under a house arrest or a geographical ban), including statistics and reasons of possible underuse. Please also provide information on the efforts to have the application of alternatives to pre-trial detention increased.*
- *Please provide information on the average duration of pre-trial detention.*
- *Please provide information on the rules of "unlimited" pre-trial detention in the case of criminal procedures conducted against the defendant for a criminal offence punishable with up to 15 years of imprisonment or life-long imprisonment, the new rule's rationale, and on the number of detainees affected by this possibility.*

⁴² For an English summary of the issue, see: http://helsinki.hu/wp-content/uploads/UNWGAD_HUN_HHC_Addendum_25November2013.pdf.

⁴³ For an English summary of the request and the motion, see: <http://www.fairtrials.org/press/guest-post-hungarys-perpetual-pre-trial-detention/>.

⁴⁴ In more detail, see: *Children Deprived of Liberty in Central and Eastern Europe: Between Legacy and Reform*. Bulgarian Helsinki Committee, 2014 http://helsinki.hu/wp-content/uploads/BHC_2014_Children_Deprived_of_Liberty_EN.pdf, pp. 400–403.

- *Please provide information on the law and practice of determining the place of executing the pre-trial detention of juveniles.*
- *Please provide information on the training received by prosecutors and judges on the case law of the European Court of Human Rights pertaining to pre-trial detention and coercive measures.*

DEFENDANTS' RIGHT TO BE INFORMED **(ARTICLE 9 (2))**

In the Hungarian system, in the trial phase the defence has unrestricted access to the files of the criminal case. As opposed to that, until 1 January 2014 access to case files was rather limited in the investigative phase: the defence had unrestricted access only to the expert opinions and the minutes of those procedural acts where the defendant and the defence counsel may be present, while the rules of the CCP allow for the presence of the defence counsel practically only at the hearing of the defendant, the hearing of witnesses whose hearing was initiated by either him/her or the defendant, and confrontations held with the participation of the latter kind of witnesses.⁴⁵ Access to further materials of the case was granted to the defence only if allowing access did not pose a threat to the "interests of the investigation".⁴⁶

It was a significant change in this regard that, in order to comply with Article 7 (1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (Right to Information Directive), the CCP was recently amended (leaving the above provisions regulating access to case materials in general intact). As a result, since 1 January 2014 Article 211 of the CCP sets out that if the prosecutorial motion is aimed at ordering pre-trial detention, the copy of those files of the investigation on which the prosecutorial motion is based shall be attached to the motion submitted to the defendant and the defence counsel. Furthermore, since 1 July 2015 Article 211 the CCP also sets out if the prosecutorial motion is aimed at prolonging pre-trial detention, the copy of those files of the investigation on which the prosecutorial motion is based and which emerged since the last decision pertaining to pre-trial detention shall be attached to the motion submitted to the defendant and the defence counsel.⁴⁷

This was a significant step also because in the last years the ECtHR delivered many decisions establishing that the former Hungarian legal provisions restricted access to case files – and, accordingly, access to evidence on which pre-trial detention is based – to such an extent in the investigative phase which amounted to the violation of the principle of the equality of arms, and, accordingly, Article 5 (4) of the European Convention on Human Rights.⁴⁸ However, in the absence of respective research data there is no information available yet as to how restrictively or broadly authorities interpret the new rules, and, in addition, the amendments do not entirely comply with the Right to Information Directive since it allow the authorities not to submit to the defence case materials which would raise doubts as to the existence of any of the grounds for pre-trial detention, violating the principle of equality of arms.

