



## HUNGARIAN HELSINKI COMMITTEE

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### **The Hungarian Helsinki Committee's opinion on the Governments amendments to criminal law related to the sealed border**

The Hungarian Helsinki Committee has analyzed the Government's amendments to existing criminal law in relation to the fence at the border with Serbia.

The Government recently introduced three new crimes related to crossing the border, tightened criminal rules relating to smuggling in human beings, and introduced special rules expediting criminal procedures for those illegally crossing the fence.

Several elements of these new rules are in direct violation of international legal obligations, and they are practically impossible to implement, the expected case load will produce an enormous pressure on the whole of the Hungarian criminal justice system. Hungary has already been condemned to pay compensation by the European Court of Human Rights several times due to the lengthiness of criminal procedures, and recently lost a strategic case before the Court due to overcrowding in criminal detention. It is easy to predict that the handling of these new cases, "with priority over all other cases" according to the new rules, will further delay the procedure in other criminal cases and further increase the overcrowding of detention facilities.

1. Our primary emphasis is on the following: **a substantive decision on the asylum claims is a prerequisite for determining the culpability of asylum seekers.** Article 31 of the 1951 Convention relating to the Status of Refugees prohibits the imposition of penalties on refugees who are coming illegally from a territory where their life or freedom was threatened, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

If during the course of the criminal procedure related to illegal entry, the defendant requests international protection, the criminal procedure must be suspended according to a 2007 position of the Prosecutor General of Hungary.

In connection with this we would further emphasize that Serbia cannot be considered a safe third country. Even though there is no armed conflict in Serbia now, in accordance with the text of the Convention, refugees' lives and freedom is under threat due to the inadequate asylum system, the lack of effective international protection, bad detention conditions and other rights violations. This is further supported by the positions of the Office of the United Nations High Commissioner for Refugees, Amnesty International and Human Rights Watch, as well as by reports of the Hungarian Helsinki Committee.

2. **Appropriate criminal justice guarantees must be adhered to at all stages of the criminal process**, therefore in accordance with the European Convention on Human Rights and EU directives non-Hungarian citizens in all stages of the procedure have the right to use their own language and the right to appropriate information and legal defense. These rights cannot be secured and are almost impossible to guarantee if authorities are to handle several thousand cases per day.

3. The use of such severe legal ramifications related to illegal entry is troubling in light of the jurisprudence of the European Court of Human Rights. Criminal penalties, in particular prison sentences, can only be introduced, if the person in question has already been expelled. However, according to the new rules, asylum seekers will immediately be criminally liable for simply crossing the border fence.



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4. There are constitutional concerns over the increased severity of rules regarding expulsion orders, and the rules on suspended sentences specifically related to acts committed in relation to the fence. Any offender may be expelled, even in the case of milder criminal sentences, even if they have familial relationships in Hungary. In case of a suspended prison sentence issued for acts committed in relation to crossing the fence, the prison sentence will be enforced even if during the time of suspension the accused returns to the territory of Hungary regardless of their reasons, or legal status. This will remain the rule even if the accused subsequently obtains refugee status in another EU country.

### **Amendments to Act XIX of 1998 on Criminal Procedure**

1. In case of crisis situation due to mass immigration, in fact within the unspecified "territory" of such a crisis, criminal procedures related to acts committed in relation to the fence will have priority over all other procedures. The Szeged Regional Court will have exclusive jurisdiction over these cases, the judges will be appointed by the National Office of the Judiciary.

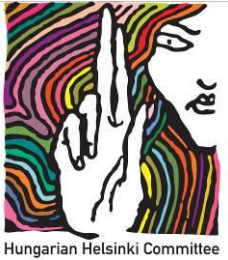
Most of the compensation ordered against Hungary by the ECtHR were paid on account of the fairness or the length of the proceedings – including that of criminal proceedings. It stands to reason therefore that the newly introduced rules will further prolong judicial procedures in general.

2. As a general rule, according to the amended law, courts should primarily order house arrest of defendants, which must be carried out in immigration or asylum detention centers. There is no doubt that if immigration or asylum detention facilities will be designated as places of house arrest, this will in fact mean pre-trial detention. It is also worrisome that private homes or shelters cannot be designated as the place of house arrest.

3. Pre-trial detention ordered by the court may take place in asylum or immigration facilities, as well as in police jails. However, based on the findings of the Hungarian Helsinki Commission and the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), Hungarian police detention facilities have been found inadequate for prolonged detention of individuals, upgrading these facilities would require substantial funding, especially in light of the special needs of traumatized refugees.

4. The amendments require the use of special rules regarding expedited criminal procedure as well. It is no longer a requirement that the punishment for the offense must not exceed 8 years imprisonment. Therefore expedited procedures of a few days or weeks may take place even in the case of more serious offenses, such as those punishable by life sentences. Such expediency comes at the cost of potentially severe violations of rights.

