



Hungarian Helsinki Committee

HUNGARIAN HELSINKI COMMITTEE

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4 March 2016

BACKGROUND MATERIAL

on the execution of the judgments of the European Court of Human Rights in the *István Gábor Kovács v. Hungary* group of cases and the case *Varga and Others v. Hungary*

Dear Madam/Sir,

The **Hungarian Helsinki Committee** (HHC) is respectfully providing background information regarding the execution of the judgments of the European Court of Human Rights (ECtHR) reached in the *István Gábor Kovács v. Hungary* group of cases and the case *Varga and Others v. Hungary* (Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, Judgment of 10 March 2015), and the Hungarian Government's updated action plan of 14 December 2015 (hereafter: "Updated Action Plan").

About the HHC

The HHC is a leading human rights organisation in Hungary, founded in 1989. It monitors the enforcement of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC's main areas of activities are centred on monitoring the human rights performance of law enforcement agencies and the judicial system, as well as on protecting the rights of asylum seekers and foreigners in need of international protection. It particularly focuses on the conditions of detention and the effective enforcement of the right to defence.

For 20 years the HHC has been running a detention monitoring program, covering police jails, penitentiary institutions, and places of immigration and asylum detention. Along with publishing its monitoring findings and its related research results, the HHC submitted numerous reports and communications to various international forums in relation to detention conditions in Hungary, including communications to the Committee of Ministers of the Council of Europe in relation to the execution of the European Court of Human Rights judgments in the *István Gábor Kovács v. Hungary* and *Szél v. Hungary* cases.¹ In addition, the HHC's attorneys have successfully litigated cases related to the conditions of and treatment in detention in Hungarian penitentiaries both before domestic forums and the ECtHR,² including the cases of three applicants in the *Varga and Others v. Hungary* case, and three further applicants with respect to whom the ECtHR established in December 2015 and in January 2016 that their rights under Articles 3 and 13 of the European Convention on Human Rights had been violated.

Summary of the HHC's view on the execution of the concerned judgments

The HHC is convinced that **the general measures outlined by the Hungarian Government in the Updated Action Plan are in themselves insufficient to comply with the requirements included in the pilot judgment reached in the *Varga and Others v. Hungary* case, fail to address systemic**

¹ See the HHC's previous submissions under Rule 9 (2) of the "Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements", submitted in November 2014 and January 2015: [DD\(2014\)1527](#), [DD\(2015\)231](#).

² See e.g.: *Engel v. Hungary* (Application no. 46857/06, Judgment of 20 May 2010), *Csüllög v. Hungary* (Application no. 30042/08, Judgment of 7 June 2011).



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deficiencies, and mostly fail to take into account the various relevant recommendations of the Committee of Ministers in the field and the relevant CPT recommendations and standards. The problems related to the execution of the pilot judgment (to be detailed below) may be summarised as follows:

- **In contrast to what is suggested by the Updated Action Plan, in reality no effective compensatory remedy is available for detainees whose rights are violated due to overcrowding in penitentiary institutions. A sui generis remedy should be introduced to provide compensation for damages arising from overcrowding.**
- **There is no preventive remedy available for detainees whose rights are violated due to overcrowding, even though this was also recommended by the pilot judgment. Solutions developed by Italy in response to the Torreggiani-judgment should be adapted by the Hungarian authorities.**
- **In contrast to the recommendations of the pilot judgment, the Hungarian Government intends to solve the problem of overcrowding almost exclusively by building prisons. Governmental measures aimed at decreasing the prison population should be upgraded.**

In addition, the inadequacy of the individual measures is shown by the fact that **at the time of submitting the Updated Action Plan, all but one applicants affected by the pilot judgment** (i.e. those who were not yet released) **were still detained in cells where their living space was below the international standards** (having a living space of 1.95, 2.28 and 1.84 square meters, respectively).³

LACK OF A COMPENSATORY REMEDY

In the pilot judgment reached in the *Varga and Others v. Hungary*, the ECtHR concluded that "the national authorities should promptly provide an effective remedy or a combination of remedies, both preventive and compensatory in nature and guaranteeing genuinely effective redress for Convention violations originating in prison overcrowding" (§ 110.). In response, the Updated Action Plan claims that Act V of 2013 on the Civil Code, i.e. the New Civil Code of Hungary introduced a "new kind of compensation" which "shall be considered to be an effective remedy",⁴ although the document itself admits that

- this is dependent on the developments in domestic case-law (which cannot be assessed at this point)⁵ and
- a sui generis compensation may need to be adopted.⁶

In the HHC's view, it is highly unlikely that the domestic case law will develop in a direction, which makes civil claims into violations of personality rights an effective remedy in relation to overcrowding.