It is an unfavourable development with a view to access to case materials and it undermines the practical effect of the amendment that the Criminal Law Chamber of the Budapest Regional Court took the following standpoint in its chamber opinion 2/2014. (III. 3.) BK: "It is not an obstacle to holding a hearing if the motion is aimed at ordering pre-trial detention and the prosecution failed to submit the copy of the case materials substantiating the motion to the suspect and the defence counsel." Even though the chamber opinion adds that "in the later phase of the [criminal procedure] it cannot be omitted to examine whether the right to defend oneself and the right to defence fully prevailed or

⁴⁵ CCP, Article 186 (1) and 184 (2)

⁴⁶ CCP, Article 186 (2)

⁴⁷ CCP, Article 211 (1a)

⁴⁸ See e.g.: *X.Y. v. Hungary* (Application no. 43888/08, Judgment 19 March 2013), *A.B. v. Hungary* (Application no. 33292/09, Judgment of 16 April 2013), *Baksza v. Hungary*, App 59196/08, 23 April 2013; *Hagyó v. Hungary*, (Application no. 52624/10, Judgment of 23 April 2013).

not” that does not change the fact that according to the chamber opinion a hearing may be held and a decision may be delivered without the defence getting access to the case materials.

In addition, the CCP does not set out any deadline as to how long before the hearing or decision the motion and the attached documents shall be submitted to the defence, and does not set out any deadline as to the time of notifying the defence counsel about the hearings related to pre-trial detention.

Suggested questions:

- *Please provide information on the rules and practice concerning right to information (access to the materials of the case) in the course of the criminal procedure regarding the grounds for pre-trial detention.*
- *Please provide information on the rules and practice on holding a hearing or deciding on pre-trial detention in case the rules on providing access to the defence to case materials are not complied with.*
- *Please provide information on the rules and practice with regard to the time of notifying the defence counsel about the hearings related to pre-trial detention and for submitting the prosecutorial motion aimed at pre-trial detention and related files of the investigation to the defence before the hearing or the respective decision.*
- *Please provide information on the steps taken to ensure that in practice, defence counsels are notified about the hearings related to pre-trial detention within a deadline which makes it realistically possible for them to appear at the hearing; and that the prosecutorial motion aimed at pre-trial detention and related files of the investigation are submitted to the defence before the hearing or the respective decision within a deadline which makes it realistically possible for the defence to get prepared for the hearing, make submissions or motions, obtain documents, etc.*

INEFFECTIVE JUDICIAL REVIEW OF ALIEN POLICING DETENTION AND ASYLUM DETENTION

In 2013, the **Hungarian Supreme Court (Kúria)** published an opinion which concluded that the **periodic judicial review of alien policing detention is ineffective**.⁴⁹ The Supreme Court uncovered a number of **systemic deficiencies and even legal errors** in the judicial review of alien policing detention, which is supposed to ensure that the such forms of detention are only used as a last resort, if no less harmful alternative measures are applicable and where all conditions set out by law are fulfilled. The Supreme Court arrived at a similar conclusion with regard to the (structurally very similar) **periodic judicial review of “asylum detention”**, the specific legal regime for the detention of asylum-seekers.⁵⁰ In both opinions, the Supreme Court made numerous **concrete recommendations**, in order to guide judicial practice, but also envisaging **structural changes indispensable for rendering the judicial review effective**. Such structural changes are dependent on legislative rules and therefore fall under the direct competence of the Government.

By the time of writing, **none of these recommendations have been implemented**. This results in the government-sponsored maintenance of a practice that **massively exposes foreigners (and asylum-seekers among them) to potentially unlawful detention**.

Suggested questions:

⁴⁹ http://www.lb.hu/sites/default/files/joggyak/idegenrendezeti_osszefoglalo_velemenyny_kuria.pdf

⁵⁰ http://www.lb.hu/sites/default/files/joggyak/menekultugyi_jecs_osszefoglalo_velemenyny_2014okt20.pdf

- *Through what concrete measures did the Government implement the 2013 and the 2014 recommendations of the Supreme Court?*
- *Through what concrete measures does the Government wish to effectively implement the 2013 and 2014 recommendations of the Supreme Court, and what is the envisaged time frame of these measures?*

