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COMMITTEE AGAINST TORTURE

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Comments by the Government of the HUNGARY* to the conclusions and recommendations of the Committee against Torture (CAT/C/HUN/CO/4)

[15 November 2007]

* In accordance with the information transmitted to States parties regarding the processing of their reports, the present document was not formally edited before being sent to the United Nations translation services

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Recommendation 7

1. Sections 126-128 of Act No 19 of 1998 on criminal procedure (henceforth: Be.) governs custody. Custody may last for maximum seventy-two hours [Section 126 subsection (3) of Be.]. During this period the public prosecutor shall determine whether the conditions of pre-trial detention are met and whether pre-trial detention is to be motioned. Within the period of custody the court shall decide on the prosecutor's motion for pre-trial detention. The defendant shall immediately be released if the court has not ordered his pre-trial detention, even if the seventy-two hours time limit has not expired at the time of release [Section 126 subsection (3) of Be.].

2. According to Section 1 subsection (1) of Act No. 107 of 1995 on penitentiary organization this organization is an armed, law enforcement state organ with the task of enforcing sentences and measures entailing imprisonment, forced measures applied in criminal proceedings and confinements imposed for minor offences as sentences converted from fines. Since custody is regulated under the Be. among forced measures, in theory it can be enforced in a penitentiary institution as well, but in practice custody is never enforced in such an institution.

3. Upon the authorisation of Law-decree No. 11 of 1979 on the implementation of sentences and measures (henceforth: Bv. tvr.) Decree No. 19/1995 (XII.13.) BM on the order of police cells was issued. Section 1 subsection (1) of this Decree provides that a person taken into custody under criminal or minor offence laws or for public security reasons, a pre-trial detainee, a convict and a person detained in a police cell for having committed minor offence shall be regarded as a detainee for the purposes of this Decree.

4. The enforcement of pre-trial detention is governed by Section 135 of Be. It provides that pre-trial detention shall, as a rule, be enforced in a penitentiary institution but if it is justified by the necessity of carrying out an investigatory act the public prosecutor may order to keep the suspect – for a period of maximum thirty days – in a police cell. After the expiry of this period, upon the public prosecutor's motion, the court shall decide on the suspect's placement in a police cell for an additional thirty-day long period. It means that pre-trial detention can, for a period of maximum sixty days, be enforced in a police cell as well.

5. The duration of pre-trial detention is governed under Sections 131-132 of Be. Pre-trial detention ordered prior to filing the indictment may continue up to the decision of the first instance court taken during the preparation for the hearing, but may never be longer than one month. Pre-trial detention may be extended by the investigating judge by three months at a time, but the overall period may not exceed one year from the date of issue of the order. Thereafter pre-trial detention may be extended by the regional court acting as a single judge by two months at a time.

6. The relevant figures taken from past years' practice show that approximately three-fourths of pre-trial detentions are terminated within four months from the date when they were ordered. Having regard to this fact the Act provides that after the expiry of one month the investigating judge may extend the duration of pre-trial detention by three months at a time.

7. Section 176 subsection (2) of Be. provides that investigation against a definite suspect may last for maximum two years from the date of his interrogation. This is the maximum period of pre-trial detention prior to the preferment of the bill of indictment.

8. Pre-trial detention ordered or upheld by the first instance court after the preferment of the bill of indictment may continue up to the pronouncement of the first instance decision on the merits. Pre-trial detention ordered or upheld by the first instance court or ordered by the second instance court may continue up to the termination of the second instance proceedings. Pre-trial detention ordered or upheld by the second instance court after the pronouncement of the second instance decision on the merits or ordered by the third instance court may continue up to the termination of the third instance proceedings but in each case it shall not last longer than the term of imprisonment imposed under the non-final decision.

9. If the first or second instance decision on the merits is quashed or the case is remitted to the first or second instance court pre-trial detention ordered or upheld by the second or third instance court may continue up to the decision taken by the court to which the case was remitted during the preparation for the hearing.

