



Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Alaa Al-Tayyar Abdelhakim v. Hungary* (Application No. 13058/11)

1. Introduction*

By letter of 14 February 2012, the European Court of Human Rights (“the Court”) granted the request of the Office of the United Nations High Commissioner for Refugees (“UNHCR”) to submit a written intervention as a third party in the case of *Alaa Al-Tayyar-Abdelhakim v. Hungary* (Application Number 13058/11). UNHCR welcomes this opportunity, as the present case raises a number of legal issues relating to the detention of asylum-seekers and persons recognized to be in need of international protection.¹

UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.² Paragraph 8(a) of its Statute confers responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)³ obliges States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.

The present case raises important issues related to the interpretation and application of Articles 31, 32 and 33 of the 1951 Convention. Given UNHCR’s supervisory responsibility, it has an interest in submitting its views to the Court. It is UNHCR’s position that the Hungarian practice of detaining asylum-seekers and persons recognized as being in need of international protection for the purposes of expulsion, is unlawful as it is not authorized by Hungarian national law, European law or international refugee law. UNHCR is particularly concerned that this practice not only risks violating the fundamental right to liberty and security of the persons concerned, as expressed in international and European human rights instruments, but may also negatively impact upon their right to asylum and the protection from *refoulement*, as guaranteed in European and international law

Part 2 of this submission addresses the systematic detention of asylum-seekers in Hungary, including the legal framework for such detention, while Part 3 deals with UNHCR’s interpretation of the relevant principles of international refugee law governing the detention and the expulsion of asylum-seekers and refugees, including UNHCR’s views on the interaction between these principles of international law and the right to liberty and security of the person under Article 5 of the European Convention of Human Rights (“ECHR”).⁴

*This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

¹ UNHCR has also submitted a third party intervention in the case of *Said v. Hungary*, European Court of Human Rights (ECtHR), App. No. 13457/11, a case involving the detention, for the purposes of expulsion, of asylum-seekers returned to Hungary under the Dublin II Regulation. The Submission by the United Nations High Commissioner for Refugees in the Case of *Said v. Hungary*, included as Annex 1 to this Submission, should be considered complementary to this intervention.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, page 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁴ Council of Europe, *The Convention for the Protection of Human Rights and Fundamental Freedoms*, 3 September 1953, United Nations Treaty Series, vol. 213, page 222, available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

2. Detention of asylum-seekers in Hungary

2.1 Practice in Hungary regarding the detention of asylum-seekers and persons recognized as being in need of international protection⁵

UNHCR is concerned that asylum-seekers face serious challenges in accessing protection in Hungary in line with international and European standards, including because of the increasing use of administrative detention. Since April 2010, detention of asylum-seekers has become the rule rather than the exception. Some 1,102 asylum-seekers were reported to have applied for asylum while in detention in 2011, representing two-thirds of the total number of asylum applicants.⁶ The majority of asylum-seekers detained in Nyirbátor, the largest detention facility for asylum-seekers and migrants in Hungary, spend an average of 4-5 months in detention. As of 24 December 2010, amendments to the legislation relevant to asylum-seekers and refugees entered into force,⁷ making it possible to detain asylum-seekers while their cases are in the “in-merit” procedure,⁸ increasing the maximum length of administrative detention to 12 months, and authorizing the detention of families with children for up to 30 days.⁹

Hungarian law does not contain legal guarantees to ensure compliance with Article 31 of the 1951 Convention (on “Refugees unlawfully in the country of refuge”).¹⁰ Asylum-seekers are often penalized for arriving in Hungary with false or forged travel documents under the provisions of the Third Country Nationals Act¹¹ providing for the expulsion of foreigners who have crossed, or attempted to cross, the Hungarian border without authorization.¹² Despite UNHCR’s consistent efforts over a number of years to positively influence Hungarian legislation and practice,¹³ asylum-seekers are routinely convicted of unlawful entry or stay, and face harsh detention conditions in prison-like immigration detention facilities.

Hungary imposes prolonged periods of administrative detention upon asylum-seekers without providing avenues to effectively challenge the detention once ordered or considering alternatives to detention.¹⁴ Judicial review of administrative detention of asylum-seekers is ineffective in Hungary in many instances, as courts fail to address the lawfulness of detention in individual cases, or to provide individualized reasoning based upon the specific facts and circumstances of the applicant.¹⁵

⁵ For further details, see Annex 2 to this Submission containing UNHCR’s *Observations on the Situation of Asylum-seekers and Refugees in Hungary*, March 2012 (hereinafter “Annex 2”).

⁶ According to official statistics from the Hungarian Office of Immigration and Nationality (“OIN”), in 2011, 1,102 asylum applications were recorded in detention; in 2010, 832; in 2009, 401; in 2008, 387; and in 2007, 762. These applications include those from persons who were detained after their transfer under the Dublin II Regulation.

⁷ Act No. CXXXV of 2010 (adopted by Parliament on 22 November 2010); Government Decree 290/2010. (XII.21.).

