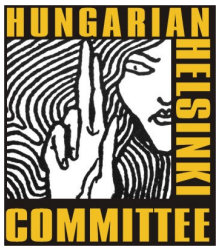

HUNGARIAN HELSINKI COMMITTEE

ALTERNATIVE REPORT

REGARDING THE FOURTH PERIODIC REPORT OF HUNGARY UNDER THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

30 March 2006

THE HUNGARIAN HELSINKI COMMITTEE

The **Hungarian Helsinki Committee** (HHC) is a non-governmental human rights organization founded in 1989 and based in Budapest, Hungary. The HHC is a member of the International Helsinki Federation for Human Rights and the European Council on Refugees and Exiles.

The Hungarian Helsinki Committee aims to monitor the respect for human rights protected by international human rights instruments, to inform the public about human rights violations and to provide victims of human rights abuse with free legal assistance. The Hungarian Helsinki Committee monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, provides legal defense 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. The HHC promotes legal education and training in fields relevant to its activities, both in Hungary and abroad. The HHC's main areas of activities are centered on protecting the rights of asylum seekers and foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention and the effective enforcement of the right to defense and equality before the law.

Hungarian Helsinki Committee
Hungary, H-1054 Budapest
Bajcsy-Zsilinszky út 36-38.
Tel: +36 1 321 4327
Fax: +36 1 321 4323
helsinki@helsinki.hu
http://www.helsinki.hu

ALTERNATIVE REPORT

REGARDING THE FOURTH PERIODIC REPORT OF HUNGARY

UNDER THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The Hungarian Helsinki Committee ("HHC") respectfully submits the following alternative report to the UN Committee Against Torture ("CAT") for consideration in the course of assessing Hungary's Fourth Periodic Report.

Part I of our report is structured to follow relevant Articles of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention").

Part II reflects the Concluding Observations of the Committee against Torture (A/54/44, paras. 78-87) as formulated in response to the Third Periodic Report submitted by Hungary ("Concluding Observations").

Part III is dedicated to HHC's comments on certain statements of the Fourth Periodic Report submitted by Hungary ("Government Report").

Part IV contains HHC's recommendations for items to be considered for inclusion in the List of Issues.

LIST OF ABBREVIATIONS

Act on Aliens	Act XXXIX of 2001 on the Entry and Stay of Foreigners
Alien Policing Government Decree	Government Decree no. 170/2001 on the Implementation of Act XXXIX of 2001 On the Entry and Stay of Foreigners
Attorneys Act	Act XI of 1998 on Attorneys
CCP	Act XIX of 1998 on the Criminal Procedure
Data Protection Act	Act LXIII of 1992 on the Protection of Personal Data and the Access to Public Data
Police Jail Regulation	Decree no. 19/1995 of the Minister of the Interior on the Regulation of Police Jails
Penal Code	Act IV of 1978 on the Penal Code
Penitentiary Code	Law Decree 11 of 1979 on the Implementation of Sanctions and Measures
Police Act	Act XXXIV of 1994 on the Police
Attorneys' Code of Conduct	Regulation no. 8/1999 of the Hungarian Bar Association on the Ethical Rules and Principles of the Legal Profession
OIN	Office of Immigration and Nationality

PART I
REFLECTIONS ON THE ARTICLES OF THE CONVENTION

Article 3 of the Convention

Assessment of Article 3

1. The regular practice of the Hungarian Border Guard and Alien Policing Authorities to expel foreigners illegally entering the country without substantively examining whether the individual would be subjected to torture in the country to which he/she is expelled, is a flagrant breach of Article 3.

2. The Hungarian legal framework undoubtedly complies with Article 3 of the Convention. Under Section 43 (1) of the Act XXXIX of 2001 on the entry and stay of foreigners [hereinafter: "Act on Aliens"], "returning, refusal of entry and expulsion shall not be ordered and shall not be implemented with respect to a country which, with regard to the person concerned, does not qualify as safe country of origin or a safe third country, in particular, where the foreigner would be exposed to persecution owing to reasons of race, religion, national or social affiliation or political views, or to the territory of a state or the border of an area where there is good reason to suppose that the returned, refused or expelled foreigner would be exposed to torture, inhuman or degrading treatment or the death penalty."

3. Government Decree no. 170/2001 (IX. 26.) on the implementation of Act XXXIX of 2001 on the entry and stay of foreigners [hereinafter: "Alien Policing Government Decree"] prescribes an assessment of the issue, when under Section 43, it states "The alien policing authority shall examine the existence of the prohibition contained in Section 43 (1) of the Act on Aliens prior to ordering any official measures aimed at the returning of, refusing of entry for a foreigner, or alien policing expulsion, or the implementation of expulsion ordered by a court verdict or by the decision of the petty offence authority."

4. However, the general practice is that no such assessment takes place. If the alien policing authorities apprehend anyone who has entered the country illegally or resides in Hungary illegally, they will quasi-automatically expel the given person, and – based on the fact of the expulsion – detain him/her, even if as a result of some scrutiny into the circumstances it would be clear that the given person shall not be returned due to the *non-refoulement* obligation.

Implementation of readmission agreements

5. The practice of implementation of readmission agreements and other technical arrangements, which create a mechanism to facilitate the return of migrants and asylum seekers to countries outside the European Union, is a subject of concern and often constitutes a breach of Article 3 of the Convention.

6. It is worrisome that not only migrants lawfully denied entry into Hungary are returned under these agreements but also asylum seekers who had been deprived of their right to have access to the territory of Hungary and to submit an application for asylum in Hungary. Readmission agreements concluded by Hungary prohibit the return of people who apply for asylum or who say their life or freedom would be in danger if they were returned, but the readmission agreements do not have an executive order. If a foreigner seeking entry into Hungary submits an application for asylum, the Hungarian border guard is obliged to forward the case to the Ministry of Interior Office of Immigration and Nationality [hereinafter: "OIN"] for decision. As such, the Border Guard cannot apply the readmission agreement to the asylum applicant.

7. The practice of applying the 1993 readmission agreement between Hungary and Ukraine[1], for example, poses a serious risk to protection against *refoulement,* and is in breach of Article 3.

8. A mission carried out by the Hungarian Helsinki Committee along the southern and eastern border of Hungary in January 2004 revealed that the practices of the Hungarian Border Guard in implementing readmission agreements with countries neighboring Hungary often do not ensure respect for Article 3 of the Convention.[2] As evidenced by protocols of hearings at the Nyírbátor Border Guard Directorate close to the border with Ukraine, the HHC discovered that the border guard has frequently ignored migrants' asylum claims, despite clear

[1] Act XXIV of 1995 promulgating the agreement between the Goverment of the Republic of Hungary and the Government of Ukraine on the return and readmission of persons at the common border, signed 26 February 1993 in Budapest

[2] Látogatás az államhatáron három szakaszán. A Magyar Helsinki Bizottság jelentése a 2004. január 26-30-án az államhatáron tett látogatásáról, 2004. szeptember 26. http://www.helsinki.hu/docs/hatarjelentes.PDF (in Hungarian)

references expressed by a number of foreigners[3] at the occasion of the interview carried out by the border Guard to conditions that give rise to Article 3.

9. Such statements were not considered as applications for asylum and the persons were sent back to Ukraine as they had not applied for asylum. Asylum-seekers readmitted to Ukraine were either returned immediately to Russia and therefore subjected to chain *refoulement*, or sent to the detention center in Western Ukraine, where Human Right Watch has found that "[d]etention conditions in Ukraine do not meet the minimum standards established by international law."[4]

10. In 2003, 141 third-county nationals were returned from Hungary to Ukraine on the basis of the readmission agreement, among them 32 Iraqis, 13 Afghans and 20 Kurds from Turkey. The Hungarian Helsinki Committee criticized this practice sharply, arguing that the Border Guard arbitrarily made decisions on access to the refugee status determination procedure. Due to strengthened protection of the Hungarian border, the forced return of potential asylum-seekers and the threat of the one-year alien policing custody (see below), the number of the asylum-seekers in 2003, 2004 and 2005 decreased much more radically than in the old Member States of the European Union (2400 asylum seekers in 2003; 1600 in 2004; 1609 in 2005[5]).

Use of country of origin information in the assessment of refoulement

11. As a positive sign in 2005, the Border Guard appointed a focal point for country of origin information [hereinafter: "COI"], as an initiative to have more direct access to accurate and up-to-date information on countries of origin and transit. This positive and appreciated improvement has not yet shown any concrete results in every-day practice concerning the application of Section 43 (1) of the Act on Aliens (see above).

12. The Alien Policing Directorate of the OIN does not have its own COI unit, but has full access to that of the OIN Asylum Directorate. The HHC does not have confirmed information on the proportion of cases in which alien policing officers contact the COI Unit for information. However, it appears that alien policing officers rarely use this otherwise easily available service. Not all alien policing officers speak foreign languages (which practically prevent them to get access to most COI) and many of them are not satisfactorily trained on the prohibition against torture and related obligations under international human rights instruments (see below, under Article 10). These factors, together with the lack of relevant internal guidelines foreseeing an obligatory acquisition of COI, question the mere capacity of many alien policing officers to effectively apply Section 43 (1) of the Act on Aliens.

13. This situation is particularly worrisome due to the fact that while subsidiary protection (the temporary "person authorized to stay" status) is usually granted by asylum authorities, the OIN Alien Policing Directorate is in charge of periodically reviewing and either withdrawing or renewing the status. It is not known to the HHC to what extent the alien policing officers rely in practice on the information or expert's opinion provided by the OIN Asylum Directorate. The lack of relevant and accurate COI may therefore easily result in the withdrawal of otherwise justified protection against expulsion and may expose the person in question to torture, inhuman or degrading treatment or punishment due to a forcible return to the country of origin.

Article 10

14. Contrary to the binding provisions of Article 10, neither the Hungarian Border Guard, nor the OIN Alien Policing Directorate provides obligatory training on the prohibition against torture, inhuman or degrading treatment or punishment for its personnel.

15. In 2005 and the first two months of 2006 a part of the Border Guard personnel received some training from the UN High Commissioner fore Refugees [hereinafter: "UNHCR"] and NGOs, which to some extent included elements foreseen by Article 10 as well. The HHC welcomes the cooperative attitude of the Border Guard Directorate to such initiatives. But since the vast majority of these training activities rely exclusively on the initiative of UNHCR and NGOs (which also have to provide the necessary funding), it is yet far from being ensured that all Border Guard officers receive the training foreseen by Article 10.

16. According to the information available to the HHC, alien policing officers of the OIN – as a general rule – do not receive specialized training on the application of the *non-refoulement* principle and the prohibition against torture, which practice is in breach of the relevant provisions of Article 10. It appears that many alien policing officers fail to know and apply binding international legal instruments related to the prohibition of torture and

[3] Migrants from Iraq and from Afghanistan who entered Hungary illegally in 2003 said "I left my home because of the war", "The members of my family had died in a bomb attack", "I was looking for a safe country in Europe

[4] Human Rights Watch: Ukraine: On the Margins. Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union, November 2005, p. 43 Available at http://hrw.org/reports/2005/ukraine1105/

[5] Statistical data provided by the Ministry of Interior Office of Immigration and Nationality.

non-refoulement, and the Alien Policing Directorate of the OIN – contrary to the Border Guard – has not shown any interest in receiving training or establishing internal training capacities in this respect (see also under Article 3).

Articles 12 and 13

17. Although in theory, the proceedings and institutions to guarantee prompt and impartial investigation of complaints regarding torture are mainly in place, the practice of the competent authorities leave much to be desired.