10. The Be. provides that the justification of the placement of the accused in pre-trial detention during the trial phase shall be reviewed periodically. Therefore, if the period of the pre-trial detention ordered or upheld after the preferment of the indictment exceeds six months and the first instance court has not taken a decision on the merits within this period, the first instance court shall review whether the placement in pre-trial detention is justified; if the duration of the pre-trial detention exceeds one year the second instance court shall review whether the placement in pre-trial detention is justified. Thereupon – that is, if the duration of the pre-trial detention exceeds one year –the second instance court or – if the proceedings are conducted at third level – the third instance court shall review every six months whether the placement in pre-trial detention is justified.

11. The period of pre-trial detention shall not exceed an overall period of three years unless pre-trial detention has been ordered or upheld after the pronouncement of the decision on the merits, or proceedings are pending at third instance or as a result of the remittal of the case. This is the maximum length of time a defendant is lawfully allowed to be exposed to uncertainty about his fate. Therefore this provision requires speedier administration on the part of the investigating authority, the public prosecutor and the court, in compliance with Section 136 subsection (1) of Be., according to which the court, the prosecutor and the investigating authority shall make all efforts to reduce the term of pre-trial detention as much as possible. If the defendant is held in pre-trial detention the case must be given priority.

12. As to the separation of juveniles and adults in pre-trial detention the provisions of the Bv. tvr. have to be invoked. Section 119 subsection (2) of the Bv. tvr. provides that juveniles and adults in pre-trial detention shall be separated.

Recommendation 9

13. At the time of the 2006 November CAT session immigration was still governed by Act No. 39 of 2001 on the entry and stay of aliens (henceforth: Idtv.) Since the harmonisation of the rules governing the entry and stay of nationals of European Economic Area Member States (EEA nationals) with the special requirements of Community law constituted a prerequisite to Hungary’s accession to the European Union and new tendencies have emerged in the field of international migration since the adoption of Idtv., also having regard to the experience gained from the application of Idtv., immigration regulation had to be reviewed.

In December 2006 the National Assembly adopted two new laws which replaced Idtv. and which entered into force on 1 July 2007: Act No 1 of 2007 on the admission and residence of persons with the right of free movement and residence, and Act No. 2 of 2007 on the admission and right of residence of third-country nationals (henceforth: Harmtv.) which, in compliance with the EU rules, order to apply different set of rules to the two circles of persons. Some of the provisions will enter into force only after Hungary's accession to the Schengen Area. Harmtv. contains several new provisions, in line with the recommendations of the Committee and the Courts. In contrast to Idtv. Harmtv. does not regulate custody under a separate title, the rules pertaining to custody are set forth among the rules governing law enforcement, including detention under immigration laws, detention carried out in order to secure expulsion, complaint, extension of detention by court order and the common provisions of court procedures.

14. As to the legal grounds of **detention under immigration laws** the possibility of placing into such detention a foreigner under an expulsion order who has committed a minor offence or a criminal offence prior to his departure from the country is no longer allowed under the law. The rationale behind the new regulation is that in case a well-founded suspicion of the commission of a criminal offence exists the prosecuting authorities are competent to determine whether the perpetrator's personal liberty should or should not be restricted; whereas the commission of a minor office has no such immigration relevance which, in itself, might justify detention. The new regulation does no longer contain obligatory grounds for detention under immigration laws, for the same reasons that have been presented in connection with expulsion: Idtv. contained grounds on the basis of which criminal proceedings must be instituted, therefore the prosecuting authorities are competent to determine whether personal liberty should or should not be restricted in the given case and if the decision is yes, the restriction of liberty has to be effected not within the framework of immigration control but within the framework of criminal procedure. This regulation provides stronger guarantees and allows for the possibility of detaining persons from third countries only as a last resort.

15. Detention under immigration laws shall be ordered by way of a formal decision, and shall be carried out when communicated. In contrast to the five-day long duration contained in Idtv., according to the regulation in force since July detention under immigration laws may be ordered for a **maximum duration of seventy-two hours**. This provision is based on Section 14 subsection (2) of the final Committee recommendation No. COM(2005)391 which provides that orders on temporary detention shall be issued by judicial authorities. In urgent cases temporary detention may be issued by administrative authorities as well but in such cases detention shall be approved by the judicial authorities within 72 hours from the date of issue of the detention order. In contrast to the regulation contained in Idtv., detention can no longer be **extended** for a period of maximum six months but only **for a period of maximum thirty days** at a time, **by the court with jurisdiction** over the place of detention, until the departure of the third-country national. This modification ensures compliance with Section 14 subsection (3) of the final Committee recommendation No. COM(2005)391, according to which temporary detention orders shall be reviewed by the judicial authorities minimum once a month. Detention ordered under immigration laws shall be terminated immediately when the conditions for carrying out the expulsion are secured, when it becomes evident that the expulsion cannot be executed, or after six months from the date of issue of the order. In contrast to the earlier regulation contained under Idtv., **the maximum duration of temporary detention is reduced from one year to six months** which complies with Section 14 subsection (4) of the final Committee recommendation No. COM(2005)391, according to which the duration of temporary detention shall not last longer than six months.