⁸ Section 55(1) of the Act No. LXXX of 2007 on Asylum (hereinafter “Asylum Act”) provides that: “If the refugee authority establishes the admissibility of an application, and the application is not manifestly unfounded, the refugee authority shall refer the application to the detailed procedure.” This “detailed procedure” is commonly referred to as the “in-merit procedure” in Hungary.

⁹ These amendments are not applicable to the present case. The relevant facts took place prior to the entry into force of the December 2010 amendments to the Asylum Act.

¹⁰ Under the Hungarian Constitution, international agreements are not automatically self-executing. Article 1(2)(d) of the new 2012 Constitution empowers Parliament to “recognize” international agreements as “binding”. The 1951 Convention was legislatively incorporated into Hungarian domestic law with Law Decree 15 of 1989, and thus all the Articles, including Article 31 of the 1951 Convention, are directly binding. Despite this, Article 31 has had little effect as detention is either ordered through Section 54 of the Third Country Nationals Act or in some cases the applicant is criminally prosecuted for violations of immigration law under Article 274(1) of the Penal Code. In neither of these scenarios is consideration of Article 31 applied as under the Penal Code, strict liability attaches once there is a finding of false documentation.

¹¹ Act II of 2007 on the Admission and Right of Residence of Third Country Nationals (hereinafter the “Third Country Nationals Act”).

¹² *Ibid.*, Section 43(2)(a).

¹³ For example, in 2008, UNHCR addressed a letter to the Chief Public Prosecutor on “The Application of Article 31 of the Geneva Convention Relating to the Status of Refugees in the Republic of Hungary”.

¹⁴ See Annex 2 at Section X. See also, *Yoh-Ekale Mwanje v. Belgium*, ECtHR, App. No. 10486/10, 20 December 2011, where this Court held that failing to consider alternatives to detention may implicate rights under Article 5(1) ECHR.

¹⁵ See Annex 2 at Section X; Hungarian Helsinki Committee (“HHC”), *Access to Protection Jeopardised: Information Note on the Treatment of Dublin Returnees in Hungary*, December 2011, at page 5 (hereinafter “Dublin Returnees Report”); Council of Europe Committee for the Prevention of Torture and Inhuman Degrading Treatment of Punishment, *Report to the*

Administrative decisions imposing detention on foreigners for unlawful entry or stay are subject to review conducted by first instance courts. It is common practice for the court to issue decisions for a group of five, 10, or 15 detainees within 30 minutes, thus significantly decreasing the likelihood of a fair and individualized review.¹⁶

Limited external monitoring of detention conditions is conducted by the Hungarian Helsinki Committee. However, each of their visits is announced in advance, potentially limiting the effectiveness of this monitoring work. The Hungarian Parliamentary Commissioner for Fundamental Rights¹⁷ announced that in 2012 it will *ex officio* conduct an inquiry on administrative detention as a result of the many problems reported, and also in anticipation of its functions under the Optional Protocol of the Convention against Torture (“OPCAT”)¹⁸ as of January 2015.

2.2 Legislative framework in Hungary for the detention of asylum-seekers

Hungary acceded to the 1951 Convention and 1967 Protocol¹⁹ in March 1989. In Hungary, there are no specific legislative provisions regulating the administrative detention of refugees, asylum-seekers or persons found to be in need of international protection. Their detention is regulated by the following general immigration provisions:

- Act II of 2007 on the Admission and Right of Residence of Third Country Nationals (the “Third Country Nationals Act”);
- Government Decree 114/2007 (V.24.) on the execution of Act II of 2007 on the Admission and Right of Residence of Third Country Nationals; and
- Decree of the Minister of Justice and Law Enforcement 27/2007 (V.31.) on the Executive Rules of Alien Policing Detention.

Pursuant to Hungarian law in effect when the facts in the present case took place, immigration detention could only be ordered by the aliens policing branch of the Office of Immigration and Nationality (OIN) or the police in the following circumstances:

- In order to secure the expulsion, or transfer in a Dublin procedure, of a third country national, if the third country national:
 - is at risk of absconding or impedes his/her expulsion in any manner;
 - has refused to leave the country, or, based on other substantiated evidence, is allegedly delaying or preventing the enforcement of his/her expulsion;
 - has seriously or repeatedly violated the code of conduct of his/her compulsory place of residence;
 - obstructs the alien policing procedure by refusing to present him/herself to the authorities as ordered;
 - has been released from imprisonment to which he/she was sentenced for committing a deliberate criminal offence; or²⁰
- If, prior to the expulsion of the third country national, and in order to secure the conclusion of the pending immigration proceedings, the identity of the third country national or the legal grounds of his/her residence are not conclusively established.²¹

Under the provisions of the Third Country Nationals Act applicable during the period relevant to the present case, the initial period of detention was 72 hours, after which it could be extended for a further

Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 24 March to 2 April 2009, April 2009, at pages 26-27.

¹⁶ Annex 2, at Section X.

