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BRIEFING

# Legal Analysis of Hungary's anti-NGO Bill

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This briefing paper presents a legal analysis by lawyers of the Open Society Justice Initiative of a bill now before the Hungarian parliament that would criminalize organized efforts to offer support to refugees and migrants. The proposals represent another attack by the Hungarian government on European democratic values, including respect for the rule of law and human rights.

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# BRIEFING ON HUNGARIAN GOVERNMENT'S ANTI-NGO BILL




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## I. INTRODUCTION

1. The Anti-NGO Bill, introduced in May 2018 as the "Stop Soros package" ("Bill T333"), is another attack by the Hungarian Government on European democratic values, including respect for the rule of law and human rights.

2. If adopted, the new Bill would gravely violate Hungary's obligations under the European Convention on Human Rights, European Union law and the 1951 Refugee Convention to which Hungary is a party. It would allow Hungarian police to deny asylum-seekers and other migrants in Hungary independent legal and other advice and assistance. It would criminalise long-standing, legitimate work of lawyers, Civil Society Organisations (CSOs), staff and volunteers, threatening them and their supporters with prison terms. The Bill would also permit Hungarian officials wrongly to deny asylum, solely on the ground that the asylum seeker travelled through an unsafe country, for example, one without an effective asylum system. The Bill therefore should be withdrawn.

3. The May version of the "Anti-NGO Bill" (Bill T333) follows drafts introduced to Parliament by the Government in January and February 2018, to restrict the work of CSOs and the protection of migrants' rights. These came after Hungary's 2017 adoption of an Anti-NGO Law, which required recipients of foreign funding to publicly label themselves as such. The 2017 law was adopted by the Hungarian Government with only minor adjustments, in spite of the recommendations of the Venice Commission. The European Commission concluded that the law violates EU law and referred the case to the Court of Justice of the European Union.

4. Alongside the Bill, the Government proposes important changes to Hungary's constitution, which appear to lay the ground for attacks on the independence of the judiciary and the right to protest.

## II. "CRIMINALISING BEST PRACTICE" - NEW CRIMINAL LAW ON SUPPORT AND PROMOTION OF ASYLUM AND RESIDENCE APPLICATIONS

5. The Anti-NGO Bill would add a new section 353/A to the Hungarian Criminal Code: a new criminal offence of organised activities to allow persons in Hungary to claim asylum or apply for a residence permit. This is an unprecedented, unlawful step by the Government, criminalising assistance to people already in Hungary to exercise legal rights. The Bill would automatically exclude anyone accused of this offence from the border zone where asylum claims are made, allowing the police to prevent lawyers acting for migrants from seeing their clients.

6. The new Bill sweeps within its broad ambit conduct clearly protected by international and European law. It violates fundamental rights guaranteed to asylum-seekers and other migrants by European Union law and the European Convention of Human Rights. The Bill also violates the rights to freedom of expression and association of individuals and Hungarian and international CSOs through vague, overbroad and disproportionate criminal sanctions on distribution of information and provision of "informational materials."

7. The Bill was introduced in May 2018 and amended in June 2018. It amends not only the Criminal Code but also related laws, including the 2007 Act on the State Border.

**Context**

8. Migrants in Hungary have the right to file a claim for asylum or to apply for another kind of residence permit, under Hungarian laws, giving effect to international law and EU law.[1] Hungary has, since 2017, illegally restricted access to the asylum procedure by limiting it to migrants who claim asylum at two border crossings with Serbia, and only if they have already claimed asylum in Serbia. Asylum claimants are detained in the border zone.[2] Under informal arrangements with Serbia, Hungary only allows one person to enter each of the two border zones each day.

9. Hungary has already implemented EU Directive 2002/90 on sanctions for facilitating irregular entry and stay. Criminal Code Section 353 (illegal immigrant smuggling) and article 354 (facilitation of unauthorised residence) make it a criminal offence to assist a person to cross Hungary's border unlawfully or to remain in Hungary unlawfully. In 2015, Hungary made it an offence to cross the border barrier: Criminal Code article 352/A.[3]

**Text of the new criminal offence**

10. The Criminal Code, Section 353/A states in relevant part:

> *Support, promotion of illegal immigration*[4]
>
> *(1) Anyone who conducts organisational activities*
>
> *a) in order to allow the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, was not subjected to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of indirect persecution is not well-founded,*
>
> *b) or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a residence permit,if a more serious criminal offense is not committed, is punishable by confinement for the misdemeanour.*

[1] Hungary: Act LXXX of 2007 on Asylum (2016) [Hungary], 1 January 2008, adopted by the National Assembly on 25 June 2007 (date of promulgation 29 June 2007), with entry into force 1 January 2008. The Act was subject to multiple amendments since. Unofficial translation available at http://www.refworld.org/docid/4979cc072.html

[2] Hungarian Helsinki Committee, *Hungary: Law on automatic detention of all asylum seekers in border transit zones enters into force, despite breaching human rights and EU law* Information update by the Hungarian Helsinki Committee (HHC) 28 March 2017 available at http://www.helsinki.hu/wp-content/uploads/HHC-Info-Update-rule39.pdf ; see also Hungarian Helsinki Committee, Two Years After: What's Left of Refugee Protection in Hungary?, September 2017, available at https://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf

[3] Act CXL of 2015 on amendment of certain Acts related to the management of mass migration.

[4] As amended in Committee on 14 June2018.

