UNHCR COMMENTS AND RECOMMENDATIONS ON
BILL No. T/1320
ON THE MODIFICATION OF CERTAIN MIGRATION-RELATED LEGISLATIVE ACTS FOR THE PURPOSE OF LEGAL HARMONISATION

I. GENERAL PREAMBULAR COMMENTS

In accordance with its mandate responsibilities the United Nations High Commissioner for Refugees (UNHCR) is pleased to share with the Parliament of the Republic of Hungary its comments and recommendations on the "*Bill on the modification of certain migration-related legislative acts for the purpose of legal harmonisation*" ("Bill").

UNHCR offers these comments and recommendations as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees.[1] As set forth in its Statute, UNHCR fulfils its international protection mandate by, inter alia, *"[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto*[2]." UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention")[3] according to which State parties undertake to "*co-operate with the Office of the United Nations High Commissioner for Refugees […] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention*". The same commitment is included in Article II of the 1967 Protocol relating to the Status of Refugees. UNHCR's supervisory responsibility extends to Hungary, as it is Party to both instruments.

UNHCR's supervisory responsibility has been reflected in European Union law. Article 78(1) of the Treaty on the Functioning of the European Union[4] stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Further, Declaration 17 to the Treaty of Amsterdam provides that *"consultations shall be established with the United Nations High Commissioner for Refugees (…) on matters relating to asylum policy"*.[5] In addition, Article 18 of the

[1] See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para. 1, available at http://www.unhcr.org/ refworld/docid/3ae6b3628.html ("Statute").
[2] *Ibid*., para. 8(a).
[3] UNTS No. 2545, Vol. 189, p. 137., as Hungary acceded to the Convention and the Protocol in 1989, these international legal instruments have become part of the Hungarian domestic law through Law Decree 15 of 1989.
[4] European Union, Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal C 83 of 30 March2010* at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML
[5] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340, 10.11.1997, at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= CELEX:11997D/AFI/DCL/17:EN:HTML.

Charter of Fundamental Rights of the European Union[6] states that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Protocol. EU secondary legislation also emphasizes the role of UNHCR. For instance, Recital 15 of the Qualification Directive states that consultations with the UNHCR *"may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention."* The supervisory responsibility of UNHCR is also specifically articulated in Article 21 of the Asylum Procedure Directive (APD).[7]

The UN General Assembly has entrusted UNHCR with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.[8] It has specifically requested UNHCR "to provide technical and advisory services pertaining to the preparation and implementation of nationality legislation to interested States". The General Assembly has also entrusted UNHCR with the specific role foreseen in Article 11 of the 1961 Convention on the Reduction of Statelessness. Furthermore, UNHCR's Executive Committee has requested UNHCR to provide technical advice with respect to nationality legislation and other relevant legislation with a view to ensuring adoption and implementation of safeguards, consistent with fundamental principles of international law, to prevent the occurrence of statelessness which results from arbitrary denial or deprivation of nationality[9]. UNHCR thus has a direct interest in national legislation of countries impacting on the prevention or reduction of statelessness, including implementation of safeguards contained in international human rights treaties.

UNHCR notes that the main focus of the amendment is to enhance public order and security. While UNHCR recognizes the States' sovereignty and the legitimate right to control entry and stay in their territory as well as to handle security concerns it also wishes to draw the attention of Hungary to the principle of international law which states that in cases in which there is a conflict between national legislation and an international treaty obligation predominance shall always be given to the latter as codified in Article 27 of the Vienna Convention on the Law of Treaties which states "(a) party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Furthermore, it is important to note that Hungary is not only bound by the provisions of the 1951 Convention, but has an international law obligation to apply it in good faith.

UNHCR notes with regret that the present Bill in its current form has not been shared with UNHCR during the drafting process despite the commitments articulated in Article 35 of the Geneva Convention. As UNHCR only found the document on the website of the Parliament on 8 October 2010 and learnt that

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[6] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 90 March 2010 (C 83) at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF

[7] European Union: Council of the European Union, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 2 January 2006, 2005/85/EC, at: http://www.unhcr.org/refworld/docid/ 4394203c4.html.