¹⁷ Pursuant to legislative amendments in Act No. CXI of 2011, available at www.obh.hu, the Parliamentary Commissioner for Human Rights was renamed the Parliamentary Commissioner for Fundamental Rights.

¹⁸ UN General Assembly, *Optional Protocol of the Convention against Torture*, United Nations Treaty Series, vol. 2375, page 237; GA Resolution A/RES/57/199 of 9 January 2003, available at: <http://www2.ohchr.org/english/law/cat-one.htm>.

¹⁹ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations Treaty Series, vol. 606, page 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

²⁰ Section 54(1), Third Country Nationals Act.

²¹ Section 55(1), Third Country Nationals Act.

period of 30 days by a first instance court.²² The total maximum period of administrative detention under the Third Country Nationals Act was six months, with monthly court reviews by a first instance court.²³ The Third Country Nationals Act also provided that administrative detention should be terminated without delay if it became evident that the expulsion order serving as the ground for detention could not be enforced.²⁴

While there is no legislative instrument specifically providing for the detention of asylum-seekers, there are a number of provisions relating to the obligations of the Hungarian asylum authorities with respect to such persons who may be in administrative detention. Section 55(3) of the Asylum Act, which applies to the present case,²⁵ provided at the relevant time that:

“If the refugee authority proceeds to the substantive examination of the application and the applicant is detained by order to the immigration authority, the immigration authority shall release the applicant at the initiative of the refugee authority.”²⁶

The application of this provision of the Asylum Act has been particularly problematic as the refugee authority has often failed to initiate the release of an asylum-seeker when the asylum claim was referred to the in-merit procedure. In *Lokpo and Touré v. Hungary*,²⁷ a case that involved asylum-seekers claiming that their continued detention for the purposes of expulsion following their referral to the in-merit procedure was unlawful and/or arbitrary, this Court held that Hungary had violated the applicants’ rights under Article 5(1) of the ECHR by failing to take a decision regarding their release under Section 55(3) of the Asylum Act. It further held that “the absence of elaborate reasoning for an applicant’s deprivation of liberty renders that measure incompatible with the requirement of lawfulness inherent in Article 5 of the Convention.”²⁸ The Hungarian Chief Prosecutor’s Office has also spoken out against Hungarian practice in relation to Section 55(3) of the Asylum Act. On 21 April 2009, the Chief Prosecutor’s Office issued a letter stating that the OIN was unlawfully detaining certain asylum-seekers, and demanding that the OIN enforce the law by releasing all asylum-seekers whose applications had been admitted to the in-merit asylum procedure.²⁹ Section 55(3) of the Asylum Act was rescinded by the December 2010 amendment mentioned above.

²² Section 54(3), Third Country Nationals Act.

²³ As noted in Section 2.1, this has been amended to provide for a maximum total period of administrative detention of 12 months.

²⁴ Section 54(4), Third Country Nationals Act. Under Hungarian law, the OIN must also consider whether the execution of the deportation can be ensured with the application of alternatives to detention: Section 54(2), Third Country Nationals Act. According to the Hungarian Helsinki Committee, “the OIN only cites the relevant provision from the law (the ground for detention) in detention orders, but does not provide any concrete justification of why the detention of a particular person meets the legal grounds for detention. Detention orders therefore lack proper individualization and never consider any special circumstances or alternative to detention.” Dublin Returnees Report, see footnote 15, at page 5.

²⁵ In the present case, the applicant’s claim for asylum was referred to the in-merit procedure on 26 July 2010.

²⁶ The December 2010 amendment of the law, which rescinded paragraph 3 of Section 55, is not retroactive, and therefore does not apply in the case at bar.

²⁷ In *Lokpo and Touré v. Hungary*, ECtHR, App. No. 10816/10, 20 September 2011, available at: <http://www.unhcr.org/refworld/docid/4e8ac6652.html>, a decision of this Court which recently became final, the applicants argued that if Section 55(3) of the Asylum Act had been applied properly, their release should have been initiated by the refugee authority once the asylum proceedings had reached the in-merit phase, and that the refugee authority’s failure to do so had rendered their continued detention unlawful. They further argued that it was not a discretionary provision, and that the refugee authority was obliged to initiate their release once their claims had been admitted to the in-merit procedure. In the alternative, they argued that if it were a discretionary provision, it created inadmissible legal uncertainty and was unlawful. The Court did not decide the issue of whether Section 55(3) was a non-discretionary provision, instead basing its decision that the applicant’s detention was unlawful on the basis that the refugee authority had failed to take a decision regarding their release.

²⁸ *Ibid.*, at paras. 23-24.

²⁹ This incident is explicitly referred to in the US State Department’s Human Rights Reports of 2009 and 2010 as follows: “On April 21, the Prosecutor General determined that the Office of Immigration and Nationality was unlawfully detaining certain asylum seekers. The Prosecutor General sent a notice to the OIN demanding that it immediately enforce the law by releasing all asylum seekers whose applications had been admitted into the final asylum procedure. The OIN challenged this notice at the Ministry of Justice and Law Enforcement, suggesting an amendment to the law. The HHC reported that the unlawful practice continued at the end of the year despite the Prosecutor General’s intervention.” The full reports are available at: <http://www.state.gov/j/drl/rls/hrrpt/2009/eur/136035.htm> and <http://www.state.gov/g/drl/rls/hrrpt/2010/eur/154428.htm>.