16. T**he duration of detention prior to expulsion shall be included in the maximum duration of the detention under immigration laws**. If the detention under immigration laws is terminated because it becomes evident that the expulsion cannot be executed or because six months have already elapsed but the expulsion cannot be enforced yet, the immigration authority ordering the detention shall designate a compulsory place of confinement for the third-country national concerned. Harmtv. also regulates **detention prior to expulsion**: The immigration authority may order the detention of the third-country national prior to expulsion in order to secure the conclusion of pending immigration proceedings if his identity or the legal grounds of his residence is not conclusively established. Detention prior to expulsion shall be ordered by way of a formal decision and shall be carried out when communicated. Detention prior to expulsion **may be ordered for a maximum duration of seventy-two hours,** and it may be extended by the **court with jurisdiction over the place of detention** until the third-country national's identity or the legal grounds of his residence is conclusively established, or **for maximum thirty days.**

17. Detention shall be terminated immediately when the grounds thereof cease to exist. *„In such proceedings a review role, more efficient than at present, must be ensured for the courts."* Harmdtv. has introduced the institution of **complaint**. A third-country national may file a complaint – as a form of remedy, by reference to violation of law – against an order for detention under immigration laws or prior to expulsion (henceforth together: detention) within seventy-two hours from the date of issue of the order. The third-country national placed under detention may file a complaint in the event of the immigration authority's failure to comply with its obligations set out under Sections 60-61 (duty to provide information and to carry out the detention according to the circumstances specified under the law). The complaint shall be determined by the **court with jurisdiction over the place of detention**. Depending on the court's decision detention shall be terminated immediately, the omitted measure shall be taken or the infringement shall be terminated. The court shall decide on a complaint about a breach of law **immediately** or simultaneously with the extension of the detention beyond the seventy-two-hour time limit, whereas it shall decide on a complaint about failure to comply with the duties specified under Section 60-61 **within eight days.**

18. The immigration authority shall request the local court to **extend the detention beyond the seventy-two-hour time limit** within twenty-four hours from the issue of the detention order. The immigration authority shall support its request with reasons.

19. The court may grant an extension of detention under immigration laws for a maximum duration of thirty days at a time. Any additional thirty-day extension of detention under immigration laws may be requested at the court by the immigration authority, where the court must receive the request within eight working days prior to the due date for extension. Thus, in contrast to the previous regulation – according to which detention could be ordered for six months with monthly court review – the **court itself shall order detention for a maximum period of thirty days which can be extended in case extension is justified.** The maximum duration of detention under immigration laws is six months – in contrast to the one year under the previous regulation – into which the duration of detention prior to expulsion shall be included.

20. With some exceptions, the **common provisions of court procedures** remained unaltered in Harmtv. The court shall proceed with a single judge presiding in proceedings concerning

complaints and the extension of detention and shall adjudicate the case by way of an order. If a complaint or a motion for extension has been dismissed by the court another request or motion may not be submitted on the same grounds. In the court proceedings representation for the third-country national may only be provided by a legal representative. The court shall appoint a representative ad litem for any third-country national who does not understand the Hungarian language and is unable to contract the services of a legal representative of his own.

21. The rules governing **personal hearing** have, however, been altered. If the seventy-two-hour time limit is extended by the court the detainee shall be heard in person; in proceedings related to complaints and further extensions the detainee shall be heard in person upon his request. The hearing may be held at the place of detention and in the absence of the third-country national's legal representative. The court may dispense with a hearing if the third-country national is unable to attend it due to medical treatment in an in-patient medical institution, or if the complaint or the motion does not originate with a party entitled to do so. The third-country national and the immigration authority shall present their evidence in writing or orally during the hearing. The persons present shall be given the opportunity to inspect the evidence presented. If the third-country national or the immigration authority having made the motion are absent from the hearing but submitted their observations in writing the court shall present their observations.