[8] UN Genral Asembly Resolution A/RES/50/152, 9 February 1996, available at http://www.unhcr.org/refworld/docid/3b00f31d24.html.

[9] ExCom Conclusion 106, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106(LVII) – 2006, 6 October 2006, para (a)

debates are scheduled to take place already on 12, 14 and 18 October 2010, extremely short time has been left available to draft and present comments and recommendations on the Bill to the Parliament. It is this reason why we can only focus on the most serious concerns with regard to the Bill without being able to provide a more detailed and in-depth analysis and recommendations.

Accordingly, UNHCR wishes to share the following comments and suggestions to the Bill, which we would like to request, in the spirit of co-operation and mutual understanding, for the Parliament of the Republic of Hungary to take into consideration.

II. POSITIVE FINDINGS

UNHCR positively notes that the Bill extends the scope of resettlement in terms of quality and quantity. While the current Asylum Act (Act LXXX of 2007 on Asylum - hereinafter: Met) only covers Mandate refugees and only for a quota of one hundred per year, the Bill now includes Convention refugees as well and discontinues the yearly quota (Section 7 (5) of Met – [Section 80 of the Bill])[10]. This provision represents a positive and progressive improvement in terms of international responsibility sharing.

UNHCR positively notes that the Bill repeals Section 5 (2) e) of Met (through Section 129 (2) d) of the Bill) which restricts the employment of asylum-seekers to the premises of the OIN reception centre for one year upon application for asylum. The Bill now makes it possible for asylum-seekers to engage in gainful employment from the very beginning under the same conditions as regular foreigners do. The discontinuation of the restriction represents a substantial improvement in terms of asylum-seekers getting self-sufficient and also establishes the link between reception conditions and a future proper integration of those accepted by Hungary.

UNHCR also positively notes that the personal scope of the Child Protection Act (Sections 4 (1) c) and 72 (1) of Act XXXI of 1997) shall cover unaccompanied/separated children who apply for asylum in Hungary. Even though the Asylum Act renders a "case guardian" for them for the refugee status determination procedure, however, such a "case guardian" is in practice a legal representative whose responsibilities are strictly limited to the asylum procedure. The Parliamentary Commissioner of Human Rights in his report of AJB 7120/2009 (January 2010) identified as a legal gap that no guardians are assigned to these asylum-seeking children (as they only get this support upon recognition). It is highly recommended therefore, that the personal scope of the Child Protection Act be amended so that it covers unaccompanied/separated children who apply for asylum in Hungary. In this way, such children will have a guardian under the Child Protection Act for all walks of life (issues that are normally covered by the parental rights to name a few to decide whether a medical intervention is indeed allowed/consented; which school to enrol the child to etc), and a legal representative (alias "case guardian") for the RSD procedure as well.

[10] Section 120 (2) of the Bill invites the Government to actually stipulate the quota of refugees to be resettled into Hungary in a given year.

III. PROVISIONS THAT RAISE SERIOUS CONCERNS

Ad Section 79 (2) of the Bill

Sub-Section (2) jc) of Met shall be complemented by the following text:

[For the purposes of this Act:
family member: the foreigner's]
"ja) minor child (including adopted and foster child),
jb) parent, if the person seeking recognition or being under international protection is a minor,
jc) spouse, *if the family relation was already existent in the country of origin*."

UNHCR has found the current Asylum Act to be too restrictive as far as the definition of family is concerned and has requested the review of it. The Bill now actually further restricts the already restrictive definition. In considering the definition, UNHCR underlines that the existence of a family is a question of fact, to be determined on a case by case basis. Therefore, in the application of the principle of family unity and for humanitarian reasons, every effort should be made to ensure the unity of families in the factual circumstances of the individual family case. UNHCR has been urging that Hungary apply broad criteria in identifying those family members who can reside in the country as a unit or, if separated, be admitted into the country for purposes of family reunification. Accordingly, consideration should be given to permitting a liberal interpretation of the family unit[11] including at least those members who are economically, psychologically and socially dependent upon the principal applicant. Although it may not always be possible to maintain the unit or reunite entire groups which formed part of a family in the broad or traditional sense of the word, closer consideration should be given by the government to the inclusion of those members, whatever their age, educational level or marital status, whose economic, psychological and social viability remains dependent on the main family nucleus.