3. Relevant principles of international and European law governing the detention and the expulsion of asylum-seekers, refugees and persons recognized as being in need of international protection

3.1 The right to free movement and the right to liberty and security of the person under international human rights law

The right to free movement, including the right to leave any country, including one's own, is protected in all the major international human rights instruments,³⁰ and is an essential component of legal systems upholding the rule of law, including those of Hungary and the other Member States of the European Union. Similarly, the fundamental right to liberty and security of person is expressed in all the major international and regional human rights instruments.³¹ These rights apply to all persons, regardless of their immigration or other status.³²

The right to liberty and security of the person is a substantive guarantee against unlawful as well as arbitrary detention. For any detention or deprivation of liberty to be lawful, it must be effected in accordance with a procedure prescribed by law. The foreseeability and predictability of the law and the legal consequences of particular actions also inform the assessment of whether the detention will be considered lawful.³³ There must be legal certainty,³⁴ meaning that the law must be sufficiently accessible and precise, in order to allow an individual to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.³⁵

With respect to the requirement that any deprivation of liberty or detention not be arbitrary, restrictions on the right to liberty and security of the person should only be resorted to when they are determined to be necessary,³⁶ reasonable in all the circumstances and proportionate to a legitimate

³⁰ See, e.g., Article 13, UN General Assembly, Universal Declaration of Human Rights 1948, 10 December 1948, 217 A (III) (hereinafter "UDHR"); Article 12, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series, vol. 999, page 171 (hereinafter "ICCPR"); Article 5, UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations Treaty Series, vol. 660, page 195 (hereinafter "ICERD"); Articles 1-4, Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46; Article 12, Organization of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (hereinafter "ACHPR"); Article 13, Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990); Articles 20-24, League of Arab States, *Arab Charter on Human Rights*, 15 September 1994.

³¹ See, e.g., Articles 3 and 9, UDHR; Article 9, ICCPR; Article 5(1), ECHR; Article 6, European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01) (hereinafter "Charter of Fundamental Rights of the EU"); Articles 1 and 25, Organization of American States, *American Declaration of the Rights and Duties of Man*, 2 May 1948, O.A.S. Res. XXX, 1948; Article 7(2), Organization of American States, *American Convention on Human Rights*, 22 November 1969; Article 6, ACHPR.

³² UN Human Rights Committee ("UN HRC"), General Comment No. 18: Non-discrimination, 10 November 1989, para. 1, available at: <http://www.unhcr.org/refworld/docid/453883fa8.html>; UN HRC, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, para. 1, available at: <http://www.unhcr.org/refworld/docid/45139acfc.html>.

³³ *Saadi v. the United Kingdom*, ECtHR, App. No. 13229/03, 29 Jan. 2008, available at: <http://www.unhcr.org/refworld/docid/47a074302.html>, at para. 67.

³⁴ *Bozano v. France*, ECtHR, App. No. 9990/82, 18 December 1986, at para. 54; *H.L. v. the United Kingdom*, ECtHR, App. No. 45508/99, 5 October 2004, at para. 114. See also *Shum Kwok-she v. Hong Kong SAR* [2002] 5 HKCFAR 318 and 'A' v. *Director of Immigration* [2008] HKCU 1109, 18 July 2008 (HK Court of Appeal).

³⁵ *Kawka v. Poland*, ECtHR, App. No. 25847/94, 9 January 2001, at para. 48-49; *Dougoz v. Greece*, ECtHR, App. No. 40907/98, 6 March 2001, at para. 55.

³⁶ The necessity requirement was expressed by the UN Human Rights Committee in its General Comment No.8 and a number of its decisions, and is reflected in Article 31(2). It should also be noted that the European Commission's recast proposal relating to Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ("Reception Conditions Directive" or "RCD") would limit detention of asylum-seekers by introducing in amended recast Article 8(2), a necessity test ("When it proves necessary and on the basis of an individual assessment of each case" and "if other less coercive measures cannot be applied effectively"). See European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)*, 3 December 2008, COM(2008) 815 final, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0815:FIN:EN:PDF>.

objective. Analysis of potential arbitrariness must consider whether there were less restrictive or coercive measures that could have been applied to the individual concerned. The availability, effectiveness and appropriateness of alternatives to detention must be considered before recourse to detention.³⁷

3.2 The detention of asylum-seekers, refugees and persons recognized as being in need of international protection should not be used as a penalty for illegal entry or as a deterrent to seeking asylum under international refugee law