Empirical data from the 2003 research of HHC

18. Claims of ill-treatment: In a questionnaire-based research carried out by the HHC in 2003 with 500 pre-trial detainees,[6] out of the 491 persons answering the question concerning ill-treatment, 83 (17 percent) claimed to have been ill-treated during the procedure. The answers given by the interviewed defendants showed that ill-treatment most frequently occurs in the initial phase of the procedure. To the question "In which phase of the procedure and where were you ill-treated?", altogether 79 answers referred to the initial phase of the procedure (one respondent could choose more than one answer), out of which there were 34 mentions of the premises of the arrest, eight mentions of the police car and 37 mentions of the police building.

19. The majority of police brutality takes place in the course of or in relation to apprehension. Out of the 83 persons complaining of ill-treatment 45 (55 percent) mentioned the police officer performing the apprehension and 21 (26 percent) the investigator as the perpetrator of ill-treatment, as opposed to only one mention of police jail guards and two mentions of prison guards.

20. From the results it seemed that the use of excessive physical violence is typical when a suspect is caught red-handed and immediately afterwards, both at the scene of the offense and later at the police station. Police officers acting in such cases seem to feel particularly justified in abusing persons who have clearly committed criminal offenses, after they are handcuffed and are unable to defend themselves, as if it were an advance punishment. In the course of the research, HHC also heard some cases in which the fury felt over the difficulty of the apprehension and the intention to extract some relevant information from the defendant on the spot may have played a role in the unlawful police action.

21. Ill-treatment also occurs in the subsequent phases of the procedure (e.g. during the interrogation of the suspect) although somewhat less frequently. 26 persons claimed that they had been ill-treated in a later phase of the procedure: 18 during the first interrogation, two during a subsequent interrogation, three at the police jail and three in the penitentiary institution.

22. Legal remedy in cases of ill-treatment: 22 persons (26.5 percent) out of the 83 detainees reporting ill-treatment claimed to have lodged a complaint in some way. 18 turned to the public prosecutor's office, 11 requested assistance from a Hungarian or international human rights organization, one person asked for advice from his lawyer, one expected help from the press, while six defendants turned to "another person", such as the case officer, the physician who performed the examination upon arrival to the premises of detention or the warden of the penitentiary institution (an respondent could indicate more than one answer).

23. The following responses concern the result of the complaint.

What was the result of your complaint about ill-treatment?

Result of the complaint	Persons	%
The person(s) accused was/were held responsible	–	–
The person(s) accused was/were not held responsible	13	59.09
The procedure aimed at holding the accused person(s) responsible is currently pending	2	9.09
Other	7	31.82
Total	22	100.00

24. The respondents' statements show that an important proportion of investigations are rejected at the start or discontinued at a later stage. Many persons claimed that the investigations initiated upon their complaints were discontinued for lack of evidence.

[6] For detailed results of the research see: András Kádár: *Presumption of Guilt: Injurious treatment and the Activity of Defense Counsels in Criminal Proceedings against Pre-trial Detainees*. Hungarian Helsinki Committee, Budapest, 2004. [Hereafter: "Presumption of Guilt"]

A detainee was retransferred from the Veszprém Penitentiary Institution to the local police headquarters in order to conduct an evidentiary procedure. In the short-term arrest cell of the police headquarters, he was kneed in the stomach and hit in the ribs. After he had been transported back to the penitentiary institution, due to his medical condition he had to be transferred again to the hospital of Veszprém, where his injuries were recorded. The prosecutorial investigator refused, however, to conduct an investigation, saying that the defendant's declaration is worthless against the statements of two "honorable" police officers.

A detainee who was allegedly ill-treated by the police officers transporting him claimed that no official medical report was prepared about his injuries and that the public prosecutor in charge told him that if he cannot identify the perpetrators there is no way he could have a confrontation with them. The investigation was therefore discontinued.

A defendant claimed that during his interrogation, the police officers hammered him for more than 15 minutes, then he was held handcuffed (with his hands behind his back) for four hours. The procedure was discontinued for lack of witnesses and other evidence; the occurrence of ill-treatment could not be proven.

25. The importance of medical examination in cases of ill-treatment: The official medical report – as the above examples show – plays a key role in combating abuses committed by authorities, due to the fact that generally there are no impartial witnesses to testify about the ill-treatment (especially when it occurs after the arrest, e.g., in the police car, in the police office, during the interrogation, etc.). This concern is also reflected by the relevant legal regulations. According to Decree 19/1995 of the Minister of the Interior on the Regulation of Police Jails [hereinafter: "Police Jail Regulation"], if the physician in charge of the detainees' medical care witnesses any outward sign of injury he/she shall prepare an official medical report, establish the plausible cause of the injury and record the detainee's declaration concerning the origin of the injury.[7] According to the Penitentiary Rules, a medical examination shall be immediately carried out, if outward signs of injury are witnessed upon the arrival of the detainee, or a person transferred from a police jail, youth custody center, or military custody claims to have been ill-treated. A record of the examination shall be prepared, and a copy thereof shall be sent to the authority performing the detainee's transfer and to the public prosecutor in charge of supervising the lawfulness of detention.[8]

26. The HHC research also focused on how the above provisions are complied with in police jails and penitentiary institutions.

27. Fifteen persons (3.5 percent) out of the 429 responding to the relevant question claimed that they had not been examined at all by a physician upon their arrival at the police jail. However, a significantly higher proportion of respondents (185 out of 400, 46 percent) were of the opinion that the medical check, which consisted of only a few questions, was purely a formality.

28. Thirty-eight respondents claimed that when they had arrived at the police jail they had had injuries originating in ill-treatment committed by officials. Five of them did not report the injuries to the physician. Among the remaining 33 persons, only seven (21 percent) reported that the doctor had proceeded properly. 22 respondents (67 percent) claimed that no official record had been taken of the medical examination, and four persons (12 percent) could not recall whether an official record had been prepared or not.

29. In penitentiary institutions, the respective figures proved to be more favorable. "Only" ten respondents (3 percent) out of 333 reported the total lack of medical examination upon arrival, while 82 of them (26 percent) claimed that the check-up had been only a formality. The latter figure still refers to one quarter of the defendants responding to this specific question, but compared to the 46 percent in police jails it may be considered relatively favorable.

30. Among those six persons who upon their arrival at the penitentiary institute had injuries originating from ill-treatment by officials, two (33 percent) said that the physician had made an official record, one person (17 percent) claimed that the doctor had failed to do so, while the remaining three (50 percent) could not recall whether this had happened or not. (Due to the small sample, no valid conclusions can be drawn from these figures.)

31. In this regard the results of the survey coincide with the experiences of the prosecutor's office responsible for the supervision of the lawfulness of implementing legal sanctions. In a number of cases prosecutorial measures became necessary because – violating the prevailing legal norms – neither police officers, nor

[7] Police Jail Regulation, § 22 (2) (b)
[8] Penitentiary Rules, § 17 (1)

physicians recorded the injuries of the detainee. It also happened that the cause of injuries as indicated by the detainee was not mentioned in the medical records.[9]

32. According to the Police Jail Regulation, medical care services shall be provided to detainees by the Police Medical Services. Therefore the compulsory medical examination upon arrival at the police jail is often carried out by physicians who are not independent from the police. This obviously has an unfavorable effect on the accurate recording of injuries. Moreover, this practice can sometimes lead to a situation in which the doctor tries to convince the defendant not to lodge a complaint, as many respondents claimed. According to the Police Jail Regulation (Section 17 (3)) if the physician discovers traces of ill-treatment or if the detainee complains about ill-treatment the doctor has to report simultaneously to the police authority *and* the prosecutor supervising the jail. The present wording of the rule came into effect on 26 October 2001, after the European Committee for the Prevention of Torture expressed concerns about the practice in police jail where – unlike institutes subordinated to the National Prison Administration – reports about ill-treatment of detainees did not reach persons other than police officers.[10]

33. It is rather characteristic that this order of the Minister of Interior, which has been in effect for more than four years, is still not generally known among police officers responsible for police jails as corroborated at the occasion of the human rights monitoring mission of the International Helsinki Federation for Human Rights, carried out on 12 May 2005.[11]

> A detainee reported having been seriously beaten up by police officers during his arrest, in consequence of which he lost a tooth. However, the physician of the Gyorskocsi street police jail did not prepare an official medical report of the injuries. Finally, he was taken to a hospital, where he stayed for one week.
>
> Another respondent detained in the Venyige street remand prison claimed to have been beaten with a truncheon, in consequence of which his rib fissured and he still has nodes on his neck. He said that following his ill-treatment he had been transferred to Gyorskocsi street, where the doctor in charge had failed to prepare an official medical report of his injuries. According to the defendant, the physician wanted to make him sign a declaration stating that he had not been ill-treated, but he refused to do so. Finally, a police officer signed this paper in his own name.
>
> Another person was also reportedly ill-treated during his interrogation, after which he started to bleed in his cell because of a previous surgery. The two physicians at the police jail then advised him not to make an accusation because the police officer would "know how to find him" after his release.

34. It may be stated that the independence of the members of Police Medical Services is disputable, and the objective recording of people complaining about abusive treatment by the authorities remains to be problematic.

35. *Lengthy investigations*: Many of those who – in order to assert their rights – lodged a complaint about their ill-treatment reported that the investigation in such cases had been quite lengthy.

> An respondent detained in the Venyige street remand prison reported that he made an accusation at the beginning of July 2002 (approximately one year before the interview) based on ill-treatment by officers conducting his interrogation. He was once questioned in connection with his complaint, but since then he has not received any information about the procedure.
>
> A person interviewed in September 2003 said that he had information that the investigation in his case had already been closed, but he had not received any official document about it since May 2002.

36. It is obvious that in these specific cases a quick procedure is an absolute necessity, since the victim is under the control of those against whom he/she has lodged a complaint. A lengthy procedure can make complainants waver and enables those accused of ill-treatment to put pressure on the alleged victims.

---

[9] Comment by György Vókó, Head of the Department for Legal Review and Rights Protection at the Chief Public Prosecutor's Office at the 16 April 2004 roundtable meeting organized for the discussion of the Draft Report summarizing the results of HHC's research.

[10] Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 16 December 1999, CPT/Inf (2001) 2

[11] Places of Detention in Hungary, Report by the International Helsinki Federation and 7 national Helsinki Committees, March 2006, published in the framework of the European Commission funded project "Preventing Torture in the Closed Institutions of Central and Eastern Europe", available at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4218

37. Defendants refraining from lodging a complaint: As mentioned above, most respondents reporting ill-treatment (61 out of 83, 73.5 percent) said that they had not lodged a complaint about it. This shows that the actual number of offenses committed by officials (including the unlawful use of force) may be significantly higher than it seems from the statistics based on the number of accusations (see below under point 33).

38. The following answers were given to our question concerning the reason for refraining from lodging a complaint.

Why did you not lodge a complaint about ill-treatment?

Reason	Persons
Thought there was no point in it	32
Was afraid of reprisal	19
Did not know how to do so	6
Other	17

Respondents could give more than one answer.

39. According to more than half of the respondents, there is no point in lodging a complaint in such cases, since no fair investigation will be carried out anyway.

> A respondent claimed to have been hit in the stomach and the chin while being transported in the police car. He did not lodge a complaint because when in 1996 he was accused of robbery and was seriously beaten up at the Miskolc Police Headquarters, he lodged a complaint against the perpetrators but the public prosecutor did not deal with his complaint on the merits.
>
> Another person said that he had already been condemned on a count of false accusation in a similar case, so he did not want to put himself at risk again.

40. Many respondents reported being afraid of the vengeance of the person accused or of the possibility that such an expression of self-assertion could have a negative impact on their criminal procedure. This fear is often reinforced by those who would otherwise be obliged to take a stand against any occurrence of ill-treatment. (According to the CCP, members of the authority and officials are obliged to report any criminal offense that becomes known to them within their sphere of competence.[12]) Examples have already been quoted of cases in which the doctor carrying out the medical examination tried to convince the victim of ill-treatment not to lodge a complaint, and this attitude is far from unfamiliar to other actors of the procedure either.