Related to paragraph jc) of Section 2 j) of Met, as outlined in *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)*[13], in UNHCR's view, respect for family unity should not be conditional on the family links having been

[11] In this respect, ExCom Conclusions No. 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b)(ii) recommend "the consideration of liberal criteria in identifying those family members who can be admitted, with a view to promoting a comprehensive reunification of the family". UN High Commissioner for Refugees, *Family Reunification*, 21 October 1981, No. 24 (XXXII) - 1981, available at: http://www.unhcr.org/refworld/docid/3ae68c43a4.html
[13] In this context, reference is also made to the Commission's recast proposals on the Qualification and Reception Directives broadening the definition of family as well as the UNHCR commments thereto.

established before flight from the country of origin. Families, marriages accordingly, which have been formed during flight or upon arrival in the country of asylum also need to be taken into account. This principle has been underlined by the UNHCR Executive Committee in Conclusions No. 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b) (ii). In addition, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification in Chapter II Article 4 related to family members authorized to entry and residence mentions in Sub-Section (a) the spouse of a third country national residing lawfully in a Member State without requesting that the marriage was existent in the country of origin[14]. Similarly, Article 8 of the European Convention on Human Rights protects the right to respect for private and family life with no restriction as to the timing of the marriage.

Accordingly, UNHCR strongly **recommends** that the wording "if the family relation was already existent in the country of origin" be deleted from paragraph jc) of Sub-Section (2).

Ad Section 94 (2) of the Bill

Section 36 of Met shall be supplemented by the following Sub-Section (8):

"(8) Upon the presentation of the application of the person seeking recognition for court review, the person seeking recognition shall appear before the refugee authority *in person*."

The assumption behind this Sub-Section is that legal representatives submit applications for judicial review on behalf of asylum-seekers to abuse and prolong the procedure in the absence of the asylum-seeker. UNHCR is of the opinion that the requirement of submitting requests for review of administrative refugee status determination decisions in person generally restricts and limits the access to legal review and so to effective legal remedy. This is especially worrisome in case of asylum-seekers who are placed in detention facilities (a very significant proportion of the asylum-seeking population) who may face hardship in meeting such a requirement as in the vicinity of most detention facilities there are no asylum authorities of OIN available for personal contacts. Furthermore, experience shows that forwarding requests, applications submitted in detention facilities are often delayed significantly. In summary, access to legal remedy may be disproportionally difficult for asylum-seekers in detention in the future. This is all the more worrisome as in the Hungarian asylum system there is no possibility for legal

[14] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (*Official Journal L 251 , 03/10/2003 P. 0012 – 0018):*
CHAPTER II Family members
Article 4
1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:
(a) the sponsor's spouse;

remedy within the administrative system and so the only possibility available for asylum-seekers is the one-instance judicial remedy.

Therefore it is **strongly recommended** that this provision of the Bill be deleted or amended to establish the cases in which legal representatives are given the possibility to introduce an application on behalf of asylum-seekers who do not have the possibility to do so.

Ad Sections 105 and 106 of the Bill

55.§. (1) Having established the admissibility of an application, the refugee authority shall refer the application to the detailed procedure, if the application does not obviously lack proper grounds.

(2) No legal remedy shall lie against a resolution referring the application to the detailed procedure.
(3)[15]

56.§.(1) In its resolution referring the application to the detailed procedure, the refugee authority shall designate, at the request of the person concerned, a private residence as his/her place of residence, or in the lack of such residences a reception centre or other accommodation maintained on the basis of the associated contract unless the applicant is subject to any forced action, action or punishment, or any action ordered in alien control proceedings for the restriction of personal freedom.
(2) The applicant shall reside at the place of residence designated for him/her on a residential basis during the detailed procedure and the duration of any court review of the decision made in the detailed procedure.