The fundamental right to liberty and security of the person, and the correlated right to freedom of movement, are also reflected in international refugee law.³⁸ Article 26 of the 1951 Convention provides for a general right of free movement for those refugees “lawfully in” the territory of the host State, subject only to necessary restrictions which may be imposed.³⁹ This provision also applies to asylum-seekers.⁴⁰ Persons who are found to be in need of international protection, for example in accordance with Section 45(1) of the Asylum Act in Hungary,⁴¹ are not only “lawfully present” in the host country, but should be considered to be “lawfully staying” there within the meaning of the 1951 Convention.⁴²

In addition to Article 26, the 1951 Convention contains a non-penalization clause, which provides that even entry without authorization does not give the State an automatic power to detain under international refugee law. Article 31(1) of the 1951 Convention stipulates that refugees having “come directly” shall not be penalized for their “illegal entry or stay” if they present themselves to the authorities without delay and show good cause for their illegal entry or stay.⁴³ The prohibition against

³⁷ *C v. Australia*, HRC, Comm. No. 900/1999, available at: <http://www.unhcr.org/refworld/docid/3f588ef00.html>, where the HRC observed that: “the State party has failed to demonstrate that those reasons justify the author’s continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author’s particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party’s immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author’s deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee’s view, arbitrary and constituted a violation of article 9, paragraph 1.”; *Sahin v. Canada, (Minister of Citizenship and Immigration)* [1995] 1 FC 214 available at: <http://reports.fja.gc.ca/eng/1995/1995fca0233.html>.

³⁸ See, e.g. UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17, available at: <http://www.unhcr.org/refworld/docid/3bfa81864.html>.

³⁹ See Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, PPLA/2011/01.Rev.1, available at: <http://www.unhcr.org/refworld/docid/4dc935fd2.html>; Reinhard Marx, “Article 26 (Freedom of Movement)”, in Andreas Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011), at page 1147.

⁴⁰ See, UNHCR, *Reception of Asylum-Seekers, including Standards of Treatment, in the Context of Individual Asylum Systems*, EC/GC/01/17, 4 September 2001, at para. 3. See also, *R. v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520, 29 July, 1999, at 527.

⁴¹ Under Hungarian law, Section 45(1) of the Asylum Act provides that: “The prohibition of *refoulement* (*non-refoulement*) prevails if the person seeking recognition would be exposed to the risk of persecution owing to reasons of race, religion, ethnicity, membership of a particular social group or political opinion or to death penalty, torture, cruel, inhuman or degrading treatment or punishment in his/her country of origin, and there is no safe third country which would receive him/her.” Section 45(4) of the Asylum Act provides that such persons be recognized as persons authorized to stay. Section 29(1)(b) of the Third Country Nationals Act provides that such persons should be granted a residence permit on humanitarian grounds, and Section 29(2) of the Third Country Nationals Act provides that such residence permit shall be valid for one year (extendable). As a result of these provisions, it should be considered that persons to whom the principle of *non-refoulement* has been found to be applicable by a competent authority are lawfully staying in Hungary.

⁴² “Lawful stay” within the meaning of the 1951 Convention embraces both permanent and temporary residence.

⁴³ The expression “coming directly” in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept “coming directly” and each case must be judged on its merits. Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression “without

penalization for illegal entry included in Article 31 applies to asylum-seekers.⁴⁴ A policy of prosecuting or otherwise penalising, including through the use of detention, illegal entrants, those present illegally, or those who use false documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's asylum claim, amount to a breach of a State's obligations in international law.⁴⁵ Further, Article 31(2) of the 1951 Convention provides that States shall not apply restrictions to the movement of refugees or asylum-seekers except when it is considered necessary. Such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

The right to asylum is recognized as a basic human right.⁴⁶ In exercising this right, asylum-seekers are often forced to arrive at, or enter, state territory without prior authorization. The position of asylum-seekers often thus differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry, not least because they may be unable to obtain the necessary documentation in advance of their flight, e.g., because of their fear of persecution or the urgency of their departure.⁴⁷ This element, as well as the fact that many asylum-seekers have experienced traumatic events,⁴⁸ needs to be taken into account in determining the justifiability of any restrictions on freedom of movement or liberty based on irregular entry or presence.⁴⁹ The prohibition against detaining asylum-seekers solely on the grounds that they have applied for asylum is also reflected in EU law, most notably in Article 18 of the Asylum Procedures Directive.⁵⁰

delay". "Illegal entry" would, *inter alia*, include arriving or securing entry through the use of false or falsified documents,⁴³ the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. "Illegal presence" would cover, for example, remaining after the elapse of a short, permitted period of stay. See, e.g. *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999 (hereinafter "UNHCR Revised Detention Guidelines"), available at:

<http://www.unhcr.org/refworld/docid/3c2b3f844.html>; UNHCR, *Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised*, 8-9 November 2001 (hereinafter "Global Consultations Summary Conclusions"), available at: <http://www.unhcr.org/3bf4ef474.html>.

⁴⁴ In *R. v. Uxbridge Magistrates Court, ex parte Adimi*, see footnote 40, at 527, a case involving an asylum-seeker who had used false documents to enter the United Kingdom prior to lodging his application for asylum, the High Court of the UK concluded: "That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt." Upheld in *R. v. Asfaw* [2008] UKHL31, at para 26.