It is true that the New Civil Code introduced a new type of compensation connected to the infringement of personality rights (called "*sérelemdíj*"), but providing monetary compensation for the violation of personality rights, such as the violation of human dignity, was also possible under Act IV of 1959 on the Civil Code, i.e. the Old Civil Code.

The problem lies in the fact that both the Old and the New Civil Code make liability for damages dependent on whether the person causing the damage was at fault for the behaviour that has caused the damage.

³ See p. 5. of the Updated Action Plan.

⁴ See p. 10. of the Updated Action Plan.

⁵ See p. 10 of the Updated Action Plan

⁶ See p. 11 of the Updated Action Plan



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This rule is included in the New Civil Code under § 6:519 [General rule of liability] with the following wording: „Any person who causes damage to another person unlawfully shall provide compensation for the damage. The person causing the damage shall be relieved of liability if he/she proves that he/she was not at fault for his/her action.”⁷ (It shall be added that the Updated Action Plan does not contain an explicit reference to this provision, even though it cites both the articles preceding and following it. There is only an implicit reference to the fact that “non-contractual liability remained to be linked to the culpability of the injuring party”.⁸)

If someone is relieved from liability, there is no possibility to oblige him/her to provide any compensation. The rules on the newly introduced “*sérelemdíj*” shall be applied in conjunction with the general rules of liability, and – as also mentioned by the Updated Action Plan on p. 10. – the amount of the compensation shall be determined e.g. on the basis of the “degree of culpability”.

Since there has been no change in the basic rules of liability for damages, it is not highly likely that the Hungarian courts will divert from jurisprudence, according to which due to their statutory obligation to place all the detainees sent to them by the courts, they are not at fault for the overcrowding, therefore, they **could not be held liable for accommodating detainees on the basis of court orders** (cf. *Varga and Others*, § 56.). Thus, civil law actions launched due to overcrowding on the basis of the New Civil Code are more than likely to be just as futile and ineffective as the earlier civil law actions launched under the Old Civil Code, resulting in the violation of Article 13 of the European Convention on Human Rights.

Thus, in contrast to what is claimed by the Updated Action Plan, **the New Civil Code has not brought along any systemic changes in terms of remedies** available for detainees. Accordingly, **the pilot judgment’s conclusions regarding the lack of an effective remedy offering “both a reasonable prospect of success and adequate redress” still apply** (cf. *Varga and Others v. Hungary*, § 59).

Recommendations

The introduction a sui generis remedy (not requiring culpability to establish liability for damages – both pecuniary and non-pecuniary – arising from overcrowding) is indispensable if Hungary wishes to properly comply, with the requirement of putting into place a compensatory remedy. It needs to be mentioned that in relation to the unreasonable length of civil procedures, such a remedy (independent of culpability) has already been put into place, so this solution would not be unprecedented.

Another possible solution is to establish in a law the liability of the Hungarian State for damages arising from overcrowding.

LACK OF A PREVENTIVE REMEDY

Even though the pilot judgment explicitly concluded that the national authorities should promptly provide “both preventive and compensatory” remedies (cf. *Varga and Others v. Hungary*, § 110), **the Hungarian Government failed to take any steps to introduce any kind of preventive remedies.** The “sui generis remedy” envisaged by the Updated Action Plan seems to be confined to “the monetary compensation of detainees whose rights have been infringed”, thus, does not seem to qualify as a “preventive” remedy

⁷ The original Hungarian text goes as follows: „[A felelősség általános szabálya] Aki másnak jogellenesen kárt okoz, köteles azt megtéríteni. Mentesül a felelősség alól a károkozó, ha bizonyítja, hogy magatartása nem volt felróható.”

⁸ See p. 9. of the Updated Action Plan and references to § 6:518 and § 6:520 of the New Civil Code.