The amendments stipulated by Sections 105 and 106, in conjunction with Section 129 (2) d) of the Bill (discontinuing Section 55 (3) of the Asylum Act – see footnote 10 below) clearly seek to legalize the current detention practice (to detain all asylum-seekers in Hungary but unaccompanied and separated children). At the moment **the practice qualifies as arbitrary detention** as it does not comply with the requirement articulated by Section 55 (3) of Met as detained asylum-seekers whose refugee status determination case is transferred from the preliminary phase to the in-merit one after 15 days are not transferred to open accommodation facility. The Prosecutor General looked into the matter and in his conclusion he repeatedly called the Office of Immigration and Nationality to terminate immediately the unlawful practice (with no result however). The

[15] Section 55 (3) of Met to be deleted by Section 129 (2) d) of the Bill, reads: "If the refugee authority refers the application to the in-merit procedure and the applicant is in alien policing detention, the alien police authority shall, at the initiative of the refugee authority, terminate his/her detention."

US Department of State's annual human rights report (released on 12 March 2010) explicitly refers to the unlawful detention of asylum-seekers in Hungary[16].

In the future, asylum-seekers may be legally kept detained for the in-merit procedure (both administrative and appeal instance) as a result of the amendment foreseen by the Bill.

According to Article 31 of the 1951 Convention relating to the Status of Refugees[17], to the relevant conclusion of UNHCR's Executive Committee[18] as well as to international and regional human rights law, detention of asylum-seekers is exceptional and should only be resorted to where provided for by law and where necessary to achieve a legitimate purpose, proportionate to the objectives to be achieved and applied in a nondiscriminatory manner, for a minimal period. The necessity of detention should be established in each individual case, following consideration of alternative options, such as reporting requirements. This is recognized by Article 18 (1) of the EU Asylum Procedure Directive stating that: "*Member State shall not hold a person in detention for the sole reason that he/she is an applicant for asylum*".

The most worrisome new development in this respect is that by force of Section 60 (2) of the Bill (amending Section 56 of Harmtv), families with children and unaccompanied/separated children may also be detained in the future up to 30 days.[19] This is clearly against the best interest of the children, a notion and requirement stipulated by Article 3 of the UN Convention on the Rights of the Child, as it is detrimental to the psycho-social development of children[20]. This is recognized by the European Commission in Article 11 of its Proposal for a recast of the Directive laying

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[16] 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 report is available at:
http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136035.htm.

[17] Article 31 (1): "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
(2). The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

[18] UN High Commissioner for Refugees, *Detention of Refugees and Asylum-Seekers*, 13 October 1986, No. 44 (XXXVII) - 1986, available at: http://www.unhcr.org/refworld/docid/3ae68c43c0.html

[19] Section 56 (2) "With respect to the paramount interests of children primarily, alien control custody or custody in preparation for expulsion (hereinafter collectively referred to as custody) against unaccompanied minor third-country nationals and families with minor children may be ordered only as an ultimate measure for a maximum term of thirty days provided that the alien control authority has ascertained that the purpose of ordering the custody may not be accomplished by way of the application of the provisions of Section 50 (2) or Section 62 (1) of this Act."

[20] Jesuit Refugee Service: Becoming Vulnerable in Detention (2010), page 98
http://www.detention-in-europe.org/images/stories/DEVAS/jrseurope_becoming%20vulnerable%20in%20detention_june%202010_public_updated%20on%2012july10.pdf

down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008). Article 11 expressly prohibits the detention of minor asylum-seekers[21].

It is also noted that detention conditions imposed on asylum-seekers in Hungary who committed a minor offence according to Hungarian law are generally far too strict resembling the ones applicabble in high security prisons; while in newly opened so called „temporary" administrative detention facilites the conditions are appaling and unacceptable for a stay longer that 72 hours as such facilities have been designed for short term detention and have never been upgraded to respond to the changed purpose of those facilities. It is foreseen therefore that because of the inadequate detention conditions extraordinary events such as hunger strikes, suicide attempts will continue to happen in an even increased manner.