> An respondent claimed that he had withdrawn his complaint about ill-treatment because he had been frightened by a police jail guard who had advised him not to defy police officers.
>
> Another detainee reported to the case officer that he had been beaten up while being transported to the police office. The officer told him not to accuse the perpetrators, since that would only make his situation worse. Afterwards, one of the police officers involved in the ill-treatment visited him in the police jail and "demanded threateningly" that he not lodge a complaint.
>
> The previously mentioned defendant who claimed that his rib had fissured and that he still had nodes on his neck because of the ill-treatment suffered tried to lodge a complaint in the Gyorskocsi street police jail, but was told by the officer on duty that it did not make any sense. When the doctor also refused to make an official record about his injuries, he finally gave up the complaint.

41. Foreigners and persons with a lower educational background are often hindered from vindicating their rights because they do not know whom to turn to and what steps to take if they want to lodge a complaint or make an accusation.

Data from the Chief Public Prosecutor's Office

42. Statistical data from the Chief Public Prosecutor's Office[13] support the conclusion that procedures launched into ill-treatment are discontinued in the majority of the cases. The tables below summarize the consequences of complaints made on the grounds of offenses committed by officials, in 2000-2005.[14] (For explanation of the results, see points 43– 47.)

[12] CCP § 171 (2)
[13] Data provided by the Department of Computer Application and Information of the Chief Public Prosecutor's Office
[14] Ill-treatment (§ 226 of the Penal Code): An official who during his/her proceedings mistreats another person commits a misdemeanor, and shall be punishable with imprisonment of up to two years.

2000

	Ill-treatment		Forced interrogation		Unlawful detention	
	Number	**%**	**Number**	**%**	**Number**	**%**
Procedures started (complaints)	**850**	**100.00**	**283**	**100.00**	**113**	**100.00**
Refusal of investigation	**303**	**35.60**	**130**	**45.90**	**51**	**47.30**
Not a criminal offense	72		25		35	
Lack of the well-founded suspicion of an offense is missing	230		104		16	
Res iudicata	–		1		–	
Statute of limitations	1		–		–	
Termination of investigation	**442**	**52.00**	**128**	**45.20**	**46**	**45.20**
Not a criminal offense	46		12		22	
The offense was not committed by the suspect	4		1		–	
The committing of an offense may not be established	357		110		23	
The identity of the perpetrator may not be established	26		2		–	
It may not be established that the offense was committed by the suspect	6		2		1	
Statute of limitations	–		1		–	
Warning	3		–		–	
Indictment	**94**	**11.10**	**23**	**8.10**	**16**	**7.50**
Other	11	1.30	2	0.70	–	–

2001

	Ill-treatment		Forced interrogation		Unlawful detention	
	Number	**%**	**Number**	**%**	**Number**	**%**
Procedures started (complaints)	**757**	**100.00**	**318**	**100.00**	**105**	**100.00**
Refusal of investigation	**318**	**42.00**	**169**	**53.10**	**58**	**55.20**
Not a criminal offense	73		39		40	
Lack of the well-founded suspicion of an offense is missing	244		129		18	
Statute of limitations	1		1		–	
Termination of investigation	**369**	**48.70**	**127**	**39.90**	**35**	**33.30**
Not a criminal offense	39		10		18	
The offense was not committed by the suspect	1		1		–	
The committing of an offense may not be established	301		113		14	
The identity of the perpetrator may not be established	19		2		–	
It may not be established that the offense was committed by the suspect	8		2		–	
Error	–		–		2	
Statute of limitations	–		1		–	
Warning	1		–		1	
Indictment	**62**	**8.20**	**21**	**5.60**	**11**	**10.50**
Other	8	1.10	1	0.30	1	1.00

Forced interrogation (§ 227 of the Penal Code): An official who – with the aim of extracting a confession or declaration – applies violence, threatens, or uses other similar methods, commits a felony, and shall be punishable with imprisonment of up to five years (forced interrogation).
Unlawful detention (§ 228 of the Penal Code): An official who unlawfully deprives another person of his/her freedom commits a criminal offense and is therefore subject to up to 5 years of imprisonment

2002

	Ill-treatment		Forced interrogation		Unlawful detention	
	Number	**%**	**Number**	**%**	**Number**	**%**
Procedures started (complaints)	**759**	**100.00**	**321**	**100.00**	**93**	**100.00**
Refusal of investigation	**282**	**37.20**	**176**	**54.80**	**44**	**47.30**
Not a criminal offense	63		27		31	
Petty offense	1		2		–	
Lack of the well-founded suspicion of an offense is missing	217		146		12	
Statute of limitations	1		1		–	
Warning	–		–		1	
Termination of investigation	**397**	**52.30**	**121**	**37.70**	**42**	**45.20**
Not a criminal offense	38		3		17	
The offense was not committed by the suspect	1		–		–	
The committing of an offense may not be established	325		113		21	
The identity of the perpetrator may not be established	19		2		–	
It may not be established that the offense was committed by the suspect	10		1		1	
Self-defense	1		–		–	
Warning	3		2		3	
Indictment	**72**	**9.50**	**24**	**7.50**	**7**	**7.50**
Other	8	1.10	–	–	–	–

2003

	Ill-treatment		Forced interrogation		Unlawful detention	
	Number	**%**	**Number**	**%**	**Number**	**%**
Procedures started (complaints)	**614**	**100.0**	**223**	**100.0**	**69**	**100.0**
Refusal of investigation / Rejection of complaint*	**187**	**30.5**	**86**	**38.6**	**32**	**46.4**
Not a criminal offense	41		15		21	
Lack of the well-founded suspicion of an offense is missing	142		69		11	
Statute of limitation	4		–		–	
Res iudicata	–		2		–	
Termination of investigation	**363**	**59.1**	**128**	**57.4**	**32**	**46.4**
Not a criminal offense	39		22		19	
The offense was not committed by the suspect	–		2		–	
The committing of an offense may not be established	304		99		16	
The identity of the perpetrator may not be established	11		2			
It may not be established that the offense was committed by the suspect	7		3		1	
Statute of limitations	1		–		–	
Warning	1		–		1	
Offender not punishable due to mental disability	–		–		1	
Indictment	**51**	**8.3**	**9**	**4.0**	**5**	**7.2**
Other	13	2.1	–	–	–	–

* After the coming into force of the new CCP on 1 July 2003, "refusal of investigation" was substituted by "rejection of complaint".

2004

	Ill-treatment		Forced interrogation		Unlawful detention	
	Number	**%**	**Number**	**%**	**Number**	**%**
Procedures started (complaints)	**564**	**100.0**	**192**	**100.0**	**79**	**100.0**
Refusal of investigation / Rejection of complaint*	**45**	**8.0**	**14**	**7.3**	**17**	**21.5**
Not a criminal offense	18		7		12	
Lack of the well-founded suspicion of an offense is missing	25		6		3	
Statute of limitation	2		1		2	
Termination of investigation	**468**	**83.0**	**166**	**86.5**	**52**	**65.8**
Not a criminal offense	86		23		33	
The committing of an offense may not be established	378		142		16	
It may not be established that the offense was committed by the suspect	2		1		–	
Statute of limitation	1		–		–	
Warning	–		–		3	
Termination of investigation after postponement of indictment	1		–		–	
Indictment	**32**	**5.7**	**11**	**5.7**	**8**	**10.1**
Other	19	3.3	1	0.5	2	2.5

43. In the analysis of the above data, and their comparison with statistical data provided by the Government, it has to be taken into consideration that not all the complaints are regarded as "identified offenses". If, for instance, someone makes a complaint of ill-treatment, and the investigation is discontinued with the reasoning that the "commission of an offense may not be established", the treatment complained of will not qualify as an identified offense, since in the investigating authority's view, in the given case the commission of a criminal offense may not be established. Therefore, in the governmental interpretation this complaint will not appear at all.

44. The term "identified offenses" refers to the instances in which indictment is made, the indictment is postponed, or the investigation is rejected or discontinued due to – among others – the following reasons:

- statute of limitations or any other reason excluding culpability of the perpetrator (e.g. mental disability);
- it may not be established that the offense was committed by the suspect;
- the offense was not committed by the suspect (in these two cases the authority acknowledges that there was on offense, but it was not the suspect who committed it, or it may not beyond doubt established that the suspect committed it);
- the suspect gets a warning (under § 71 of the Penal Code, a warning shall be communicated to the perpetrator if he/she may not be punished due to the low degree of threat that his/her behavior poses to the society);
- the investigation is suspended because it may not be established who committed the offense (such cases are included in the "other" category in the above table).

45. As regards for instance the cases of ill-treatment in 2004, it can be seen that there were altogether 46 identified offenses (2 rejections of complaint due to the statute of limitation, plus 2 cases in which it may not be established that the offense was committed by the suspect, plus 1 termination of investigation due to the statute of limitation, plus 32 indictments, plus 9 suspensions of the investigation, included in the 19 instances falling under the "other" category). Out of 46 identified offenses, 32 indictments are a fairly good result (almost 70 percent), however if we compare the number of indictments to the total number of complaints (564), the picture is completely different: only 5.7 percent of procedures initiated due to alleged ill-treatment led to indictment.

How false the approach calculating on the basis of identified offenses may be, is exemplified by the case of Mr. L. S., a client of the HHC. In July 2003 he was caught red-handed by two police officers (L. B. and Z. L.), as he was trying to break into a newspaper stand. As L. B. and Z. L. had to stay on the spot to secure the crime scene, they called for reinforcement. Two police officers (A. B. and S. V.) arrived to the scene to escort Mr. S. to the Budapest 4th District Police Station. Upon arrival at the scene, A. B. hit Mr. S. in the mouth. When Mr. S. fell to the ground, A. B. continued to hit and kick him. Finally, they made him get into the police car and transferred to the police station.

In the jail of the police station, both A. B. and S. V. ill-treated (slapped and kicked) Mr. S. Later on, L. B., one of the police officers who originally caught Mr. S., figured out that Mr. S. gave him a false identity card. To punish this behavior, he visited Mr. S. in the cell, and slapped him two or three times.

Mr. S. suffered injuries on his left thigh and the back of his left hand. Although according to the forensic medical expert's opinion, it may not be excluded that the injuries were caused by ill-treatment as described by Mr. S., the Budapest Prosecutorial Investigation Office discontinued the investigation, claiming that based on the testimonies of the police officers and the expert opinion, the commission of an offense may not be established, since it may be supposed that Mr. S. caused the injuries to himself. In December 2003, the Chief Public Prosecutor's Office rejected the complaint submitted against the decision terminating the investigation.

Mr. S.'s counsel filed a private bill of indictment against the officers with the Metropolitan Court in January 2004. The Court accepted the bill of indictment, and on 9 May 2005, it found the three officers guilty of "ill-treatment in an official procedure". The sentence is final and binding.

46. Thus, we can see that in this case the Prosecutorial Investigation Office discontinued the investigation on the basis of the reason, which is the most frequently cited reason for terminating investigations. In 2004 for example, 378 cases were discontinued on the basis of this reason, which meant 67 percent of all the complaints. Based on the above described method of calculation, the case of Mr. S. (in which the court finally established the responsibility of the three officers) would not have been included in the number against which the number of indictments is measured, as his complaint would not have been an "identified offense".