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either. **Hence, the Updated Action Plan does not even mention the possibility of introducing such remedies.**

Since the applicability of some preventive remedies is highly dependent on the capacities of the prison system (a person cannot be placed under less cramped conditions upon a complaint until the whole prison system remains overcrowded), and since not even according to the Governmental plans will the prison building program bring the occupancy rate close to 100% until 2019 (i.e. for another three years), the HHC is of the view that in the meantime the reduction of sentences in the case of inmates held under unacceptable conditions could be an acceptable solution (c.f. Italy's measures in response to the Torreggiani-judgment.)

Recommendations

Until the time that the occupancy rate comes close to 100% and therefore complaints of overcrowding can be remedied by placing the complainant inmates under Article 3 compliant circumstances, the reduction of sentences to be served under overcrowded conditions should be considered (with the appropriate adaptation of the Italian measures taken to execute the Torreggiani judgment).

DEFICIENCIES OF GOVERNMENTAL MEASURES AIMED AT DECREASING OVERCROWDING

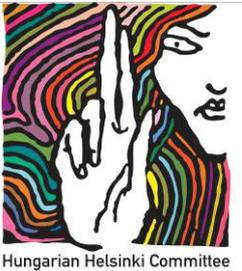
The pilot judgment reached in the *Varga and Others v. Hungary* case reminded that "it has been the constant position of the Court and all Council of Europe bodies that the most appropriate solution for the problem of overcrowding would be the reduction of the number of prisoners by more frequent use of non-custodial punitive measures [...] and minimising the recourse to pre-trial detention" (§ 104). However, as presented in detail below, for the time being **the Hungarian Government intends to solve the situation almost exclusively by building prisons, and measures taken to decrease the prison population remained very limited.**

A) Lack of change in the criminal policy and the law

In its communications submitted to the Committee of Ministers earlier regarding the *István Gábor Kovács v. Hungary* and the *Szél v. Hungary* cases, the HHC presented in detail why several of the legislative steps taken by the Hungarian Government in the last years contributed to the overuse of incarceration and the increase of the prison population. The main examples in this regard may be summarised as follows:

- Act C of 2012 on the Criminal Code (the New Criminal Code, which came into force in July 2013) applies harsher sentences, and also inflicts more severe sentences e.g. by setting out a significantly stricter way to count the median of the imprisonment to be imposed by judges.
- The New Criminal Code maintained actual life imprisonment without the possibility of parole, and applies a "three strikes rule" which under certain circumstances makes it obligatory for judges to sentence certain violent offenders to actual life imprisonment without the possibility of parole.
- After 2010, the range of petty offences (misdemeanours) punishable with confinement has been widened, and since petty offence confinement shall be executed in a penitentiary institution, this contributes to the overcrowding.

Since the pilot judgment, **no legislative steps have been taken to ease the harsh criminal policy realized by the legislative provisions referred to above.**