22. The court's decision shall be communicated to the third-country national concerned and to the immigration authority. If the third-country national has a legal representative or a representative ad litem, the decision shall be communicated to them as well. The court’s decision shall be pronounced and shall be served without delay. The court's decision shall not be subject to further remedy. Court proceedings are exempt from charges.

23. In parallel with the modification of the immigration rules the law governing persons in need of international protection have also been altered. Act No. 80 of 2007 (henceforth: new Met.) replacing Act No. 139 of 1997 was drafted with a view to modernising asylum procedure on the basis of experience gained from the application of the law and to harmonising the regulation with the EU directives and other legal acts. The new Met. was adopted by the National Assembly on 25 June 2007 and it will enter into force on 1 January 2008. As a result of the new Met. asylum procedure became modified: at present it is divided into a preliminary examination proceedings phase and a proceedings on the merits phase. The first phase is aimed at identifying and excluding from the second phase those requests in respect of which the proceedings for surrender and take over specified under the Dublin II Regulation have to be instituted or which are inadmissible, thereby enabling the asylum authorities to focus their capacity on determining the merits of the requests. Requests for refugee status filed in the immigration proceedings are governed under Section 55 of the new Met.: if the asylum authority forwards the request to consideration on the merits and the requestor is placed in detention under immigration laws, upon the initiation of the asylum authority the immigration authority shall terminate the detention. The implementation rules related to this provision are being elaborated by the Government, upon authorization given in the Act.

24. The new rules shall be applicable from 1 January 2008, until that date the text of the 1997 Act shall remain in force. In the enactment of the implementation rules special attention is devoted to the recommendations of the Committee Against Torture.

Recommendation 12

25. In respect of this question it must be noted that according to Section 54 subsection (2) of the Constitution no one shall be subjected to torture or inhuman or degrading treatment. It means that the highest level protection is ensured for the field falling under the competence of CAT. However, in addition to the right against torture Section 59 subsection (1) of the Constitution also guarantees another fundamental right, the right to protection of personal data. Section 2 of the governing law, Act No 63 of 1992, defines data related to racial origin and affiliation to a national or ethnic minority as special data. It means that under the law in force such data can be processed only upon the prior written consent of the person concerned, or if processing of the data is based on international convention, or is provided for by an Act for the purpose of enforcing a fundamental right safeguarded under the Constitution, or in the interest of national security, crime prevention or criminal prosecution. Section 9 subsection (1) governing the transfer of personal data to a foreign state provides that personal data (including special data) shall – irrespective of the data carrier or the form of data transfer – be transmitted to a data handler in a third country if:

a) the person concerned has given express consent to it, or

b) such transfer is allowed under the law and proper level of protection is ensured in the third country in respect of the handling and processing of the personal data transmitted.

Recommendation 17

26. Para. 4 a) of the CAT Committee Report welcomes the fact that the National Assembly of Hungary adopted **Act No 135 of 2005 on support to victims of crime and mitigation of damages by the state (henceforth:** Ástv.) whereas it finds regrettable that under the Act no special compensation or support scheme is offered to victims of torture. It must be noted that in the application of Ást. any victim of a crime committed on the territory of the Republic of Hungary and any natural person who, as direct consequence of a crime, suffered injury – especially bodily or mental harm, emotional shock or peculiar damages – shall be regarded as a victim. Victims of crime are entitled to specific forms of support under the Act. As any person having suffered injury as a result of crime is regarded as a victim under the Act, support is based exclusively on the fact of the commission of the crime and no other circumstance (e.g. age) is taken into consideration. The Hungarian legislature started from the assumption that support for victims of crime should be based on the effect exerted by the specific crime on the victim concerned therefore victims seeking help from the victim support service are offered individualised support responding to the specific needs arisen in consequence of the crime. The law ensures that victims of crime shall receive the form of support they need. In addition to pecuniary compensation the state also offers legal advice, administration and rehabilitation programs for victims of crime.