47. The year 2003 prosecutorial examination into this problem identified the difficulties of finding evidence as the primary reason for the low ratio of indictments. These offenses are usually committed in premises that are not open to the public, and since there is a very strong solidarity among the potential perpetrators, the statements of the victim are rarely supported by witness testimonies. According to the conclusion of the prosecutorial examination, without such testimonies and unambiguous expert opinions as to the causes of the injuries, no indictment is possible in ill-treatment cases, even if the investigation is very thorough.[15]

Relevant cases from of the European Court of Human Rights (ECHR)

48. Cases decided by the European Court of Human Rights against Hungary reveal that serious shortcomings in the investigation of offenses committed by officials also play a role in the low percentage of complaints that lead to indictment.

49. In its decision of 16 December 2003 delivered in the case of **Kmetty v Hungary**[16], the ECHR held unanimously that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights on account of the failure of the Hungarian authorities to carry out an effective investigation into the allegations of the applicant (represented by the Hungarian Helsinki Committee's lawyer) concerning ill-treatment.

The applicant, Mr. Kmetty, claimed to have been ill-treated by police officers at the scene, in the police car and in the 9th district Police Headquarters when he was arrested in December 1998.

After the applicant had lodged a criminal complaint alleging ill-treatment and unlawful detention, the Prosecutorial Investigation Office "heard evidence from him, his relatives and a number of witnesses. In a medical report drawn up in March 1999 at the authorities' request, it was stated that three of the applicant's incisors had become loose and that he had bruising on his wrists and stomach." Finally, finding that it was impossible to exclude the possibility that the applicant's injuries had resulted from the police's lawful measures to overcome the applicant's resistance, the Prosecutorial Investigation Office discontinued the proceedings.

While the ECHR did not establish that Mr. Kmetty had indeed been the victim of ill-treatment, it stated "that where an individual raised an arguable claim that he had been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, the authorities were under an obligation to carry out an effective investigation capable of leading to the identification and punishment of those responsible. In the applicant's case, the authorities had indeed opened an investigation following his complaint, but the Court doubted whether it had been effective and sufficient." The Court considered "that

[15] The examination was conducted by the Chief Public Prosecutor's Office's Department for Investigation Review and Indictment Preparation. Conclusions of the investigation were presented by György Vókó, Head of the Department for Legal Review and Rights Protection at the Chief Public Prosecutor's Office at the roundtable held on 16 April 2004.

[16] Kmetty v. Hungary (Application no. 57967/00) Judgment of 16 December 2003

this inexplicable shortcoming in the proceedings had deprived the applicant of any opportunity to challenge the suspects' version of the events."

50. Less than a year later, in July 2004, in the case of **Balogh v. Hungary**[17], the ECHR held by four votes to three, that there had been a violation of Article 3 of the Convention.

In August 1995 Mr. Balogh was taken to Orosháza Police Station, where he was questioned for two hours. He claimed that one of the police officers repeatedly slapped him across the face and left ear while the other punched him on the shoulder. The applicant was met on the ground floor of the police station by four of his companions who each testified that he had a red and swollen face and that he must have been beaten.

On his return to his home in Miskolc, he consulted the local doctor, who advised him to report to the Hospital. An operation was carried out to reconstruct the applicant's ear drum which had been damaged as a result of a traumatic perforation. Three medical reports stated that he had sustained a traumatic perforation of the left tympanic membrane.

Criminal proceedings were opened against the police officers involved and, in November 1995, a medical expert concluded that it could not be determined whether the injury in question had been caused before, during or after the police interrogation. The criminal proceedings were discontinued. On 24 January 1996 the investigation was resumed. The Investigation Office found that it could not be excluded beyond all doubt when the injuries had been sustained.

A further medical opinion found that a traumatic perforation of the tympanic membrane was usually caused by a slap on the ear and that the applicant's account of how his injury occurred was plausible. Relying on this new evidence, Mr Balogh with assistance from a human rights NGO NEKI (the Legal Defense Bureau for National and Ethnic Minorities) requested that criminal proceedings be re-opened. However, the Public Prosecutor's Office decided that the case should be discontinued since it was impossible to prove the applicant's allegations.

In the ECHR's view, it could not be overlooked that independent investigations were carried out into the applicant's allegation. The prosecutor, whose task was made difficult on account of the absence of independent eyewitness testimony, heard statements from the applicant and his companions, and tested the veracity of their statements against evidence taken from the police officers who had been on duty at the police station and the officers who were alleged to have beaten him. However, it still remained the case that the authorities had not provided any plausible explanation for the cause of the applicant's injury. The Court concluded that the Hungarian Government had not satisfactorily established that the applicant's injuries were caused otherwise than by his treatment in police custody.

51. The Hungarian Helsinki Committee has also documented cases of ill-treatment carried out by security guards working in refugee reception centers maintained by the Office of Immigration and Nationality.

Recognized refugee **Mr. F. K.** was beaten by the security guards of the Debrecen refugee reception center. After he was recognized as a refugee on 1 June 2005, he was released from alien policing detention, and sent to the Debrecen refugee reception center, where he was unlawfully placed in medical quarantine. On the third or fourth day after his arrival, he was ill-treated by the security guards of the center, who are employees of an external company contracted by the refugee reception center maintained by the Office of Immigration and Nationality.

After the beating, Mr. K. tried on a number of occasions to visit the reception center's doctor; however, at first the medical unit was closed because of the weekend, and later he was sent away without examination by an assistant. He only received proper medical care when he was escorted to the doctor by one of the HHC's lawyers. On that occasion, the center's physician sent Mr. K. to the Debrecen hospital, where a medical report was prepared of his still visible injuries.

After this case came to light, it turned out that Mr. K.'s case was not in any way unique. Four persons – including both asylum seekers and recognized refugees – informed the HHC that they had been ill-treated by the security guards as well. Recognized refugee and citizen of Serbia and Montenegro **Mr. C. D.**, was hit on the chest by a security guard on 17 June 2005. He fell from the blow and hit his head and elbow against the concrete floor. The injury on his right arm required medical care.

[17] Balogh v. Hungary (Application no. 47940/99) Judgment of 20 July 2004

Recognized refugee and citizen of Afghanistan **Mr. S. N.** was hit and kicked repeatedly by a security guard at the gate of the center in the second half of June 2005, recognized refugee and citizen of Turkey, **Mr. B. D.** was beaten in his room by one of the security guards in late June 2005.

Asylum seeker and Russian citizen, **Ms. M. M.** complained to the HHC in a letter that on 2 July 2005, one of the security guards accused her of having stolen a plate from the canteen. The guard dragged her to an employee of the canteen who verified that she had not stolen anything. When Ms. M. tried to jot down the guard's name, he grabbed her by the hair and dragged her out to the corridor, and started threatening her with his truncheon. A bunch of torn out hair remained in the guard's fist, and Ms. M.'s arm was also injured. When she visited the doctor, he refused to prepare a medical report.

Asylum seeker **Mr. R. M.**, who notified HHC about the ill-treatment of Mr. K. and the others, was threatened repeatedly by the security guards.

The HHC immediately filed a complaint with the Office of Immigration and Nationality, the Public Prosecutor's Office and the Parliamentary Commissioner for Human Rights. (No reply has been received until the time of writing.)

With legal assistance from the Hungarian Helsinki Committee, Mr. F.K. and Mr. C.D. also filed a complaint at the local police authority, based on which a criminal investigation was launched (against unidentified suspects). The investigation was terminated citing that the commission of an offense may not be established, as Mr. F.K. and Mr. C.D. had left the reception center to an unknown location and were not available to be interviewed, and the security guards and other witnesses couldn't provide sufficient evidence. Eventually Mr. F.K. returned to the reception centre, and the investigation was re-launched. However, the procedure has been suspended with the reference that the suspect could not have been identified so far in the course of the procedure, though apparently Mr. F.K. – who was then available - was still not interviewed.

Article 16

52. In certain areas the legal framework in combination with the practice of certain state authorities pertaining to the (i) alien policing detention of foreigners and (ii) the practice of placing inmates regarded as particularly dangerous into indefinite administrative detention may be considered to amount to inhuman or degrading treatment.

Detention of foreigners in alien police jails

53. Those asylum seekers who manage to enter Hungary often face lengthy periods of detention if intercepted by the Border Guard or the Alien Policing Authority. In most cases the asylum seeker is subject to an alien policing procedure, a result of which he/she can be detained for up to 12 months (until 2002, the maximum period was 18 months).

54. Foreigners detained in alien police jails are not suspected of a crime. Detention in these jails is not a form of punishment, it is just administrative detention aimed at making foreigners available for deportation.

55. Pursuant to Sections 46-48 of the Act on Aliens, three forms of detention may be implemented in alien police jails:

- detention for refusal (in order to implement the readmission agreements)
- detention in preparation for expulsion
- alien policing detention

56. Detention type (1) can be ordered by the Border Guard, while detention type (2) and (3) are ordered by the Office for Immigration and Nationality (OIN). The administrative authorities may order the detention for up to five days, after which period the local court is entitled to extend the duration of detention of type (1) and (2) by up to 30 days, and of type (3) by up to 12 months. The cumulative duration of the different forms of the detention may not exceed 12 months.

57. Alien policing detention can be ordered by the court only after the OIN decided on the expulsion of the foreigner. During the procedure, the foreigner must be heard by the court with an interpreter provided by the authorities. As the decision on expulsion is delivered in the course of a different procedure, it cannot be debated by the court which decides on the detention of the foreigner. As a foreigner who had been expelled can be detained with a view to executing his/her expulsion, judges feel they do not have any other choice but to prolong the detention. They prolong detention even if the foreigner applied for asylum (meaning that the expulsion

cannot be executed before the final rejection of the asylum claim). There is no appeal against the court's decision.

58. The Act on Aliens rules that after six months of detention, judicial review is compulsory and it is shifted from the local courts to the county courts. Detention must be terminated if it becomes obvious that the expulsion of the foreigner cannot be executed (Section 46(8)). In practice, however, this section is seldom referred to as judges arbitrarily decide that they are not able to verify whether expulsion can or cannot be executed, unless the alien policing authorities declare that the expulsion is not executable. This practice had turned the judicial review of detention into an entirely formal provision.

59. The arbitrariness of the Hungarian practice is shown by the fact that, depending on which authority he/she encounters first after entering Hungary, the very same person may end up in alien policing detention with an expulsion order or in an open refugee reception center and no expulsion order. If the asylum seeker enters the country unlawfully but manages to submit an asylum claim with the refugee authorities before he/she is caught by the alien policing authorities, he/she will be placed in a reception center, and no expulsion order will be delivered. If however, he/she is caught by the alien policing authorities, he/she is likely to be expelled. If he/she subsequently submits an asylum claim, the expulsion order may not be executed, as under Section 43 (2) of the Act on Aliens, "when the foreigner is subject to an asylum procedure, the returning, refusal of entry or expulsion can be implemented only pursuant to the valid and enforceable resolution of the refugee authority rejecting the application". The submission of an application, however, will not save the person from detention that might be ordered by the alien policing authority for the purpose of securing the success of the possible future expulsion.

> This anomaly is well illustrated by the case of **Mr. F. K.**, a Kurdish man of Turkish citizenship. Mr. K. was expelled on 30 March 2005 by the Alien Policing Department of the Western Trans-danubian Regional Directorate of the Office of Immigration and Nationality for violating the rules of entry into Hungary. The expulsion order claims that "when delivering this decision I have established that no reason excluding the ordering and execution of expulsion as set forth by Section 43 (1) of the Act on Aliens prevails, as in the case of Mr. K.'s expulsion to Turkey he would not be exposed to persecution owing to reasons of race, religion, national or social affiliation or political views, and there is no reason to suppose that he would be exposed to torture, inhuman or degrading treatment or the death penalty." Mr. K. was taken into detention for 5 days (the maximum that may be ordered by the alien policing authority), after the expiry of which the court prolonged his detention until 30 September 2005. (The prolongation is based on the motion of the alien policing authority, the court may not examine in the procedure whether the expulsion is lawful or not.)
>
> On 1 April 2005, Mr. F.K. submitted an application for asylum. On 1 June 2005, the Refugee Affairs Department of the Western Trans-danubian Regional Directorate of the OIN recognized Mr. F. as a refugee, thus acknowledging that he would face persecution if returned to Turkey. As a result, the Alien Policing Department withdrew the expulsion order. The only explanation for the two contradictory decisions is that the Alien Policing Department did not carry out a thorough examination of whether *refoulement* would be lawful in Mr. K.'s case, which amounts to an infringement of Article 3 of the Convention. Mr. K. was fortunate to have submitted an asylum application, because otherwise, the Alien Policing Department would have returned him to Turkey without any further ado.