UNHCR believes that detention of asylum-seekers should only be maintained under very clearly defined exceptional circumstances after examining the principle of necessity and proportionality with regard to the manner and to the purpose of such detention. Detention of asylum-seekers should comply with human rights standards as well as the ones stipulated by the Parliamentary Assembly of the Council of Europe in 2010[22].

Grounds for immigration detention are limited by Article 5.1.f of the European Convention on Human Rights. Detention should be used only if less intrusive measures have been tried and found insufficient. Consequently, priority should be given to alternatives to detention for the individuals in question (although they may also have human rights implications).

In light of the above, UNHCR is seriously further concerned over the justification provided to these Sections stating that the Bill *"[it] is not in conflict with the provisions of the Geneva Convention of 1951"*.

It is **strongly recommended** therefore that Section 106 as well as the reference to Section 55 (3) of the Met in Section 129 (2) d) of the Bill be deleted.

It is also **strongly recommended** that legal guarantees for the full and inclusive application of Article 31 of the 1951 Geneva Convention be included into domestic law by transposing in national legislation Article 18 of the Asylum Procedure Directive .

[21] Proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum-seekers (Recast), COM(2008) 815 final, 2008/0244(COD), {SEC(2008)2944}, {SEC(2008)2945}, 3 December 2008, available at http://www.unhcr.org/refworld/docid/493e8ba62.html.
[22] Parliamentary Assembly Resolution 1707(2010) of 28 January 2010 as well as Recommendation 1900 (2010) of 28 January 2010 on the detention of asylum-seekers and irregular migrants

Ad Section 109 of the Bill

Section 62 c) of Met. shall be replaced by the following provision:

[There may be the following actors behind persecution or serious harm]

c) a person or organisation who or which is independent of that referred to in Paragraph a) or b), provided that the state referred to in Paragraph a), as well as the party or organisation referred to in Paragraph b), *or any international organisation controlling a significant part of the state's territory*, is unable or unwilling to provide protection against persecution or serious harm.

UNHCR has generally welcomed the transposition of this provision of the EC Qualification Directive as it guarantees the recognition of refugee status or subsidiary protection status irrespective of the source or agent of persecution, including persecution emanating from non-State actors. However, the Article of the Directive raises the question regarding the extent to which non-State entities can provide protection. In UNHCR's view, refugee status should not be denied on the basis of an assumption that the threatened individual could be protected by parties or organizations, including international organizations, if that assumption cannot be challenged or assailed. It would, in UNHCR's view, be inappropriate to equate national protection provided by States with the exercise of a certain administrative authority and control over territory by international organizations on a transitional or temporary basis. Under international law, international organizations do not have the attributes of a State. In practice, this generally has meant that their ability to enforce the rule of law is limited[23]. Furthermore, it is difficult to attach State responsibility to non-State actors which do not have the same obligations under international law.

Furthermore, the provision that State actors, parties or organisations, including international organisations, are unable or unwilling to provide protection against persecution or serious harm may substantially raise the applicant's burden of proof on a material issue which he or she may not have the capacity to successfully discharge, and, as such, severely handicaps the applicant's ability to realistically lodge a claim for international protection. Indeed, this may negate the general principle that in claims for international protection the obligation to discharge the burden of proof is a shared responsibility between the applicant and the adjudicator. The UNHCR Handbook puts this in the following manner *"(i)t is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule….Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the*

[23] UN High Commissioner for Refugees, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, comments to Article 6, available at: http://www.unhcr.org/refworld/docid/4200d8354.html

examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."[24] The UNHCR Handbook also acknowledges that evidentiary requirements should not be applied too strictly "in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself."[25]

Accordingly, UNHCR **recommends** that Section 109 of the Bill be deleted**.**

Ad Section 122 (2) of the Bill

Section 326 of Act III of 1952 on the Civil Procedure Code (Pp) shall be supplemented with the following Sub-Section (13):

"(13) In review proceedings initiated on the basis of the Act on Asylum and the Government Decree on its enforcement, the competence of the county court of justice based in the place of the higher court (*itélőtábla*), in case of the Capital Higher Court the Municipal Court of Budapest, shall be based on the domestic place of residence – or place of stay in the absence of a place of residence – of the claimant, or in the absence of such places the accommodation facility specified in the refugee records. If the claimant has no domestic place of residence, place of stay or accommodation facility, the county court of justice based in the place of the higher court (*itélőtábla*), in case of the Capital Higher Court the Municipal Court of Budapest based in his/her last domestic place of residence, or at the last place of stay if s/he had no such a place of residence, or in the absence of such places at the accommodation facility specified in the refugee records shall be competent."