Article 14 of the ICCPR

PROBLEMS RELATED TO THE EX OFFICIO APPOINTED DEFENCE COUNSEL SYSTEM

Surveys of various actors and empirical studies show that the Hungarian system of the ex officio appointment of defence counsels (who provide criminal legal aid to indigent defendants) suffers from severe deficiencies. Such counsels often fail to participate in proceedings in the investigative stage (do not contact their clients, fail to attend interrogations and remain passive even when present), and the **quality of their performance is believed by all actors of the procedure to be worse than that of retained counsels.**

In the HHC's view one of the central problems related to the ex officio defence counsel system is the way defence counsels are appointed: the low quality of ex officio defence work is to a great extent also due to the fact that **the authorities** (including the investigative authorities, i.e. in most cases the police) **are completely free to choose the lawyer** to be appointed under Article 48 (1) of the CCP, thus the authorities are not obliged in any way to consider the wishes of the defendant. (Under Article 35 of Act XI of 1998 on Attorneys at Law, the competent bar association keeps a register of those attorneys who can be appointed as defence counsels, and the authority conducting the actual phase of the procedure chooses from this list.) Thus, during the investigation the legal aid lawyer is selected by the police, which – by its nature – are not interested in efficient defence work. Empirical studies and data show that some attorneys base their entire practice on appointments, and so they **may become financially dependent on the police officer deciding on the appointments.** This situation is prone to a form of corruption, as the lawyer's financial interest may have a negative impact on the quality of his/her work, and as a whole poses a severe **threat to effective defence.** Since no entity monitors the appointment practice, and no data are made available on the issue, related police practices lack any transparency.

In the framework of its latest research regarding the issue, the HHC requested data concerning the names of appointed counsels and the number of cases in which they were appointed in 2008 from police headquarters, as a result of which a database containing the related data of 36 local police headquarters, 7 Budapest district police headquarters and 6 county police headquarters was established. Data analysis clearly demonstrated that **the practice of having "in-house" ex officio defence counsels at police headquarters is widespread**, and that in-house lawyers deal with a **significant, sometimes irrational amount of cases.**⁵¹ At 19 police organs the same attorney was appointed in more than one third of all cases. One of the highest percentages in this regard was 82% at the Kiskőrös Police Headquarters, where 295 criminal cases were dealt with by the same defence counsel out of the total of 358 cases in 2008. At the Siófok Police Headquarters the most frequently appointed attorney defended clients in 276 cases, amounting to 70% of all ex officio criminal cases handled by the police unit in that year (393). When analyzing the data, the HHC has examined what percentage of the cases the three most frequently appointed attorneys take per unit, and revealed significantly disproportionate practices in this regard as well. At 34 police headquarters the three most frequently appointed defence counsels were chosen by the police in more than 50% of the cases, the percentage exceeding 70% at 19 police headquarters.

⁵¹ For the latest research report of the HHC in this regard, see: András Kristóf Kádár – Nóra Novoszádek – Adrienn Selei: *Ki rendelt itt védőt? – Egy alternatív védőkirendelési modell tesztelésének tapasztalatai*, Magyar Helsinki Bizottság, Budapest, 2012, available in Hungarian at: http://helsinki.hu/wp-content/uploads/MHB_Ki_rendelt_itt_vedot_2012.pdf.

The table below shows examples of the highest results in terms of appointments per year received by the same single attorney and the percentage of appointments the same attorney takes a year.

Ex officio counsel's cases per year	Police headquarters	% as compared to the total number of appointments
453	Nyíregyháza Police Headquarters	23%
372	Kecskemét Police Headquarters	54%
295	Kiskőrös Police Headquarters	82%
289	Győr Police Headquarters	37%
276	Siófok Police Headquarters	70%
265	Miskolc Police Headquarters	29%
232	Tatabánya Police Headquarters	58%
207	Székesfehérvár Police Headquarters	31%
205	Gödöllő Police Headquarters	45%
200	Miskolc Police Headquarters	22%

Suggested question:

- *Please provide information on how the Government aims to ensure that ex officio appointed defence counsels are selected and work independently of investigating authorities, and on how the Government aims to prevent the police from appointing "in-house" lawyers.*

LACK OF PRESENCE AND LATE NOTIFICATION OF THE DEFENCE COUNSEL

Under the Hungarian law the defence is mandatory in certain cases (e.g. if the defendant is detained, if the defendant is a juvenile, etc.), and in these case defendants either have to retain a lawyer, or an ex officio defence counsel shall be appointed for them. If the suspect's detention is ordered, it shall be guaranteed that he/she can retain/get appointed a lawyer before the first interrogation.⁵² However, **not even the mandatory nature of defence requires the presence of the defence counsel at individual procedural acts in the investigative phase** of the criminal proceeding – thus, if the notified counsel fails to show up for any reason, it will not prevent the investigative authority from interrogating the defendant. (The situation is different in the judicial phase: if defence is mandatory, no hearings may be held without the defence counsel's presence.)

In terms of the legal provisions, with the exception of urgent investigative acts, the defence counsel shall be notified in due course, at least 24 hours beforehand about all the investigative acts that he/she may be present at.⁵³ This however still may not mean that the defence counsel actually has the chance to be present because there is no obligation on the investigating authority to actually wait for him/her. Practitioners also claim that the **notice given is often very short, or sent in a way that the chances of the lawyer receiving the notification are practically non-existent** (e.g. sending a fax to the lawyer's office during the night). Furthermore, while the CCP prescribes that the defence counsel should contact the defendant without delay and to use all lawful means and methods of defence at the appropriate times in the defendant's interests⁵⁴ (which of course include participation of the defence counsel at all investigative acts open to him/her), if the defence counsel fails to fulfil these obligations, he/she will commit an ethical misdemeanour at most, but this will not prevent the investigative authority from interrogating the defendant or confronting him/her with any witnesses testifying against him/her.

As examples for late notifications, the following may be cited from a recent research of the HHC, in which a considerable proportion of defence counsels were notified within one hour before the

⁵² Joint Decree 23/2003. (VI. 24.) of the Minister of Interior and the Minister of Justice on the Detailed Rules of Investigation Conducted by Organisations under the Minister of Interior, Article 6

⁵³ Joint Decree 23/2003. (VI. 24.) of the Minister of Interior and the Minister of Justice on the Detailed Rules of Investigation Conducted by Organisations under the Minister of Interior, Article 9 (2)

⁵⁴ CCP, Article 50 (1)

defendant's first interrogation. Within this group of notifications, there were some that cannot be de facto regarded as "notifications" due to the extremely short notice, as shown by the following examples.⁵⁵

Time of notification	Beginning of interrogation
7:53	8:10
14:25	14:29
12:00	12:03
1:49	2:20*
8:00**	8:00**

* The beginning of the interrogation was originally set for 2:00.

** The time of notification via mobile coincided with the beginning of the interrogation.

Suggested question:

- *Please provide information on the rules and practice of the presence of defence counsels at procedural acts in the investigative phase.*
- *Please provide information on the measures taken to ensure that defence counsels are notified about procedural acts in due course, thereby guaranteeing effective access to a lawyer for defendants.*

LACK OF VIDEO RECORDING OF INVESTIGATIONS

The video recording of interrogations is not obligatory in Hungary. Under Article 167 of the CCP, the prosecutor or the investigative authority may order that procedural acts (including interrogations) be audio or video recorded. Upon the request of the victim, the defendant or the defence counsel the recording is mandatory, but only if they advance the costs of such recording. Thus, the recommendation of the Concluding Observations 2010 saying that Hungary should "provide free video-recording services so that indigent suspects are not deprived of their rights by virtue of their economic status" (§ 13) has not been fulfilled.