60. In HHC's experience, Mr. F.K.'s case is not an exception, but rather the general rule. The HHC has on numerous occasions expressed its concern about this unlawful practice – to no avail. On 29 August 2005, HHC turned to the Parliamentary Commissioner for Human Rights, and requested an investigation into the matter. (No reply has been received at the time of writing.)

61. Foreign nationals detained under the Aliens Act are held in alien policing jails maintained by the Border Guard.

62. Joint Decree 27/2001 (XI. 29.) of the Minister of Interior and the Minister of Justice on the Implementation of Detention Ordered in the Alien Policing Procedure provides rules on the implementation of detention in border guard jails. These rules were modeled after the rules of detention facilities for those in pre-trial detention operated by the police.

63. Pursuant to the Joint Decree, the National Border Guard Headquarters issued an order claiming that the doors of the cells must be closed all day, except for the time of meals and the daily one hour open air exercise. This means that the rules of maximum-severity penitentiaries are applied to detained foreigners who had not committed any criminal act. This is so in spite of the fact that due to the dramatic decrease in the number of asylum seekers, the eight detention facilities of the Border Guard set up for more than 500 inmates are currently almost empty: the average number of inmates is between 80 and 100. Hence, alien police jails run on 20% of their capacity on average.

64. Furthermore, as foreigners do not understand why they are detained and they cannot communicate with the guards who do not speak any foreign languages, the tension between the inmates and the guards is much higher than in prisons. This is aggravated by the fact that the maximum time of detention is one year which is unusually long compared to other countries in the European Union.

65. The lack of legally guaranteed adequate medical care or specific medical institutions available to foreigners detained in alien police jails who are suffering form from serious somatic sickness or any kind of mental health problem is in breach of Article 16.

66. While in such cases remand prisoners or convicts shall be transported to the Central Hospital of the National Prison Administration in Tököl or to the Forensic Observation and Psychiatric Institution (IMEI) in Budapest, foreigners held in alien police jails cannot be transferred to such institutions as they are not charged with any crime and the aforementioned medical institutions are not under an obligation to provide medical care for detainees held in alien police jails.

67. Section 78 (1) of Decree no. 170/2001 (IX. 26.) of the Minister of Interior on the implementation of the Act on the entry and stay of foreigners provides that foreigners placed in an alien police jail are entitled to all necessary medical care free of charge if needed. In practice, in case of medical problems which cannot be dealt with in the jail, they are transferred to a local hospital and are permanently guarded by border guard officers. This places an undue burden on the Border Guard as they have to employ four or five officers to guard per single foreigner and also on the hospital that does not wish to see officers with guns in their wards. In case of mental problems, the patients will be returned after some days of medication to the alien police jail where they usually refuse to take the prescribed medicine and are not under the supervision of a trained psychiatrist; consequently, their mental state deteriorates.

68. As a result foreigners held in alien police jails who did not commit any crime are in this respect in a worse situation than convicted detainees.

69. A solutions to this anomaly could be terminating the alien policing detention in case of a seriously ill detainee and to place him/her, depending on his/her health condition, either in a civilian hospital or in a reception center for asylum seekers where appropriate medical care is accessible and available.

Administrative isolation of especially dangerous inmates in penitentiary institutions

70. If a person is qualified as a Grade 4 inmate[18] he/she may be placed in a maximum security cell or ward (maximum security cells can be found in most penitentiaries; however there are only two maximum security wards in Hungary). The law does not specify on the basis of what reasons such placement is possible, so it is completely up the penitentiary system to decide whether a Grade 4 prisoner is detained under normal circumstances or in a maximum security cell.

71. The Admission Committee of the given penitentiary institution may order that the inmate be placed in a maximum security cell for a maximum of three months. The Admission Committee may prolong placement with three months on two occasions. After nine months, placement shall be ordered by a special committee appointed by the national commander. The special committee shall examine at least once in every six month whether placement in the maximum security ward is well-grounded.

72. The rights of persons placed in a maximum security cell or ward are severely restricted. For instance, their cell must be locked all the time irrespective of the regime they are in, they may only participate in collective sports and cultural activities with the Warden's special permit, the range of objects and articles they may keep with themselves may be restricted.

73. The Committee does not hold hearings, and reviews its decision at least once in every six month. However, neither of the above bodies issue formal resolutions, and no appeal is possible to any higher level authorities or any courts, while the rights of a person placed in a maximum security cell are severely restricted.

[18] Upon his/her reception into the penitentiary institution, the inmate is graded by the Admission Committee according to how dangerous he/she is to the order of the penitentiary system. Grade 4 prisoners are those who are expected to escape or commit an act severely endangering or violating the order of the penitentiary or his/her or other people's life and/or physical integrity, or who have already committed such acts, and whose safe detention may only be guaranteed through guarding or – exceptionally – through surveillance. There is no written decision on the categorization, the reasons are not provided, and there is no possibility to appeal to any entity outside the penitentiary system.

74. Furthermore, there is no final time limit for placement in a maximum security cell or ward. As a matter of fact some convicts serve their whole sentence in the maximum security ward.

75. In May 2005 a delegation of the International Helsinki Federation for Human Rights[19] visited one of the two maximum security wards (located in the Sátoraljaújhely Maximum- and Medium-Severity Penitentiary). The delegation found that the eight cells of the maximum security ward are situated within the perimeters of a "special corridor" complex. The IHF delegation was not able to talk with any of the four prisoners placed in the ward at the time of the visit but saw their cells and acquainted itself with the regime they were placed in. The cells in the unit were closed all the day. The prisoners were only allowed one-hour outdoor exercise in a special part of the prison. The walking space for this unit was around 25 sq. m. bare concrete floor. It was covered from above with metal bars and did not have any sports facilities.

76. The prisoners could sign up to use the adjacent poorly equipped sports hall every second day for one hour and they performed the exercises alone. In terms of the relevant Hungarian legislation, they could participate in the general activities of the prison only with the Warden's special permit. They were allowed visits of friends and family as the other prisoners but had to talk with them only by phone in a special booth separated with a plastic partition disabling any contact. It is possible for the guards to keep contact with the inmates by a special phone from the corridor, so without contacting them directly.

77. The IHF delegation was concerned by the extreme isolation and deprivation of human contact, which can be extremely damaging to prisoners held in the "special corridor". Due to the aggregation of different factors (isolation, prolonged periods of time spent and a possibility for arbitrary placement), the conditions there can in the delegation's view be described as inhuman.

[19] Places of Detention in Hungary, Report by the International Helsinki Federation and 7 national Helsinki Committees, March 2006, published in the framework of the European Commission funded project "Preventing Torture in the Closed Institutions of Central and Eastern Europe", available at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=4218

PART II
REFLECTIONS ON THE CONCLUDING OBSERVATIONS

Concluding Observations, para 81: proportion of Roma prisoners

78. Due to the Hungarian data protection law (for more details, see below, under point 139) there are no official statistical data on the ethnicity of inmates and detainees. There are however scientific studies that provide some information on this issue.

79. According to a research into the representation of Roma in penitentiary institutions, prisoners regarding themselves as Romani amounted to 30 and 40 percent of the prison population in 1995 and 1996 respectively. This result only slightly deviated from the data based on the identification of the interviewers (they regarded 44 percent of the respondents to be of Roma origin), while differed greatly from the estimation of wardens, who thought 61 percent of the prison population to be Roma.[20]

80. In the HHC's 2000–2001 prison research, out of the 549 convicts choosing to answer the question on ethnic affiliation, 179 said that they were of Roma (81) or Hungarian and Roma (98) origin. This means 32,6 percent, which is close to the result of the 1995–96 survey. Interestingly, only 129 persons said that in their opinion their environment regarded them as Roma.[21]

81. In the HHC's 2003 questionnaire based research into the situation of pre-trial detainees, out of the 497 persons who were willing to answer the question, 121 (24.4 per cent) said that they were Roma. Although this percentage is below the data of the earlier surveys, it is still significantly higher than the ratio of Roma in the total population, which – according to reliable estimations – is between 4 and 7 percent.[22]

82. As to the reasons of the significant overrepresentation of the Roma in prisons, interesting information was provided by the HHC's research carried out in 2002-2003 into discrimination against Roma in the criminal justice system.[23] By scrutinizing 1,147 court files, the research of the HHC focused on possible discriminatory practices in the different phases of the criminal procedure from investigation to criminal sentencing.

83. The research's findings on how perpetrators were initially detected by the authorities appeared to be fully in line with similar Anglo-American studies conducted in analyzing discrimination in the criminal justice procedure against visible minorities. Research results show that if a non-Roma perpetrator is not caught red-handed, he/she stands a much better chance of not being found at all than a Roma offender. 21 percent of Roma defendants were detected by the police this way as opposed to 38 percent of non-Roma suspects.

84. The trend is reversed concerning identity checks (stop and search measures): 29 percent of Roma perpetrators were identified by the authorities this way, whereas only 17 percent of non-Roma suspects were caught during identity checks.

85. The police in Hungary enjoy practically unlimited discretion in deciding whom to stop: according to the Police Act,[24] a policeman may stop anyone whose identity he/she needs to establish. The law does not say anything about the possible reasons why this necessity may arise. Therefore the fact that proportionately more Roma suspects are detected in the course of stop and search measures gives rise to the suspicion that racial profiling exists in Hungary, and that the disproportionate number of Roma inmates in prisons may at least partly be attributed to the discriminative practices of the authorities.

86. In further stages of the procedure (investigation and court phase), the HHC research did not detect significantly discriminative trends; however, it must be noted that in this respect the research may not have been fully representative. The research was based on the scrutiny of individual case files. Access to the files was provided by the presidents of particular courts researchers had approached. In terms of the Hungarian legal background, the presidents of the courts exercise discretion in this regard, i.e. they can decide whether to allow

---

[20] László Huszár: Az „ethnical issue" – romák a börtönben (The ethnical issue – Roma in prisons). In: *A büntetés-végrehajtás néhány problémája a kutatások tükrében*. (Some problems of the penitentiary system as reflected by research). BV. Szakkönyvtár – 1997/2. BVOP Módszertani Igazgatóság, Budapest.

[21] For details see: András Kádár – Ferenc Kőszeg (eds.): *Double Standard: Prison Conditions in Hungary*. Hungarian Helsinki Committee, Budapest, 2002

[22] Gábor Kertesi – Gábor Kézdi: *A cigány népesség Magyarországon.* (The Roma population in Hungary) Socio-typo, Budapest, 1998.

[23] For details see Lilla Farkas – Gábor Kézdi – Sándor Loss – Zsolt Zádori (2004) "A rendőrség etnikai profilalkotásának mai gyakorlata" (The current practice of racial profiling by the police) in *Belügyi Szemle* (Review of the Ministry of Interior) 2004/2-3, p. 33.