As set forth in UNHCR Comments and Recommendations on Bill No. T/11209 on "The Amendment of Specific Acts Related to Law Enforcement and Migration for the Sake of Harmonisation" (1 December 2009), UNHCR has serious concerns about the system based on the competence of county courts of justice in review proceedings that may jeopardize fair and efficient asylum procedures in support of which UNHCR and the Hungarian Government have been cooperating and making significant progress over recent years.

Over the last few years the international community – through UNHCR – has invested significant resources into building the capacity of the Municipal Court of Budapest (MCB). Judges dealing with refugee cases have been enrolled into language courses and attended training activities in and outside of Hungary. A knowledge centre has been established in MCB consisting of a country information data base and research centre and

[24] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, January 1988, para 196
[25] UNHCR Handbook para. 197.

a library with relevant international legal documents and books which contributed to the improvement of quality and overall efficiency of the review procedure. Consequently, the judges of the MCB have gained outstanding professional expertise in reviewing asylum cases and the MCB has acquired the resources and experience and merely lacks sufficient staffing capacity in relation to the number of cases. Moreover, Hungarian refugee law judges of the MCB have been integrated in the international networking of refugee law judges as the MCB has developed and maintained close working relationship with the International Association of Refugee Law Judges. It would be regrettable if Hungary would not be able to continue its pro-active and visible participation in the international debate of experienced asylum law judges and would no longer be able to significantly benefit from such an engagement for Hungary's asylum system and the European aspiration for a Common Asylum System.

All these efforts would not be used under the arrangement defined in Section 326 (13) of Pp. when in the end the MCB would only process a few cases, namely of those asylum-seekers who reside in private accommodation in Budapest, while large numbers will reside in counties whose court and judges have neither the capacity, nor the training and experience let alone the information resources and tools available needed to take decisions within reasonable time and at the required level of quality to ensure correct and fair decisions as well as harmonised interpretation of the applicable international and domestic law.

Subsequently, newly competent courts (the Debrecen, Győr, Szeged, Pécs based courts) will be in urgent need of capacity building such as training on international refugee law and case law, setting up up-to-date country information research services and allocating the necessary human and financial resources. Simultaneously, the system of free legal aid to asylum-seekers needs also be re-designed and arranged just like the OIN legal representation in court hearings which would undoubtedly impose enormous expenses to the OIN and the state budget in general. The 400-450 cases per year divided between the newly competent courts would raise the problem of the consistency of the law application process as particular courts would receive a small amount of cases which would not lead to the development of a consistent practice, consequently, decisions may be superficial.

As in Hungary no administrative review is available for rejected asylum-seekers, shifting the responsibility of judicial review which affects the lives and security of individuals to courts that are inexperienced, unequipped both in terms of human, financial and material resources may in practice result in inefficiency of the review. This in turn may raise the issue of compliance with Articles 6 and 13 of the European Convention on Human Rights and Article 47 of the Charter of the EU. A drop in the quality of the decisions as well as continued delays in decisions making are the potential results at the expense of those individuals who are in need of international protection and the effectiveness and fairness of the review procedure in their cases.

It is **strongly recommended** therefore that Section 122 (2) of the Bill be deleted**.**

IV. GAPS, SHORTCOMINGS

The Bill fails to address certain shortcomings of the current law to which UNHCR has been calling for solution for long. These are the following ones.