⁴⁵ Global Consultations Summary Conclusions, see footnote 43, at paras. 5-7; Guy Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection", in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) at page 219 (paras. 11-12).

⁴⁶ Article 18 of the Charter of Fundamental Rights of the EU enshrines the right to asylum. The scope of this right is broad and incorporates not only the substantive provisions of the 1951 Convention but also the procedural and substantive standards contained in the Union's asylum *acquis*. The protection it confers plainly goes beyond protection from *refoulement* and includes a right to apply for and be granted refugee or subsidiary protection status. There will thus be a breach of Article 18 not only where there is a real risk of *refoulement* but also in the event of (i) limited access to asylum procedures and to a fair and efficient examination of claims or to an effective remedy; (ii) treatment not in accordance with adequate reception and detention conditions and (iii) denial of asylum in the form of refugee status or subsidiary protection status, with attendant rights, when the criteria are met. See UNHCR, *N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland - Written Observations of the United Nations High Commissioner for Refugees*, 1 February 2011, C-411/10 and C-493/10, available at: <http://www.unhcr.org/refworld/docid/4d493e822.html>. The right to seek and enjoy asylum is also recognized in Article 14 of the UDHR. Read together, the right to asylum and the right to liberty and security of the person give rise to a presumption against detention for asylum-seekers.

⁴⁷ UNHCR Revised Detention Guidelines, see footnote 43. See also, UN Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, at para. 53: "[C]riminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention." Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement>.

⁴⁸ As recognized by this Court in its Grand Chamber judgment of *M.S.S. v. Belgium and Greece*, ECtHR (Grand Chamber), App. No 30696/09, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>, at paras. 232-33.

⁴⁹ UNHCR Revised Detention Guidelines, see footnote 43.

⁵⁰ *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, OJ L 326/13 of 13.12.2005, Article 18 (hereinafter "Asylum Procedures Directive"). Article 18 provides: "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum." Further, Article 31(2) also provides that: "Contracting States shall not apply to the movements of such refugees (including

3.3 The prohibition of the expulsion of asylum-seekers, refugees and persons recognized as being in need of international protection

UNHCR notes that under Articles 31 to 33 of the 1951 Convention, an asylum-seeker cannot be deported or otherwise removed until his/her application for refugee status has been definitively determined. This principle was recently stated in clear terms by this Court in the case of *R.U. v. Greece*:

“[I]l ressort du droit international et national, à savoir les articles 31-33 de la Convention de Genève relative au statut des réfugiés [...] que l’expulsion d’une personne ayant soumis une demande d’asile n’est pas permise jusqu’au traitement définitive de ladite demande.”⁵¹

This prohibition against the deportation or expulsion of an individual who has sought asylum, and whose claim has not yet been definitively determined, stems from States’ *non-refoulement* obligations. The obligation of states not to expel or return (*refouler*) a person to territories where his/her life or freedom would be threatened is a cardinal protection principle, most prominently expressed in Article 33(1) of the 1951 Convention. The prohibition of *refoulement* applies to all refugees, including those who have not been formally recognized as such, to persons recognized as being in need of international protection, and to asylum-seekers whose status has not yet been determined.⁵² The *non-refoulement* principle has been recognized as a principle of customary international law,⁵³ and is also contained in Article 19(2) of the EU Charter, and a *non-refoulement* obligation may also arise as a result of the risk of a breach of certain rights contained in the ECHR.⁵⁴

The protections against *refoulement* and expulsion of refugees lawfully in the territory of a host State (contained in Articles 33 and 32⁵⁵ of the 1951 Convention respectively) and the prohibition of penalization of refugees and asylum-seekers for illegal entry and presence (contained in Article 31 of the 1951 Convention) are central tenets of the 1951 Convention and the right to asylum. In addition, the right to asylum requires States to (i) advise individuals of their right to apply for refugee status and other forms of international protection and (ii) provide for fair and effective status determination

asylum-seekers) restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country.”

⁵¹ *R.U. v. Greece*, ECtHR, App. No. 2237/08, 7 June 2011, available at:

<http://www.unhcr.org/refworld/docid/4f2aafc42.html>, at para. 94 [UNHCR Translation: “[I]t emerges from international and national law, notably Articles 31-33 of the Geneva Convention Relating to the Status of Refugees [...] that the expulsion of a person who has submitted an application for asylum is not permitted until a final determination on the asylum application.”]. The Court made a similar finding in *S.D. v. Greece*, ECtHR, App. No. 53541/07, 11 June 2009, available at:

<http://www.unhcr.org/refworld/docid/4a37735f2.html>, at para. 62, without making specific reference to the provisions of the 1951 Convention.

⁵² See ExCom Conclusion No. 6 (XXVIII), 1977, at para. (c), ExCom Conclusion No. 79 (XLVII), 1996, at para. (j), ExCom Conclusion No. 81 (XLVII), 1997, at para. (i), available at <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, at para. 11, available at <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>.