[24] § 29 (1)

access to their files or not. The organizers of the research approached altogether 37 courts, out of which only 18 granted access to the case files. Interestingly, in counties where the percentage of the Roma in the total population is low (below 6 percent), 26 percent of the courts rejected the HHC's request for permission, whereas in counties where the proportion of the Roma population is higher than this, 78 percent of the courts gave a negative answer. This at least gives rise to the suspicion that these courts would not have been comfortable with a scrutiny of their sentencing, so the fact that the research did not trace discrimination in the court phase may not mean that there are no such tendencies.

87. The HHC's 2003 research into ill-treatment[25] provided interesting data concerning whether the suspect's ethnic affiliation plays a role in how he/she is treated by the authorities. To the question "Were you ill-treated during the procedure", HHC got the following responses.

Were you ill-treated during the procedure?

	Roma (persons)	Percent of all Roma defendants	Non-Roma (persons)	Percent of all non-Roma defendants	Roma and non-Roma together (persons)	Percent of the total number of defendants
Yes	26	21.85	56	15.14	82	16.77
No	93	78.15	314	84.86	407	83.23
Total	119	100.00	370	100.00	489	100.00

88. As the above table shows, 22 percent of the Roma persons reported ill-treatment, while the percentage of ill-treated persons among the non-Roma is "only" 15 percent. This difference is not statistically significant. However, there is a rather important difference concerning the initial period of the procedure (the apprehension and the short-term arrest).

89. Of the 26 Roma persons claiming to have been ill-treated, 64 percent (16 persons) said that the perpetrator had been the police officer who carried out the short-term arrest/72-hour detention, while that percentage is 51 percent (29 out of 57) among the non-Roma defendants. The difference is 13 percentage points and is therefore statistically significant. Meanwhile, as far as ill-treatment committed by investigators is concerned, 20 percent of Roma and 28 percent of non-Roma defendants (5 and 16 persons, respectively) claimed that the officer used unlawful force on them. This difference is not statistically significant.

90. The reason for the difference might be that violence applied during the apprehension of the supposed perpetrator (i.e. in a very stressful situation) is more driven by emotions, whereas unlawful force applied in order to extort a confession is motivated by more rational considerations. Therefore, biases, potential anti-Roma sentiments may play a more significant role in aggressive acts committed at the beginning of the criminal procedure.

91. Out of 497 persons 44 (9 percent) claimed to be foreign. Most of them (19 persons, 43 percent) were Romanians. To the question concerning ill-treatment, they gave the following answers.

Were you ill-treated during the procedure?

	Foreigners (persons)	Percent of all foreigner defendants	Not foreigner (persons)	Percent of all non-foreigner defendants	Foreigner and non-foreigner combined (persons)	Percent of the total number of defendants
Yes	13	30.23	70	15.63	83	16.90
No	30	69.77	378	84.38	408	83.10
Total	43	100.00	448	100.00	493	100.00

92. According to the numbers above, there is a statistically significant difference between the probabilities that a foreigner or a non-foreigner falls victim of ill-treatment.

93. In 2004, two cases of police actions resulting in death of the person subjected to the action received wide press coverage:

> On 10 June 2004, a 27-year old Bulgarian national turned violent on a flight from Amsterdam to Budapest. An accelerated criminal procedure was carried out against him in Budapest, and the

[25] For detailed results of the research see: András Kádár: *Presumption of Guilt: Injurious treatment and the Activity of Defense Counsels in Criminal Proceedings against Pre-trial Detainees*. Hungarian Helsinki Committee, Budapest, 2004.

court expelled him from Hungary for 5 years. After the trial he was being transported in a police car, from which he tried to break out. A fight ensued with police officers, in the course of which he was brought down to the ground, then died because he suffocated from the grasp on his upper body and neck. The police stated that the officers had applied legitimate force, but the two police officers involved in the incident were suspended from their job for the duration of the investigation. The prosecutor's office started a criminal investigation on account of death caused by negligence; this procedure is still pending as of writing.

On 25 July 2004 in Kecskemét, Mr Richárd Jakab, a 19-year old Romany man died during a police measure. He tried to run away from police officers who were pursuing him for being suspected of theft, and died while being pushed to the ground by a police officer. The police officer was suspended from the police force for the duration of the preliminary forensic medical examination, but the final forensic medical examinations concluded that the young man's death resulted from a genetic heart malfunction, and the police officer returned to work. The investigating bureau of the county prosecutor's office is still investigating the case as of writing.

94. While the HHC has no intention of implying that these incidents refer to an intentional tendency among the law enforcement agencies, it must be noted however that almost all recent cases in which the use of excessive force by the authorities had lethal consequences (including a case from December 2000, when a Cameroonian citizen died at the Budapest airport when the police used coercive measures during his deportation) have involved foreigners or Roma people as victims. In our view, an explanation may be that police officers tend to act more harshly when taking measures against persons who do not belong to the majority population.

Concluding Observations, para 83: conditions in prisons

95. Overcrowding remains to be a general problem in the Hungarian prison system. The rate of overcrowding is 140-150 percent on average, which became higher in early 2005 due to the effect of new legislation that entered into force on 1 January 2005: Section 135 of CCP maximizes the duration of pre-trial detention implemented in police premises to two months. (In exceptional cases, and upon the decision of the court, pre-trial detainees may be held in police establishments for a maximum of 30 days, and they may be sent back twice to police establishments, each time for a maximum of 15 days, in exceptional circumstances justified by the investigation.)

96. Therefore, as a rule, pre-trial detainees are today placed in penitentiary institutions rather than police jails. The HHC welcomed this new provision, but it has to be pointed out that its coming into effect has further increased overcrowding in prisons.

97. In the HHC's experience, there is hardly a penitentiary institution where the 3 square meters of free space per detainee as prescribed by law is complied with. The worst situation is in the Baranya County Penitentiary Institution [*Baranya Megyei Bv. Intézet*], where the HHC observed in April 2004 that there were 194 detainees held in the 97 person capacity prison, thus in the majority of cells overcrowding was unbearable. Three-level bunk beds were installed in most cells, and the HHC saw cells of about 10 square meters which contained 2 three-level bunk beds (total of 6 beds) separated by about 40-50 cm of space.

98. The problems of overcrowding can lead to absurd situations.

In the Vác Penitentiary Institution two inmates who were placed in a cell where lawfully only one person could be detained but where there were three beds (one bunk bed and one single bed), received a disciplinary warning because they folded the unused single bed and leaned it against the wall of the cell so that they would have more moving space. The warden claimed that inmates were sanctioned because they may not change the arrangement of the cell without permission, but also added that even if they had asked for permission, they would not have been likely to get it. Thus, the penitentiary institution (which violates the law by not providing 3 square meters of moving space) imposed a sanction on inmates who tried to mitigate the unlawful situation with their own restricted means.

99. The proposed amendments of the provisions regulating penitentiary institutions are rather unsettling in this respect. The Draft Penitentiary Code[26] proposes to raise the minimum moving space from three to four square meters; however, the wording would be changed in a way that makes it possible for the penitentiary authorities to lawfully disregard the minimum requirement.

[26] The presently scattered regulation concerning penitentiaries, police jails and other places of detention is supposed to be substituted by a single code. The Draft Penitentiary Code has been discussed by the Government in July 2005 but has not yet been submitted to Parliament.

100. The current Section 137 (1) of the Penitentiary Rules provides that "the number of people to be placed in a cell shall be defined in a way that each inmate have six cubic meters of air space and – in the case of adult male inmates – three square meters of moving space. Minors and women shall be provided with three-and-a-half square meters of moving space." Section 137 (2) provides that "when calculating the moving space, the space covered by equipment and furniture shall not be taken into account."

101. Section 82 of Draft Penitentiary Code proposes the following text to replace the above provision: "The number of people to be placed in a cell shall – if possible – be defined in a way that each inmate have six cubic meters of air space and four square meters of moving space."

102. This means that even if much less moving space is provided, the penitentiary institution will be able to defend itself by referring to the clause that makes the provision of adequate moving space dependent on the possibilities of the institution. Another problem is that – unlike the present regulation – the Draft Penitentiary Code does not specify whether the four square meters is to be calculated with or without the furniture.

Concluding Observations, para 84: prompt access to defense counsel soon after arrest

103. Access to a defense counsel within a short time following the deprivation of liberty remains an unsolved problem in Hungary. There are a number of difficulties that are common in the case of retained and ex officio appointed lawyers, while some specific concerns exist in connection with the latter group.

The legal background

104. The formal criminal procedure launched against an individual starts with the communication of the suspicion. If the person who is to become the accused is not detained he/she is summoned to appear before the investigating authority, which will then communicate the suspicion. In such cases (and if the notification informs the addressee that he/she is summoned as a suspect, which is not always the case) the accused – provided that he/she can afford a lawyer – has the opportunity to arrange his/her defense.

105. However, this opportunity may be missed if the accused (or the person to be accused) is deprived of his/her liberty. This is the case, for instance, if the person to be accused is taken into short-term arrest.[27] Although in practice the temporal limits of the different procedural acts are often blurred, it is possible to distinguish here that during the short-term arrest the communication of the suspicion takes place, which means that the arrested person formally becomes a defendant. According to the law, only after becoming a defendant can the arrested person be taken into a 72-hour detention. In the criminal procedure this is the longest deprivation of liberty possible without a judicial decision (ordered by either the investigative authority or the prosecutor). A 72-hour detention may be ordered if there is a well-founded suspicion of an offense punishable by imprisonment, provided that the subsequent pre-trial detention of the defendant is likely. If the court does not order a pre-trial detention within 72 hours, the person taken into a 72-hour detention shall be released.[28]

106. The defendant has to be informed of his/her right to choose a defense counsel or to ask for the appointment of counsel by the investigating authority. If defense is mandatory, the defendant shall be informed that if he/she fails to authorize a lawyer within three days, appointment will be made ex officio. If the defendant claims that he/she does not wish to retain a defense counsel, the prosecutor or the investigative authority shall immediately appoint a counsel.[29]

107. The first interrogation of the defendant usually takes place immediately after the communication of the suspicion. If the defendant is detained, the first interrogation after the communication of the suspicion shall take place within 24 hours from the time when the defendant appeared before the investigative authority.[30] Although defense is mandatory if the defendant is detained,[31] and – unlike under the old code of criminal procedure – a defense counsel shall be appointed before the first interrogation at the latest,[32] in practice it is still questionable whether this new provision really guarantees the presence of the defense counsel at the first interrogation. If, for instance, the authority appoints the counsel an hour before the time of the interrogation, in spite of the formal fulfillment of the provision, the defense counsel is not likely to be able to appear at the procedural act.

108. Mandatory defense does not mean that the first (or any subsequent) interrogation may not be conducted in the absence of the defense counsel. Although under Section 117 (2) of the CCP the defendant shall be warned in the beginning of the interrogation that he/she is not obliged to make a statement (and if this

[27] See under point 118
[28] CCP § 126
[29] CCP § 179 (3)
[30] CCP § 179 (1)
[31] CCP § 46 (a)
[32] CCP § 48 (1)

warning is not made, the defendant's testimony may not be taken into consideration as a piece of evidence), it often happens that the defendant is not "experienced" enough to refuse to testify until he/she can consult with a defense counsel.

Practice of arrests

109. From what is set forth above, it is clear that with regard to defendants being able to benefit from the assistance of a defense counsel during the first interrogation, the manner in which the defendant comes into contact with the authorities is a significant factor. The HHC's empirical study based on interviews with 500 pre-trial detainees[33] showed that being summoned as a suspect (and thus being able to find a defense counsel in advance) is relatively rare in Hungary.

How did you come into contact with the investigating authority prior to the pre-trial detention?