1) UNHCR to receive RSD decisions
It is recommended that Section 38 ac) of Met be amended as follows:

"ac) (UNHCR) shall be informed by the refugee authority of the progress of the refugee procedure and the decisions adopted, including any court decisions *shall be shared with UNHCR"*;

Justification: Article 35 of the 1951 Geneva Convention calls for cooperation by States Parties to the Convention. The reception of administrative and court decisions made in the refugee status determination procedure is the prerequisite for UNHCR to successfully perform its Mandate of supervising the implementation of the Convention. In addition, the amendment would greatly enhance coherence of domestic law as Section 166 of Government Decree 114/2007 (V.24.) implementing Act II of 2007 (Aliens Act) clearly stipulates that UNHCR shall receive the decisions made in the stateless status determination procedure.

2) Age assessment
It is recommended that Section 44 of Met be complemented by a Sub-Section (4) as follows, as suggested by the Parliamentary Commissioner of Human Rights in his report of AJB 7120/2009 (12 May 2010) covering among others the issue of age assessment in case of unaccompanied/separated minor asylum-seekers.

"(1) If any doubt emerges concerning the minor status of a person seeking recognition who claims to be a minor, a medical expert examination may be initiated for the determination of his/her age. The examination may only be performed with the consent of the person seeking recognition, or if the person seeking recognition is in a state which does not permit the issuance of a declaration, with that of his/her representative by law or guardian.
(2) An application for recognition may not be refused solely on the grounds that the person seeking recognition, the representative by law or guardian did not consent to the performance of the examination.
(3) If the person seeking recognition, the representative by law or guardian does not consent to the expert examination aimed at determining the minor status, the provisions relating to minors, with the exception of the provisions relating to the involvement of a legal representative or the appointment of a guardian, may not be applied to the person seeking recognition.
(4) Beyond the physical appearance of the applicant, the medical expert examination shall cover the psychological maturity of the applicant and the relevant ethnic and cultural facts/components. It shall be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the

child; giving due respect to human dignity; and, in the event of remaining uncertainty, the decision should be made to the benefit of the person examined. The examination be shall be carried out by an independent paediatrician with appropriate expertise and persons claiming to be children shall be treated as such, until age determination has taken place.[29]*"*

Justification: Article 8 of the UN Convention on the Rights of the Child stipulates that " State Parties undertake to respect the right of the child to preserve his or her identity.." According to the Hungarian Ombusman, the age of the child is an important element of the identity. Furthermore, according to Section 31 (i) of General Comment No. 6 on UNCRC[30] by the Committee on the Rights of the Child, the identification of a child without appropriate ID documents as an unaccompanied minor should include age assessment and should not only take into account the physical appearance of the individual, but also his or her *psychological maturity*. As regards age assessment, it is emphasized in the document that it must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, the decision should be made to the benefit of the person examined.

3) Apply Council Regulation (EC) No 333/2002 of 18 February 2002 on uniform format for forms for affixing the visa issued by Member States to persons holding travel documents not recognized by the Member State.

Justification: many refugees recognized by Hungary are prevented in re-unifying with their family members left behind as the family members' travel document (e.g. a Somali national passport) is not recognized by EU MS. The lack of family reunification forces those refugees to leave Hungary in an irregular manner and find a place where the family may reunite. The EU Uniform Format Forms based on the above mentioned instrument is used in many EU MSs (e.g. in the UK) to solve this problem. Hungary has failed to apply this regulation till today, even though it is directly applicable in its entirety[31] therefore it is recommended that it be applied in order to facilitate the practice of basic human rights such as family life of refugees and so enhance the opportunity for successful integration in Hungary.

4) Integration of refugees

The current Met is silent about integration of beneficiaries of international protection and there is no other domestic legislation which would cover this issue (the Met only specifies some very basic and extremely limited pre-integration services however no such provisions exist with regard to integration proper). It is extremely worrisome that the Bill does not even try to take up the issue despite UNHCR's suggestions over the last couple of years. Instead, it introduces restrictions to reception conditions to be provided to asylum/seekers while in the procedure. Section 85 of the Bill amending Section 27 of the

[29] See UNHCR provisional comments to Article 17 (15(5) of the Asylum Procedure Directive.
[30] The Committee on the Rights of the Child General Comment No. 6 (2005) TREATMENT OF UNACCOMPANIED AND SEPARATED CHILDREN OUTSIDE THEIR COUNTRY OF ORIGIN
http://www2.ohchr.org/english/bodies/crc/comments.htm
[31] See Article 288 TFEU – ex-Article 249 of TEC