We must emphasize that the use of special procedural rules in these cases are inappropriate for two reasons: first the **adjudication of the asylum claim should precede any criminal procedure** related to illegal entry, therefore tight procedural deadlines cannot be complied with; furthermore, **these cases could hardly be considered "easy to determine"** which would be a prerequisite of the use of special arrangement rules.



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5. There is no statutory requirement to provide a written translation of either the indictment or the sentencing part of the ruling, which is in direct violation of the relevant EU Directive and of the right to fair trial in accordance with the European Convention on Human Rights.

6. Although the amendments require that all coercive measures must be used with regard to the interests of minors in mind, in fact the special protections and rules pertaining to minors are not met in the criminal procedures relating to the border closure. This means that for those under the age of 18 there is no requirement to appoint a guardian and parents or legal guardians cannot exercise their rights related to the case of the minor even if they reside within Hungary. Neither the favorable rules relating to deferred prosecution, nor the specialized rules of evidence pertaining to juveniles (i.e.: prohibition of the use of lie detectors) apply in these cases. This is in violation of the best interest of the child principle guaranteed by numerous international instruments and it is further discriminatory.

### **Amendments to Act C of 2012 on the Criminal Code**

**1. Expansion of the rules of expulsion violates the right to family life and privacy.** According to the general rules, if expulsion would violate the right to family life, only those sentenced to 10 years or more could (properly) be expelled from Hungary, independent of the lawfulness of their residence. Under the new regulations, anyone residing in Hungary unlawfully may be expelled, regardless of their parents or children residing in Hungary. Under current regulations foreigners sentenced for robbery may not (lawfully) be expelled if they have a child residing in Hungary, however if a refugee violates the border fence, there is no prohibition against expulsion.

Furthermore, in cases involving the border closure, it will now be mandatory for judges to order expulsion – upon determining the existence of the necessary conditions – if they issue a prison sentence.

2. The use of suspended prison sentences will be more broadly available in cases of violation of the border closure: option of suspended prison sentences will be available for sentences up to 5 years instead of 2, probation may be 2 – 10 years.

It is especially troubling that for those returning to the territory of Hungary during their probation, their suspended prison sentences will have to be enforced immediately without any substantive deliberation, regardless of the reason or lawfulness of their return to Hungary. Absurdly, even if they obtain refugee status in another EU country and return to Hungary in a couple of years (provided that they would ever feel inclined after such an ordeal) these refugees will likely end up in prison, even though their asylum claim has been found legitimate in the meantime.

### **Acts committed in relation to the border closure (fence):**

**3. Prohibited crossing of the border closure:** unauthorized entry into the territory “protected by the border closure”. Under the basic definition this criminal act is punishable by up to 3 years imprisonment. If committed armed, or with the use of weapons, or while part of a riot (previously the requirement only existed under insurrection): the sentence will range between 1 – 5 years; the sentence ranges from 2 – 8 years if committed armed, with the use of weapons and as part of a riot. If the act results in a death the sentence ranges between 2 – 10 years.



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**4. Damaging of the border closure:** damaging and destruction of the facility and "instruments". Under the basic definition it is punishable up to 5 years imprisonment. In the aggravated cases mentioned in the previous section sentences will increase between 2 – 8 years; 5 – 10 years and 20 year to life imprisonment. There is no definition provided in the text for the term "material" in relation to the border closing.

The condition of "armed" will easily be fulfilled by anyone carrying so much as a penknife; therefore these rules may easily lead to impractical and unjust decisions.

**5. Obstructing the construction or maintenance of the border fence,** in absence of a more serious offense: punishable by up to 3 years imprisonment.

**6. Smuggling of human beings:** the criminal penalties have increased, this may be well justified. There is a new aggravated form of the crime committed in relation to the border closure.

The HHC is a leading human rights organisation in Hungary focusing on various areas such as detention, access to justice, the rule of law, anti-discrimination, asylum, statelessness and nationality. As an implementing partner of the UNHCR, the HHC has been the only non-governmental organisation to provide free-of-charge professional legal assistance to asylum-seekers in Hungary since 1998. We are present at all places in Hungary where asylum-seekers are detained or accommodated and we have assisted several thousands of foreigners in need of international protection in recent years. The HHC has also gained outstanding international reputation as an expert organisation in various fields of law. We have led some of the most powerful research and training initiatives in the European asylum field in recent years, working closely together with state authorities, the UNHCR or the judiciary. Our experts trained over a thousand lawyers, state officers, judges and other professionals on asylum and statelessness all around Europe and even beyond. More information: [www.helsinki.hu/en](http://www.helsinki.hu/en)