Response	Selected		Not selected		Total	
	Person	%	Person	%	Person	%
Taken to the police station after someone had called the police	70	14.06	428	85.94	498	100.00
Taken to the police station after being caught committing a crime	66	13.25	432	86.75	498	100.00
Taken to the police station after being found in the course of the investigation	174	34.94	324	65.06	498	100.00
Detained pursuant to an arrest warrant	61	12.25	437	87.75	498	100.00
Taken to the police station following an identity check	56	11.24	442	88.76	498	100.00
First summoned as a witness, then became a suspect	18	3.61	480	96.39	498	100.00
Summoned to appear before the authority as a criminal suspect	17	3.41	481	96.59	498	100.00
Other	70	14.06	428	85.94	498	100.00

The same respondent could give several responses.

110. It is well demonstrated by the table that, prior to the deprivation of liberty, only a fraction (3 percent) of respondents had been summoned to appear before the authorities. Even if the number of those against whom an arrest warrant had been issued is included in the calculation (because in most cases the reason for this is that the defendant fails to appear despite being summoned and his place of residence is not known to the authorities, therefore he/she cannot be forced to appear), out of the altogether 498 respondents, summons were attempted in the cases of only 78 persons (16 percent), while more than one-third of respondents (174 persons) were taken to the police prior to the order of pre-trial detention from their home, work place or school, and a few respondents had been initially summoned as witnesses and then, upon appearing before the authority, were charged with a crime.[34]

111. Although it can improve the effectiveness of investigations, this practice is of concern: if the suspect (or person about to become a suspect) is held in detention (in short-term arrest or custody), it is highly probable that he/she will not be able to ensure defense for the first interrogation, since (as it is pointed out above) the first interrogation generally takes place shortly after the deprivation of liberty has commenced. Therefore, even if the suspect states his intention to hire a defense counsel, this may only take place once the interrogation has ended (as the presence of counsel is not a prerequisite for conducting the interrogation).

112. In light of the above, the possibility to select a defense counsel (at least with regard to the first interrogation) becomes practically illusory, as corroborated by a number of responses to the question: "At the first interrogation, were you informed of your right to select a defense counsel?"

> A respondent voiced incredulity, stating that the information had been provided, but he had not been permitted to notify any of the four attorneys he had named.
>
> A detainee in the Venyige street remand prison in Budapest reported a similar incident: the information about the right to counsel had been given to him, and he had asked permission to telephone his attorney, but the police officers had told him that they were not obliged to ensure

[33] For more details see: Presumption of Guilt

[34] When evaluating survey results, it should be borne in mind that this relates to suspects of severe criminal acts, which are grounds for ordering pre-trial detention. It cannot be excluded that in the total sample of defendants the rate of those defendants who did not receive summons as a suspect was considerably lower. At the same time, with respect to defendants who had been taken first into custody then into pre-trial detention, this issue is of particular importance as defendants who have not been detained are in a much better position to ensure and hire appropriate defense services.

the presence of counsel at the first interrogation and that he would have the opportunity to inform his attorney after making a confession.

A detainee in the Csillag Prison in Szeged complained to the HHC that upon taking him into custody, the case officer did not permit him to inform his parents, and did not allow his attorney to take part at the first interrogation.

Specific problems concerning ex officio appointed counsels

113. With regard to ex officio defense counsels, the situation is even worse. A question in the HHC survey focused on the time that had elapsed between the start of the deprivation of liberty and contact between the defense counsel and defendant. The following responses were received.

After the start of the deprivation of liberty, when could you contact your defense counsel?

Response	Ex officio appointed counsel		Retained counsel		Total	
	Person	%	Person	%	Person	%
Immediately	12	5.66	48	21.43	60	13.76
Later, but still before the first interrogation	9	4.25	29	12.95	38	8.72
At the first interrogation	29	13.68	13	5.80	42	9.63
After the first interrogation, or still no contact at all	162	76.41	134	59.82	296	67.89
Total	212	100.00	224	100.00	436	100.00

114. Hence 24 percent of appointed counsels and 40 percent of retained counsels had not contacted their clients until the first interrogation. The difference is particularly significant because the presence of counsel at the interrogation in vital from the point of view of the defense, as well as in the interest of preventing any abuse.

115. The reasons for the poorer performance of appointed defense counsels are twofold. On the one hand, they are related to the police's practice of appointment, on the other, to the structural problems of the Hungarian system.

Police practices of appointing ex officio defense counsels

116. In the course of another HHC project aimed at the reform of Hungary's ex officio appointment system it was realized that the police systematically failed to ensure the participation of lawyers at interrogations held during the so-called short-time arrest, claiming that it is not regarded as detention in terms of the CCP.

117. This deprivation of liberty – which is not formally a phase of the criminal procedure, but often precedes the criminal process – can be applied if one is caught in the act of committing a crime or if someone is "suspected of having committed a crime" (a strongly founded suspicion is not required). A short-term arrest may not last longer than "necessary", but not longer than 8 or (in exceptional cases) 12 hours.[35]

118. Since – under Section 46 of the CCP – detention is one of the cases in which defense is mandatory, it is crucial whether short-time arrest is deemed detention or not. The investigative authority tried to justify its legal position of refusing to interpret short-term arrest as detention by referring to the fact that short-term arrest is regulated in the Police Act and not in the CCP, therefore, short-term arrest shall not be regarded as detention. Consequently, argues the police, if a person is interrogated while in short-term arrest, he/she does not qualify as a detained defendant, so the police is under no obligation to appoint a defense counsel for him/her. The person becomes a detained defendant only if he/she is taken into a 72-hour detention on the basis of the result of the interrogation. Only then shall the police be obliged to appoint a defense counsel.

119. Since this argument did not seem to be convincing, in October 2004 the HHC submitted a reasoned opinion to the Chief Public Prosecutor's Office, and requested the Office's position on whether the police's interpretation is correct. The Chief Public Prosecutor's Office declared that the practice of the police was against the law and short-time arrest is to be regarded as detention. Therefore, in case of short time arrest the ex officio legal counsel has to be granted if the defendant does not retain his/her own private lawyer. The Office issued a circular to the leadership of the police on this issue.

120. Notwithstanding this positive development, the HHC still is concerned that the position of the Prosecutor's Office is that a defendant in short-term arrest shall only qualify as a detained defendant if the short-

[35] Police Act § 33 (1) (a) and (2) (b).

term arrest is followed by 72-hour detention. This leads to a logically absurd situation, since the investigating officer may not know in advance of the interrogation whether on the basis of the hearing's result, it will be necessary to take the defendant into a 72-hour detention. Thus, it is still to be seen when exactly a defense counsel shall be appointed.

Poor performance of ex officio appointed counsels and structural deficiencies of the Hungarian criminal legal aid system

121. The HHC's survey confirmed that **the overall performance of ex officio appointed lawyers does not satisfy the constitutional and international requirements of effective defense**. At the time of the HHC survey in 2003, 5 percent (11 persons out of 227) of defendants with retained defense counsels compared to 26 percent (65 persons out 246) of defendants with ex officio counsels reported that they had not had been contacted at all by their attorney. Our findings show that 31 percent of respondents with ex officio defense counsels in cases where the investigation was still pending had not had contact with their defense counsel, which means that **every third person with an ex officio defense counsel had remained without actual assistance from his/her attorney in the investigation phase of the procedure**.

> A respondent in the Venyige street remand prison in Budapest stated that at the occasion of the second interrogation the case officer had named the defense counsel appointed to his case, and informed him that the defense counsel failed to appear at the interrogation in spite of lawful summons issued. Almost a full year has passed since then, but the defense counsel still had not sought contact with this client.
>
> Another detainee reported that his first ex officio defense counsel refused to visit him despite his request, thus he applied for a different defense counsel to be appointed to his case, which was granted by the authority. It took almost half a year for the new ex officio defense counsel to contact him.
>
> A detainee in the Veszprém prison reported that since his ex officio defense counsel did not appear even at the court hearing, the prison chaplain recommended a defense counsel who was eventually appointed to his case by the court.
>
> A respondent reported that before his current ex officio defense counsel (who fulfills his duties diligently), he had two ex officio defense counsels, but he does not know them and has never met them in person because both resigned from the appointment before having done anything for him.

122. Furthermore, HHC results show that ex officio appointed counsels participate in procedural actions much less frequently than their retained colleagues (30 versus 68 percent), and are significantly less active during the proceedings.

> A respondent told the HHC that the ex officio defense counsel had appeared at the judicial hearing regarding the ordering of pre-trial detention, but the attorney was noticeably drunk.
>
> A defendant in the Sopronkőhida prison stated that his ex officio defense counsel had been present at the "30-day hearing", but remained seated and silent throughout the hearing.
>
> Another respondent related that when he demanded an explanation from his ex officio defense counsel for the latter's passivity in the courtroom, the attorney replied that "he will not start to argue with a judge".
>
> A Romanian detainee who did not speak Hungarian and who at the time of the HHC survey still carried severe bruises on his arm from the alleged ill-treatment suffered from the police officers who had apprehended him, voiced the most serious "charges" against his ex officio attorney. The detainee stated that he had reported the incident to both the Romanian interpreter and the ex officio defense counsel present at the interrogation, but neither had done anything.

123. In the HHC's view, in addition to the well-known constraints (low fee levels, late notification etc.), fundamental structural issues also contribute to the poor performance of ex officio appointed counsels. In order for an ex officio system to work properly, four basic functions should be addressed:

1) providing legal aid/ex officio defense counsel in all cases where it is mandatory or otherwise needed (management of the system);
2) monitoring the quality of services provided by ex officio defense counsels (individual quality assurance);
3) monitoring and evaluating the system as a whole (general quality assurance);
4) budgetary planning and implementation for the legal aid system.

124. In Hungary none of the four functions are fulfilled properly. The most burning problem may be raised in connection with the management of the system. In terms of the present regulation, the defense counsel is appointed, from a register compiled by the bar association, by the authority before which the procedure is in progress (the investigating authority, the court or the prosecutor – depending on the phase of the project). With regard to the investigating authority and – in certain cases – the prosecutor, this means that the organ deciding whom to appoint is – due to its procedural position and function – not interested in effective defense work, which may lead to a situation where police officers appoint lawyers about whom they know that they will not attend the procedural acts and will not in general cause too much trouble.

125. Individual quality assurance is not properly solved either. It is only performed by the bar association indirectly, through its disciplinary tasks. According to the CCP, the defense counsel shall be obliged to contact the defendant without delay,[36] while Section 8/4 of the Attorneys' Code of Conduct prescribes that following the receipt of the appointing decision, the counsel shall immediately report to the appointing authority, request information about the case and contact the client in pre-trial detention personally. Thus, if an appointed counsel fails to contact his/her client, he/she commits a disciplinary offense. The possible sanctions include: a) warning; b) fine; c) exclusion from the bar.[37]

126. Experience shows that there are few disciplinary procedures related to ex officio appointment.[38] The discrepancy between the wide-ranging dissatisfaction with the activities of appointed counsels and the information on the (minimal) number of complaints only seems surprising. In the investigative phase, primarily the investigating authority and the defendant are in the position to judge the performance of the counsel. Neither the one nor the other can realistically be expected to file a complaint with the bar association. The former is not really interested in effective defense work, whereas the latter is in a very vulnerable situation (especially when detained). Those defendants who cannot afford to retain a lawyer usually come from indigent, uneducated segments of society, with a limited capacity to assert their interests.

127. Furthermore, they do not have a guaranteed right to request the appointment of a new defense counsel. According to the Attorneys Act, the authority may (but is not obliged to) withdraw the appointment if the defendant makes the request on reasonable grounds.[39] The CCP practically repeats this provision when it prescribes: "there is no remedy against the appointment of the defense counsel, but the defendant may – in a reasoned motion – request the appointment of another defense counsel. The request is decided upon by the court or prosecutor or investigating authority before which the procedure is in progress."[40] Thus, it may happen that the defendant requests a new defense counsel, the authority rejects the request, and the defendant is forced to continue the procedure with a counsel against whom he/she has filed a complaint. It is not surprising that practically no defendants risk this possibility.