Met specifically stipulates that only the *basic needs* of the asylum-seekers are to be met. This will have a negative impact on the integration of recognized refugees as well, since there is evidently a link between the phases of reception and integration.[32]

5) Need to issue ICAO compliant Convention Travel Document (CTD) for refugees
Since 1 April 2010, States are required to issue machine readable passports in line with Annex 9 to the 1944 Convention on International Civil Aviation (Chicago Convention) as developed by the International Civil Aviation Organization (ICAO)[33]. These new ICAO standards also apply to the issuance of CTDs to refugees and stateless persons. ICAO Document 9303 provides for the technical specifications of official MRTDs and, *inter alia*, designates codes for "persons of an undefined nationality", including *refugees and stateless persons*. In addition to being machine readable, travel documents issued after 1 April 2010 must contain several security features, including a digitalized image of the bearer. ICAO standards further require that travel documents be issued in a secure environment and that individual documents be issued to all family members intending to travel, including to minor children. Like national passports, CTDs should take the form of a book consisting of a cover and a minimum of eight pages and must include a data page onto which the issuing State enters the personal data relating to the holder of the document and the data concerning its issuance and validity. Hence there is a need to update the format of CTDs issued pursuant to the 1951 and 1954 UN Conventions.

Travel documents issued by the Republic of Hungary under the 1954 Convention are machine-readable, however, CTDs issued for refugees recognized by Hungary do not comply with the ICAO requirements. It is **strongly suggested** therefore that the process that aim to amend migration related national legislation also addresses this need especially because the Bill accords great emphasis to the issue of documents for non-Hungarians be secure and up to requirements (see the many Sections of the Bill).

6) Stateless
It is welcomed that by virtue of Section 40 of the Bill, stateless people recognized by Hungary shall be furnished with a resident permit valid for 3 years (instead of the current one year). It is however recognized that the wording of Section 76 (1) of Act II of 2007 on the entry and stay of third country citizens (Harmtv) remains to be corrected. Therefore, it is suggested that the term "lawfully" be deleted from the text of Section 76 (1):

[32] See pages 7, UNHCR Note and Agenda on Refugee Integration in Central Europe. Available at: http://www.unhcr-budapest.org/hungary/images/stories/news/docs/05_Integration/5_1_Integration%20Note%20and%20Agenda_HUN/UNHCR-Integration_note-ENG.pdf

[33] See ICAO Document 9303, *Machine Readable Travel Documents*, sixth edition – 2006. Part 1, Machine readable passports, Volume 1, Passports with Machine Readable Data Stored in Optical Character Recognition Format, Approved by the Secretary General and published under his authority. Available at: http://www2.icao.int/en/MRTD/Downloads/Doc%209303/Doc%209303%20English/Doc%209303%20Part%201%20Vol%201.pdf.

"Section 76
(1) Proceedings aimed at the establishment of the statelessness shall be instituted upon an application submitted to the alien police authority by an applicant *lawfully* staying in the territory of the Republic of Hungary, which may be submitted by the person seeking recognition as a stateless person (hereinafter referred to as the "applicant") orally or in writing.
(2) An application presented orally shall be committed to minutes by the alien police authority.
(3) Upon submission of an application, the alien policing authority shall inform the applicant on his/her procedural rights and obligations, the consequences of not complying with the obligations and the place of accommodations designated to him/her.
(4) The acknowledgement of the provision of information shall be committed to minutes."

Justification: the current wording is not in compliance with the 1954 UN Convention on the status of stateless persons. It limits the application of the Convention to lawfully staying applicants. In other words, unlawfully staying applicants are excluded from the application of the Convention in Hungary (de facto exclusion clause). Article 38 (1) of the Convention expressly prohibits that States Parties make reservation to Articles 1, 3, 4, 16(1) and 33 to 42 inclusive. A de facto exclusion clause is a de facto reservation to Article 1 which should be discontinued.

UNHCR, 12 October 2010