⁵³ *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12–13 December 2001*, HCR/MMSP/2001/09, 16 January 2002, available at:

<http://www.unhcr.org/home/RSDLEGAL/3d60f5557.pdf>, at preambular para. 4. Earlier, the Executive Committee of UNHCR observed that “the principle of *non-refoulement* ... was progressively acquiring the character of a *peremptory rule* of international law.” See Executive Committee Conclusion No. 25 (XXXIII), para. (b). See also UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>

⁵⁴ On Article 3, see in particular: *M.S.S. v. Belgium and Greece*, see footnote 48, and *Hirsi Jamaa and Others v. Italy*, ECtHR, App. No. 27765/09, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>. On Article 6, see in particular *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, App. No. 8139/09, 17 January 2012, available at: <http://www.unhcr.org/refworld/docid/4f169dc62.html>.

⁵⁵ Compliance with due process is expressly required by Article 32(2) of the 1951 Convention in respect of expulsion of refugees. To the extent that *refoulement* would pose a potentially greater threat to a refugee or asylum-seeker than expulsion, it is UNHCR’s position that, at the very least, the due process safeguards applicable to expulsion must be read into the application of the exceptions to *refoulement*. There are no exceptions to the *non-refoulement* obligation under the ECHR or in the jurisprudence of the European Court of Human Rights, and as such, the protection afforded by the ECHR is wider than that provided by Articles 32 and 33 of the 1951 Convention. *Saadi v. Italy*, ECtHR, App. No. 37201/06, 28 February 2008.

procedures.⁵⁶ States must regulate and apply their immigration policies with due regard to their obligations under the 1951 Convention.⁵⁷ This means that States cannot return such persons to their country of origin or another territory until such time as it has been definitively determined that they do not have international protection needs.⁵⁸

3.4 The prohibition of detention of asylum-seekers, refugees and persons recognized as being in need of international protection for the purpose of expulsion

In light of the principles highlighted above in Parts 3.1, 3.2 and 3.3, it can be concluded that there exists a prohibition in international human rights and refugee law, under which asylum-seekers and persons recognized as being in need of international protection cannot lawfully be detained for the purpose of expulsion.⁵⁹

3.5 The right to liberty and security under Article 5(1) ECHR in light of the relevant international human rights and refugee law standards

The guarantee of the right to liberty and security in Article 5 ECHR applies to “everyone” within a State’s jurisdiction, irrespective of nationality or immigration status. Article 5 also explicitly states that “no one” shall be deprived of the right to liberty save in prescribed cases. Sub-paragraphs (a) to (f) of Article 5(1) contain an exhaustive list of grounds upon which persons may be deprived of their liberty.⁶⁰ Article 5(1)(f) only permits the State to restrict the liberty of third-country nationals in an immigration context, either (i) to prevent an individual from effecting an unauthorized entry or (ii) with a view to deportation or extradition.

Compliance with the international obligations of States should form an integral part of their compliance with their obligations under the ECHR. This Court has already taken into consideration a State’s international obligations, including under international refugee law, when assessing its compliance with the ECHR in a number of cases. As noted above, in a case particularly relevant to the facts presently before the Court, *R.U. v. Greece*, this Court considered Greece’s obligations under Articles 31 to 33 of the 1951 Convention in assessing whether there had been a violation of Article 5(1)(f) ECHR.⁶¹ In *Hirsi Jamaa and Others v. Italy*, this Court took into account a State’s *non-refoulement* obligation under international law in the context of its finding that there had been a violation of Article 3 ECHR.⁶² In *Kuric and Others v. Slovenia* (pending before the Grand Chamber), this Court took into account the international standards on the avoidance of statelessness to conclude that there had been a violation of Art. 8 ECHR,⁶³ while in *Rahimi v. Greece*, this Court took into account, *inter alia*, the Convention on the Rights of the Child to conclude to a violation of Art. 5 ECHR.⁶⁴

⁵⁶ ExCom Conclusion No. 85(XLIX),1988, at para. (dd).

⁵⁷ *Hirsi Jamaa and Others v. Italy*, see footnote 54, at para. 179.

⁵⁸ See, for example ExCom Conclusion No. 22 (XXXII), 1981, Section 2 (Admission and *Non-Refoulement*); ExCom Conclusion No. 81 (XLVIII), 1997, at para. (h) (no rejection at frontiers without the application of these procedures); ExCom Conclusion No. 82 (XLVIII),1997, at para. (d) (admission of asylum applicants to state territory); ExCom Conclusion No. 85 (XLIX), 1998, at para. (q); ExCom Conclusion No. 99 (LV), 2004, at para. (l); ExCom Conclusion No. 108 (LIX), 2008. Under EU law, there are clear legal obligations on the part of the responsible State (pursuant to the provisions of the Dublin II Regulation) to complete the examination of the application for asylum and to allow asylum-seekers to remain on their territory pending the examination of their application. See, in particular, Article 3 of the Dublin II Regulation; Article 7 of the Asylum Procedures Directive; Article 6 of *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, OJ L 31 of 6.2.2003, (hereinafter “Reception Conditions Directive”).