Furthermore, defendants are not warned about the possibility of recordings, so if a defendant does not have a defence counsel, he/she is unlikely to be aware that he/she may put forth such a motion. In addition, witnesses may not even request that such recording is made, even though they also may be subjected to undue pressure or ill-treatment during police interrogations.

In addition, the below data received from the National Police Headquarters show that there are **very few police stations or police detention facilities where the audio or video recording of interrogations would be feasible** at all, and that **interrogations are recorded extremely rarely** by the police: e.g. **in 2014 only 0.026% of the interrogations of defendants was recorded.** (This is also particularly worrying since the obligatory recording of interrogations – or, as a minimum, a large increase in their numbers – would obviously make the investigation into allegations of ill-treatment committed during or in relation to interrogations more effective and would also prevent such incidents – see comments made in relation to Article 7 and 10 of the ICCPR in this regard.) The respective information provided by the National Police Headquarters goes as follows:

"The Police have 2,071 such rooms where an interrogation may be conducted, and the possibility of image and sound recording is ensured in only 62 of them (in 3% of the rooms concerned). With regard to the interrogation rooms, it needs to be emphasized by all means that a significant part of them does not only serve for conducting interrogations, but [...] staff members also carry out their other official duties in these rooms. (...) The Somogy, Hajdú-Bihar, Pest and Veszprém

⁵⁵ In more detail, see: Anna Bárdits – András Kristóf Kádár – Nóra Novoszádek, Bori Simonovits – Dóra Szegő – Dániel Vince: *Last Among Equals – The equality before the law of vulnerable groups in the criminal justice system.* Hungarian Helsinki Committee, Budapest, 2014, http://helsinki.hu/wp-content/uploads/HHC_Last_Among_Equals_2014.pdf, pp. 114–116.

County Police Headquarters did not have an account for the data required as to the number of interrogations of suspects, victims or witnesses, and the interrogations of defendants⁵⁶ conducted in the framework of a criminal procedure, and so did not submit any data, while the Fejér, Győr-Moson-Sopron, Szabolcs-Szatmár-Bereg, Tolna and Zala County Police Headquarters and the Airport Police Directorate provided only partial data.⁵⁷

Taking into consideration the above, the data at our disposal concerning the investigative authorities of the Police may be summarised as follows:

Number of interrogations of suspects, victims or witnesses conducted in the framework of a criminal procedure			Number of interrogations recorded by an image and sound recording device			Proportion in % of interrogations recorded by an image and sound recording device		
2012	2013	2014	2012	2013	2014	2012	2013	2014
527,618	483,495	363,565	32	72	74	0.006%	0.014%	0.020%

Number of interrogations of defendants			Number of interrogations recorded by an image and sound recording device			Proportion in % of interrogations recorded by an image and sound recording device		
2012	2013	2014	2012	2013	2014	2012	2013	2014
136,442	132,033	100,925	19	31	27	0.013%	0.023%	0.026%

Suggested questions:

- *Please provide information on the number of police stations and police detention facilities where the audio or video recording of interrogations is feasible and, on the measures taken to increase the number of such police stations and police detention facilities, and on the measures taken to increase the number of interrogations recorded.*
- *Please provide information on accessibility of the audio or video recording of interrogations for defendants and witnesses, including the information they receive about this opportunity preceding interrogations and the accessibility for indigent persons.*

⁵⁶ Remark of the HHC: the term "defendant" ("terhelt" in Hungarian) is used to refer to the subject of the criminal procedure, irrespective of the actual phase of the procedure: i.e. the suspect ("gyanúsított" in Hungarian), the accused and the convict. It is not entirely clear from the answer of the National Police Headquarters whether the usage of two different terms – "defendant" and "suspect" – in the two tables above has any significance, but is it safe to assume that the first table includes the overall number of interrogations, whereas the second table includes the number of interrogations of suspects.

⁵⁷ Remark of the HHC: Hungary has 19 counties, and, consequently, 19 county police headquarters, and the Budapest Police Headquarters for the capital, which also qualifies as a county-level police headquarters.