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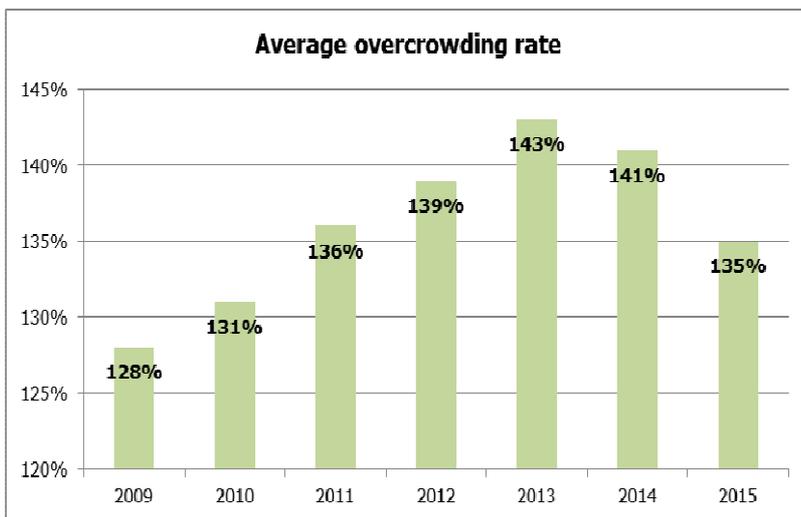
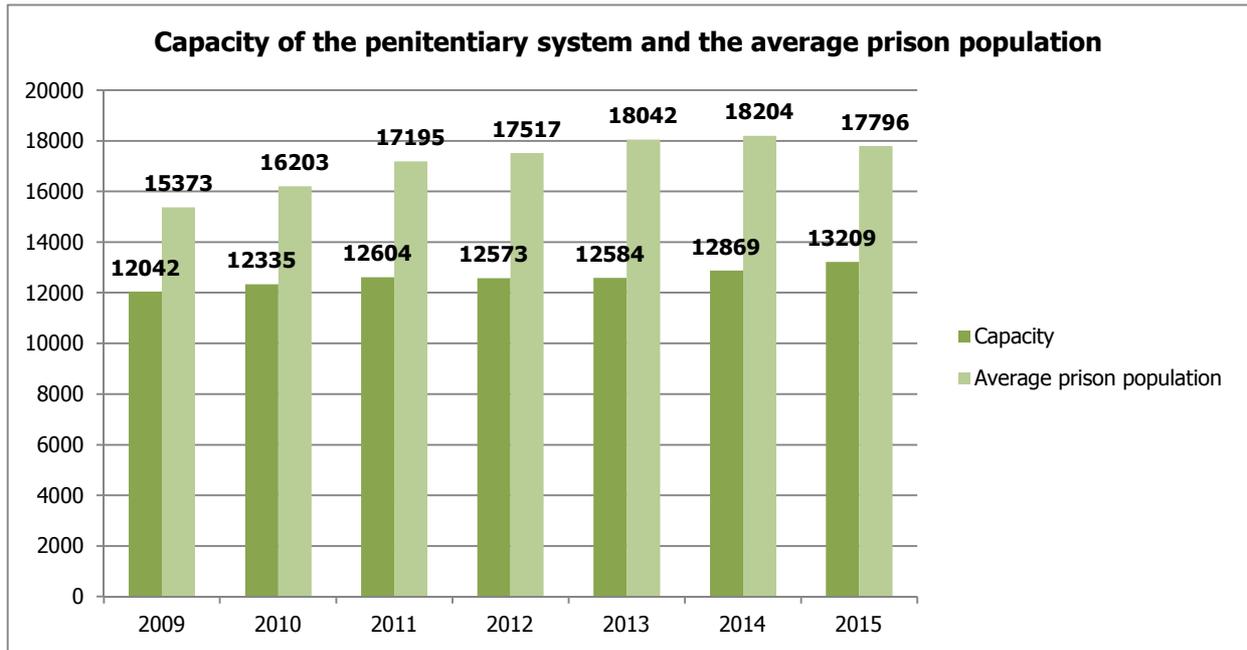
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B) *Number of detainees v. planned capacity increase⁹*

It is an undoubtedly positive development that the average prison population decreased for the first time for years in 2015, and, together with expanding the capacity of the penitentiary system, this resulted in a decrease in the average overcrowding rate as well, being 135% in 2015.



As presented by the Updated Action Plan, if everything goes according to the plans, by 2019 (thus, 3-4 years from now), altogether 4,374 new places will be established in the penitentiary system. Added to the currently available places, this will mean that **theoretically, the Hungarian penitentiary system will be able to accommodate altogether 17,583 detainees by the end of 2019, which is still lower than the average prison population was in 2015.** This shows that the construction of new prisons and/or units is a very time-consuming exercise, which may offer some kind of a solution

⁹ In terms of the years 2009–2014, the source of the numbers included in this section is the website of the National Penitentiary Headquarters (particularly its annual reports at <http://bv.gov.hu/evkonyv> and its press materials under <http://bv.gov.hu/sajtoszoba>). The source for the numbers pertaining to the year 2015 is a press release of the National Penitentiary Headquarters, issued on the experiences of last year, and a response from the National Penitentiary Headquarters to the HHC's FOI request, dated 10 February 2016 (reference: 30500/536-1/2016.).