⁵⁹ *R.U. v. Greece*, see footnote 51, at para. 94; *S.D. v. Greece*, see footnote 51, at para. 62.

⁶⁰ See, e.g., *Saadi v. the United Kingdom*, see footnote 33, para. 43; *Witold Litwa v. Poland*, ECtHR, App. No. 26629/95, at para. 49.

⁶¹ *R.U. v. Greece*, see footnote 51.

⁶² *Hirsi Jamaa and Others v. Italy*, see footnote 54, at para. 134.

⁶³ *Kuric and Others v. Slovenia*, ECtHR, App. No. 26828/06, 13 July 2010, available at: <http://www.unhcr.org/refworld/docid/4c3f01312.html>, at para. 376.

⁶⁴ *Rahimi v. Greece*, ECtHR, App. No. 8687/08, 5 April 2011, available at: <http://www.unhcr.org/refworld/docid/4d9c3e482.html>, at paras. 108-110.

As with the right to liberty and security of the person in international human rights law, as summarized in Section 3.1 above, any deprivation of liberty must (i) be lawful and (ii) not be arbitrary under Article 5(1)(f) of the ECHR.

This Court has held that where the lawfulness of detention is in issue, including the question of whether a “procedure prescribed by law” has been followed, the ECHR refers essentially to national law, although the State party also needs to ensure that any deprivation of liberty is in keeping with the purpose of Article 5, which is to protect the individual from arbitrariness.⁶⁵ As mentioned in Section 3.1 above, this Court has also held that there must be a degree of legal certainty.⁶⁶

In relation to detention for the purposes of expulsion, this Court has held that any deprivation of liberty under the second limb of Article 5(1)(f) will be justified only so long as deportation or extradition proceedings are in progress. As stated in *Chahal v. the United Kingdom*, and subsequent cases, if deportation proceedings are “not prosecuted with due diligence, the detention will no longer be permissible under Article 5(1)(f).”⁶⁷

UNHCR notes that in Hungary, detention of asylum-seekers is generally based upon Sections 54(1) or 55 of the Third Country Nationals Act, related to deportation or expulsion. As noted in Section 2.1 above, Hungarian law only permits detention with a view to deportation where that deportation can be executed.⁶⁸ Under Hungarian law, persons to whom the *non-refoulement* principle has been found to be applicable cannot be deported or expelled.⁶⁹ Moreover, under Hungarian law, asylum-seekers cannot be expelled until such time as their applications have been refused by a final and executable decision of the competent refugee authority.⁷⁰

Further to Sections 3.2 to 3.4 above, UNHCR submits that detention, for the purposes of expulsion, of (i) an asylum-seeker whose application for international protection has not been definitively rejected and/or (ii) a person recognized as being in need of international protection, is at variance with international human rights and refugee law. In keeping with this Court’s jurisprudence cited above, Hungary’s failure to comply with its obligations under international refugee law should form an integral part of any assessment of its compliance with Article 5(1)(f) of the ECHR.

4. Conclusion

Hungary’s asylum and related administrative detention practices are not in conformity with their obligations pursuant to Articles 31 to 33 of the 1951 Convention.

Under international human rights and refugee law as well as Hungarian national law, asylum-seekers cannot be deported or expelled, until such time as there has been a final decision on their claims, determining that they are not in need of international protection. In such circumstances, the detention of an asylum-seeker for the purposes of expulsion or removal is unlawful.

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30 March 2012**

⁶⁵ *Amuur v. France*, ECtHR, App. No. 19776/92, 25 June 1996, available at: <http://www.unhcr.org/refworld/docid/3ae6b76710.html>, at para 50; *Lokpo and Touré v. Hungary*, see footnote 27, at para. 17

⁶⁶ *Bozano v. France*, see footnote 34, at para. 54; *H.L. v. the United Kingdom*, see footnote 34, at para. 114; *Dougoz v. Greece*, see footnote 35; *Kawka v. Poland*, see footnote 35, at paras. 48-49.

⁶⁷ See *Chahal v. the United Kingdom*, ECtHR, App. No. 22414/93, 15 November 1996, available at: <http://www.unhcr.org/refworld/docid/3ae6b69920.html>, at para. 113; *Louled Massoud v. Malta*, ECtHR, App. No. 24340/08, 15 November 1996, available at: <http://www.unhcr.org/refworld/docid/3ae6b69920.html>, at para. 60.

⁶⁸ Third Country Nationals Act, Section 54.

⁶⁹ Asylum Act, Section 55(3).

⁷⁰ Section 51(2) of the Third Country Nationals Act. Moreover, asylum-seekers are entitled to resident permits in Hungary: Section 5(1)(a) Asylum Act; Section 29(1)(c) and Section 29(2)(a) of the Third Country Nationals Act.