128. General quality assurance is practically missing from the Hungarian system: neither the bar, nor the Ministry of Justice, nor any other organization collects information about the appointment system. There are no statistics on the annual number of appointments, the costs of the system, the outcome of the cases where appointed counsels provided defense, and so on.

129. The budgetary functions are also problematic: the Minister of Justice determines the rules relating to the payment of fees and reimbursement of costs for ex officio defense counsels, while the fee levels themselves are set by Parliament. Therefore the agencies that determine the system's budget do not have the means to control the quality of services provided for their funds, while the entity that performs the most functions in operating the system (the bar association) only has a limited say in budgetary matters or actual appointments of attorneys.

Rules concerning contacts of detained defendants with the outside world

130. Recent legislative changes constitute additional obstacles that make it difficult for detained defendants to arrange their defense. The CCP made maintenance of contact with the outside world significantly more cumbersome for detainees, also creating a contradiction between different legislative instruments.

131. The Penitentiary Code provides that pre-trial detainees may exchange written correspondence with their family members or – based on the permission of the prosecutor, or the court after the bill of indictment has been submitted – with other persons, and may receive visitors and a package at least once a month; the right to

[36] CCP § 50 (1) (a)
[37] Attorneys Act § 37
[38] Interview with Mr János Zimnic, High Commissioner of the Hungarian Bar Association in charge of Disciplinary Affairs, 11 September 2002.
[39] Attorneys Act § 34 (3)
[40] CCP § 48 (5)

correspondence and receiving visitors and packages may be limited – save contacts with the defense counsel – in the interest of ensuring the success of the criminal procedure.[41]

132. In contrast, the CCP provides that – until the submission of the bill of indictment, based on the permission of the prosecutor, later based on the permission of the judge – detained defendants may contact their family members orally or in person under supervision, or in writing under control.[42] Thus, while under the Penitentiary Code the detained defendant can only be prohibited from contacting his/her family members if the prosecutor or the judge forbids this in the interest of ensuring the effectiveness of the criminal procedure, the CCP provides that pre-trial detainees may not write letters or meet with their relatives without the express permission of the prosecutor or the judge.

133. The CCP's provision leads to the situation that it is the detainee who should submit a written application to the competent prosecutor's office for permission to maintain contact; until receipt of the permit, neither the police nor the penitentiary staff will allow the detainee to maintain contact with family members by written correspondence, by telephone or visits. Furthermore, until the prosecutor's permit is received detainees may not even receive hygienic packages (e.g. clean underwear, toothbrush, toothpaste, soap, towel etc.) from relatives.

134. Prosecutors do not consider the adjudication of applications for maintaining contact with family members as their primary task, thus frequently weeks or months pass until the application has been considered.

135. As the law does not prescribe any deadlines or formats for the prosecutor for issuing the permit, this practically means that prosecutors are not under the obligation to provide reasons for their decision to ban or restrict maintenance of contact. Hence legal remedies are not available against the decision, and in lack when making a formal complaint, detainees are not able to effectively call into question the prosecutor's decision as the reasons for the ban or restriction remain unknown to him/her.

136. The problem also applies to judicial decisions taken on this matter in cases which have already reached the judicial phase.

137. Although HHC warned about this problem on several occasions in the legislative process, the latest version of the Draft Penitentiary Code leaves this problem untouched, prolonging this unlawful situation that is in contradiction with international norms concerning detention, and the recommendations of relevant international organizations, such as the CPT.[43]

Concluding Observations, para 85: requested data

138. The number of complaints about ill-treatment, and the number and proportion of cases discontinued by prosecutors are indicated above, under point 42. Data on the proportion of Roma detainees and prisoners is presented above, under points 79-81.

139. With respect to the proportion of Roma complaints, we have to call attention to a specific problem making it impossible in Hungary to get reliable information on any question related to ethnicity. The Data Protection Act contains very strict rules concerning the collecting and processing of sensitive data, among them data on national or ethnic origin. Personal data are defined in Section 2 (1) as "any data relating to a specified natural person (data subject) and any conclusion drawn from such data with respect to him. As long as the data subject can be identified by the data it preserves this personal characteristic." Special categories of data are defined in Section 2 (2) as "any personal data relating to (i) racial origin, nationality, national or ethnic origin, political opinion or party affiliation, religious or other belief; (ii) health, pathological addiction, sexual life and criminal record."

140. The Data Protection Act provides strict rules for processing of personal data and special categories of data in order to ensure the protection of such data. In terms of Section 3 (1) of the Act, personal data may only be processed with the consent of the data subject, or if the processing of personal data is ordered by law or in a bylaw of the local government, given that the local government has special authorization of law to issue such a bylaw. Section 3 (2) regulates the processing of special categories of data. Such data may not be processed unless (i) the data subject has consented to the processing in writing; (ii) processing is based on international agreements or the enforcement of basic rights guaranteed by the Constitution, or unless it is ordered by law in the interest of national security, criminal investigation or the prevention of crimes.

[41] Penitentiary Code, § 118
[42] CCP § 43 (3)(b)
[43] See the recapitulation of CPT's recommendations under para. 16 of the Government Report.

141. These rules are used as a pretext by Hungarian authorities for not collecting data related to ethnicity even in cases where this would be crucial in assessing whether discrimination is present in certain areas of life. "Sometimes practice appears to be quite illogical. For example, officials claim that even the recording of racial violence victims would run against statutory provisions, even though the Criminal Code acknowledges certain racially motivated crimes, such as "violence against members of national, ethnic or racial minorities and religious groups" or "incitement against community", all of which presuppose membership in the given (racially or ethno-nationally defined) community."[44]

142. In reality, the Data Protection Act does not exclude the collection and processing of sensitive data for statistical purposes. Section 32/A of the Act explicitly claims that statistical use of personal data is possible provided that the data are not used for any other purpose. So the authorities' reference to data protection considerations whenever they are asked about the extent of discrimination, or other sensitive ethnic issues, seems no more than trying to find the easy way out of a difficult situation.

[44] András L. Pap: Racial Profiling in Hungary, manuscript, 2005.

PART III
REFLECTIONS ON THE GOVERNMENT REPORT

Government Report, para 33

143. The Government Report refers to the 1999 visit of the CPT, and claims that during the visit "no hint of torture or inhuman treatment was observed." While this is true, however, the Government Report itself quotes the CPT's conclusions from its 2003 visit, according to which the delegation heard allegations of ill-treatment (involving beatings and verbal abuse) at Unit III of the Budapest Remand Prison (see para. 19 of the Government Report).

Government Report, para 42

144. The Government Report enumerates the new legal institutions that may be used a substitutes for pre-trial detention. It however fails to give an account of the implementation into practice of these instruments.

145. According to data from the Department of Computer Application and Information of the Chief Public Prosecutor's Office, in 2004, public prosecutors made a motion for pre-trial detention in 5,918 cases. The court ordered the detention in 5,424 cases (97 percent). Only in a fraction of the cases did the court choose a ban on leaving the defendant's place of residence (134 cases, 2.3 percent) or house arrest (35 cases, 0.6 percent) instead of pre-trial detention.

146. The prosecutor originally made a motion for a ban on leaving the defendant's place of residence in 47 cases in the year 2004. The court ordered this measure in 44 cases. In 2004 prosecutors made a motion for house arrest in only 9 cases, and in 7 did the court accept the motion.

147. This means that in 2004, altogether 5,424 pre-trial detentions were ordered as opposed to only 178 bans on leaving one's place of residence and 42 house arrests, which indicates that the new institutions have failed to offer a true alternative for pre-trial detention in the Hungarian court practice.

Government Report, para 47

148. The Government Report attributes the decrease in the number of working inmates to low remuneration. In reality, inmates are obliged to work in terms of Section 77 of the Penitentiary Code, and Section 104 of the Penitentiary Rules. Refusal to work qualifies as a disciplinary offense. Thus, inmates are not in the position to decide whether or not they wish to work for the – truly – low remuneration.

Government Report, para 98

149. The Government Report describes the case of a 16-year old defendant who had been placed together with and severely abused by adult inmates. The victim was represented by the HHC's lawyer in both the criminal proceeding launched against the penitentiary staff member who was responsible for the placement of the juvenile defendant and the civil lawsuit launched for non-pecuniary damages against the penitentiary institution.

150. The HHC would like to stress that the responsible member of the penitentiary personnel was not in any way called to account for his unlawful action. The investigation launched against him for abuse of official powers was discontinued due to lack of evidence. And the penitentiary institution conducted no disciplinary procedure against him either, because first the leadership claimed to be waiting for the outcome of the criminal procedure, and by the time the investigation was discontinued, the one year period open for the launching of a disciplinary action had already passed. The civil lawsuit is still pending before the court of first instance.

PART IV
QUESTIONS PROPOSED FOR INCLUSION IN THE LIST OF ISSUES

1. How does the Government intend to ensure that Hungarian alien policing authorities' practice improve in carrying out a thorough examination in accordance with Section 43 (1) of the Act on Aliens, prior to taking an expulsion order, in all cases of foreign nationals who had entered or stayed in Hungary unlawfully, in order to ensure that the person concerned would not be subjected to torture, inhuman or degrading treatment or punishment in the country where he/she would be returned?

2. Does the Government plan to review its readmission agreements with neighboring countries in order to ensure that they are applied with adequate safeguards for asylum seekers such as protection against *refoulement* and potential chain-*refoulement*, and to ensure that these agreements are not merely used as tools to transfer asylum seekers out of the European Union?

3. Does the Government intend to change legislation or practice concerning detention of foreign nationals, including asylum seekers who have entered or stayed in Hungary unlawfully? What measures can be taken to ensure that courts carry out a more effective judicial review of the detention of asylum seekers and replace the currently formal and inadequate procedure?

4. What is the reason for the asylum authority not making the list of "safe third countries" public? What were the main conditions examined when composing the list of "safe third countries" and what were the main sources of information used? How often is the list reviewed and updated, by whom and how?

5. Is there a list of countries designated as "safe countries of origin"? If yes, what were the main conditions examined when composing the list of "safe countries of origin" and what were the main sources of information used? How often is the list reviewed and updated, by whom and how?

6. How does the Government intend to ensure that all personnel of the Border Guard and the Office of Immigration and Nationality receive the training envisaged in Article 10 of the Convention?

7. How does the Government intend to ensure that investigations into claims of ill-treatment become more efficient, prompt and impartial, thus putting an end to the impunity that officials generally enjoy due to the extremely low indictment rates?

8. Does the Government intend to take measures to make it sure that police officers found guilty of ill-treatment may not remain on the police force?

9. Does the Government intend to change the practice that physicians not independent from the police examine detainees who claim to have been ill-treated by the authorities?

10. What does the Government intend to do to in terms of legislation and practice to make sure that detained persons can contact an attorney immediately after the deprivation of their liberty?

11. What does the Government intend to do to guarantee that defense provided by ex officio appointed defense counsels become truly effective, and that ex officio appointed counsels appear at procedural actions, thus decreasing the chance of ill-treatment in the criminal procedure?

12. Does the Government intend to amend the legislative framework in order to guarantee that pre-trial detainees may contact their relatives soon after their arrest?

13. Does the Government intend to make use of the existing legal possibilities to collect data that could highlight if there is any discrimination in the practice of criminal procedures against Roma and foreign defendants?

14. How does the Government intend to decrease overcrowding in prisons, and to end the practice that inmates in Hungary are regularly provided with less moving space than the legally required minimum?

15. How does the Government intend to ensure that legal institutions designed to serve as alternatives to pre-trial detention become truly functional?