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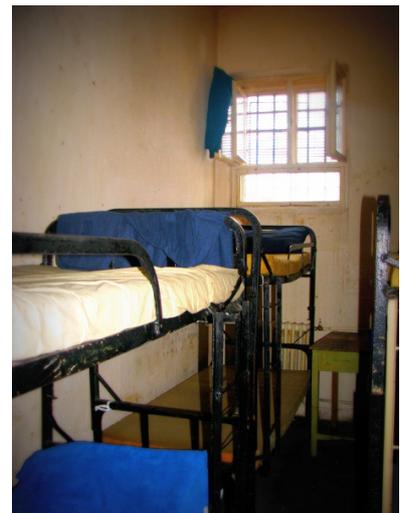
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only in the long run, and only if the decrease of the prison population continues (or at least stagnates). **However, the Government has not taken any steps to ensure that the decrease – which was detectable only last year – continues.**

In addition, it has to emphasized, that the numbers above show the *average* overcrowding rate and the *average* prison population per year, and experience shows that **in certain time periods and/or in certain penitentiaries the overcrowding may be much higher than the average rate.** The following table shows the overcrowding rate of two of the penitentiary institutions visited by the HHC in 2015 and 2016.

Hajdú-Bihar County Penitentiary Institution ¹⁰		
	Average overcrowding rate in 2014	194%
	Average overcrowding rate in the first four months of 2015	189%
	Overcrowding rate at the time of the HHC's monitoring visit (May 2015)	158%
Szabolcs-Szatmár-Bereg County Penitentiary Institution		
	Average overcrowding rate in 2014	194%
	Average overcrowding rate in 2015	152%
	Overcrowding rate at the time of the HHC's monitoring visit (January 2016)	155%

The penitentiary institutions above are so-called “**county penitentiary institutions**” which predominantly accommodate pre-trial detainees, and which tend to be even more overcrowded than the average in general. This is especially problematic since pre-trial detainees are typically confined to their cells 23 hours a day. 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, which, again, tend to apply to county penitentiary institutions (typically located in older buildings) more often.



Furthermore, the Updated Action Plan states that the National Penitentiary Headquarters “keeps taking into account the capacity reports of the individual facilities in order to reduce the burden on the overcrowded county prisons”.¹¹ However, **re-allocating detainees** nationwide to ensure a more even distribution of inmates can have negative “side effects” e.g. on the frequency of family visits: the HHC has encountered many complaints that family members do not have the financial means and the possibility to visit their detained relatives due to the distance between their place of residence and the respective penitentiary, which may amount to the violation of Article 8 of the European Convention on Human Rights.

C) *Number of pre-trial detainees*

Up until 2013 the number of pre-trial detainees detained in penitentiary institutions had constantly increased. However, in 2014 there was a rather significant drop in the number of pre-trial detainees accommodated by the penitentiary system, and this trend continued in 2015, which is, again, a positive development.

¹⁰ Report of the Hungarian Helsinki Committee on the monitoring visit to the Hajdú-Bihar County Penitentiary Institution on 11-12 May 2015,

http://helsinki.hu/wp-content/uploads/MHB_jelentes_HBMBVI_final_2015.pdf, pp. 5-6.

The picture included in the communication was taken in this penitentiary.

¹¹ See p. 8. of the Updated Action Plan.



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Date	Number of pre-trial detainees ¹²	% of pre-trial detainees as compared to the total prison population
31 December 2010	4,803	29.6%
31 December 2011	4,875	28.4%
31 December 2012	4,888	27.9%
31 December 2013	5,053	28.0%
31 December 2014	4,400	24.6%
31 December 2015	3,978	22.8%

This drop in the number of pre-trial detainees is in correlation with the significant (20-21%) decrease in the number of prosecutorial motions requesting pre-trial detention, and, accordingly, in the number of court decisions ordering pre-trial detention.

Year ¹³	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%

Some stakeholders believe that one of the reasons for the sudden drop in the number of prosecutorial motions aimed at ordering pre-trial detention is that implementing Article 7 of the Right to Information Directive¹⁴ widened the scope of the case materials available for pre-trial detainees and their defence counsels in the investigative phase of the criminal procedures to a significant extent, while access to case materials for those released or under alternative coercive measures (e.g. house arrest) remained very limited. This may have resulted that authorities choose not to propose or motion pre-trial detention due to considerations related to investigative tactics, avoiding in this way that they become obliged to submit a significant part of the case materials to the defence.¹⁵ This theory is supported by the fact that the number of alternative coercive measures motioned or ordered remained to be very low in 2014,¹⁶ and also by a memo issued by the Chief Prosecutor's Office with regard to the interpretation of the respective provision of Act XIX of 1998 on the Criminal Procedure Code, which draws the attention of prosecutors to the fact that opting for alternative coercive measures instead of pre-trial detention has the tactical advantage that access to case materials remained limited e.g. for those under house arrest.¹⁷

¹² Source: data published by the National Penitentiary Headquarters (<http://bv.gov.hu/sajtoszoba>), and the press release of the National Penitentiary Headquarters on the experience of the year 2015.

¹³ No official data is available yet with respect to the year 2015.

¹⁴ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings

¹⁵ In more detail, see: *The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making. Country report: Hungary.* Hungarian Helsinki Committee, October 2015, http://www.helsinki.hu/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf, pp. 16. and 36-37.

¹⁶ See e.g.: *The Practice of Pre-Trial Detention: Monitoring Alternatives and Judicial Decision-Making. Country report: Hungary.* Hungarian Helsinki Committee, October 2015, http://www.helsinki.hu/wp-content/uploads/PTD_country_report_Hungary_HHC_2015.pdf, pp. 22-24.

¹⁷ The memo was submitted to the HHC by the Chief Prosecutor's Office upon an FOI request in a letter dated 14 January 2016 (reference: Ig. 42/28/2015. Legf. Ü.).



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D) Confinement¹⁸

As referred to above, the range of petty offences punishable by petty offence confinement was widened in the last years, and the law also allows for automatically transforming the fine or community service imposed in a petty offence procedure to confinement in case the offender fails to pay the fine or carry out the work. In addition, the New Criminal Code also introduced a new form of detention called confinement, which may last for 5 to 90 days. The National Penitentiary Headquarters submitted both with respect to 2014 and 2015 that the number of those in confinement exceeded 400 persons many times during both years. The National Penitentiary Headquarters also submitted in 2014 that since confinements were often very short (limited even to only 1-2 days) **some of the detainees under confinement** could not be transferred elsewhere, and **served their confinement in the county penitentiary institutions**. Thus, **executing these usually short-term detentions put an additional burden on the already severely overcrowded county penitentiaries**.

E) Reintegration custody

Introducing the reintegration custody into the Hungarian legal system was indeed a prominently positive development. However, as also shown by the numbers included in the Updated Action Plan, **this new possibility itself will not be able to ease the overcrowding of the Hungarian prison system significantly**.

In its press release on the achievements of the year 2015 the National Penitentiary Headquarters submitted that almost 600 related requests for reintegration custody were submitted during the nine months since April 2015 (when the application of this measure was started), and permission was granted in over 200 cases. At the end of the year, 110 persons were in reintegration custody, while an additional 105 persons had already been released.

These numbers show that compared to the number of convicts detained at the end of 2015 (13,027 persons), **reintegration custody was permitted only with regard to 1.4% of convicted detainees**. In addition, judicial permission was granted in only around 34% of the requests.

The HHC is of the view that the Hungarian authorities should consider the extension of the possibility and the possible length of reintegration custody to further ease the pressure on the prison system.

Recommendations

Building new prisons cannot in itself provide a sustainable solution for overcrowding. Even if all the planned prisons are constructed, the total capacity will still be below the average number of inmates for 2015. **Therefore, the Hungarian authorities should upgrade the efforts to provide alternatives to incarceration** (e.g. through the extension of the application of reintegration custody).

¹⁸ Sources for this section: Yearbook of the Hungarian Prison Service, 2014 (available at:

<http://bv.gov.hu/download/d/71/f0000/A%20B%C3%BCntet%C3%A9s->

[v%C3%A9grehajt%C3%A1si%20Szervezet%20%C3%89vk%C3%B6nyve%202014.pdf](http://bv.gov.hu/download/d/71/f0000/A%20B%C3%BCntet%C3%A9s-v%C3%A9grehajt%C3%A1si%20Szervezet%20%C3%89vk%C3%B6nyve%202014.pdf), p.17.), and the press release of the National Penitentiary Headquarters on the experiences of the year 2015.