*(2) Anyone who provides financial means for committing the criminal offence specified in Subsection (1), or who regularly carries out such organisational activities, is punishable by a term of imprisonment of up to one year.*

*(3) Those shall be punishable according to Subsection (2), who commit the criminal offence specified in Subsection (1)*

*a) for the purposes of financial gain*

*b) or providing support for more than one person*

*c) commits the criminal offence within an 8 kilometre area from the external borders of Hungary as specified in point 2 of article 2 of the Schengen Border Code or from the border signs.*

*[…]*

*(5) For the purposes of Section 353/A., it shall be regarded as organisational activity especially if with the purpose specified in Subsection (1)*

*a) the person organises border monitoring at the external borderlines of Hungary as specified in point 2 of article 2 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons in the territory of Hungary.*

*b) prepares or distributes information materials or commissions such activities,*

*c) builds or operates a network.*

**Analysis of new criminal provision and related changes**

Criminalising assistance to claim asylum or to seek a residence permit

11. While new section 353/A to the Criminal Code is headed "Support, promotion of illegal immigration", its true target is "Supporting *legal applications.*"

12. Subsection (1) makes it a criminal offence to conduct "organisational activities" in order to allow the initiating of an asylum procedure in Hungary, or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a residence permit. Section 353/A(1)(a) applies to all bona fide applications for residence permits, if the applicant is currently in an irregular situation in Hungary. The only limitation stated in section 353/A(1)(a) for asylum cases, is that the offence is committed only where the person assisted has come from *or travelled through* a country in which they were not persecuted.

13. Hungarian law recognises legal rights of persons in Hungary to apply for asylum or for other kinds of residence permit. The new Bill is vague and broad and it would make it a criminal offence for any lawyer, adviser or volunteer to assist anyone seeking asylum or a residence permit, that is, it would make it a crime to act in accordance with Hungarian law.

14. The Government's detailed reasoning for Section 11 of the Bill, which adds Section 353/A to the Criminal Code, refers to abusive acts and deception. The text of Section 353/A is not limited to assisting false or fraudulent claims. It is directed at the long-standing and legitimate activities of established Hungarian and international CSOs. The Bill does not define "organisational activities", but states that they include border monitoring, preparing and distributing informational materials, and building and operating a network – activities that are legal and even required under international law. For instance, under a formal agreement with Hungarian Police and United Nations High Commissioner for Refugees

(UNHCR), the Hungary Helsinki Committee conducted border monitoring for eight years to 2014,[5] and CSOs regularly prepare and distribute information materials on the internet and paper. Subsection (2) makes it an aggravated form of the offence to provide support for more than one person, or to commit it in the 8 km border zone of Hungarian territory from the external EU border. This too relates directly to the current work of CSOs, since all the detained migrants they assist with asylum claims and other applications for residence permits are held in this border zone.

15. Not only does the new Bill criminalise activities in which Hungarian CSOs properly and routinely engage, section 353/A (5) of the Bill also criminalises an open-ended list with various types of conduct, as the Bill's reasoning readily concedes: "the exact content of the organising activity cannot be fully listed, therefore, paragraph (5) of the new provision defines the most typical components of the organisational activities with an appropriate abstraction as an interpretative provision. This allows the provision to penalise any conduct, which can in practice be identified as a type of organisational behaviour, in addition to punishing the most typical organisational behaviours and modes of committing listed."

16. Section 353/A (2) also makes it a criminal offence to provide financial means for the offence under subsection (1), making individuals criminally liable for giving donations to CSOs conducting this work.

17. Where the principal offence (e.g., helping a third country national to complete an application form for a residence permit) takes place in Hungary, a natural or legal person aiding that offence, or funding it, commits that as principal/accessory regardless of nationality or residence.[6]

18. The penalty for any of these offences is either imprisonment of up to one year, where the offence is funding of support, assistance to more than one person, or conducted in the border zone, or, in lesser cases, imprisonment for a misdemeanour.

19. Hungarian law on criminal legal liability of legal persons[7] applies, meaning that CSOs and funding organisations themselves can be convicted of the section 353/A crime, and subject to fines and bans on activity.

Ban on access to the border zone

20. The new Bill would impose an automatic ban on entry or stay in the border zone for any person accused by the police of the new section 353/A offence. Violating the ban would be an offence. The new Bill would also permit courts to ban any person convicted of the new section 353/A offence from parts of Hungary, including the border zone.

21. Section 8 of the Bill amends section 5 of the Law on the State Border,[8] by authorising police to impose and enforce a ban on entry or stay in the Hungarian territory within 8 km of the external border on any person who is under criminal proceedings for a section 353/A offence. The ban is not formally notified and does not require a decision of a prosecutor or

[5] See Asylum Seekers' Access to the Territory and to the Asylum Procedure in Hungary 2014, Hungary Helsinki Committee, available at https://www.helsinki.hu/wp-content/uploads/woocommerce_uploads/1_asylum-seekers_ebook.pdf
[6] Under sections 11-13 of the Criminal Code.
[7] Act CIV of 2001 on the criminal code measures against a legal person. The detailed reasoning for Section 11 of Bill T333 affirms this.
[8] Law LXXXIX of 2007 on the state border,

court. It would be an automatic result of proceedings, and does not require any separate decision. Section 9 of the Bill provides for recording on police systems of criminal proceedings for the section 353/A offence.[9] Section 10 of the Bill makes it a petty offence to stay in the border area in violation of the ban.[10]

22. Section 11(2) amends the Criminal Code to provide that persons convicted of the section 353/A offence may be banished from part of Hungary, for between one and five years.[11] In the case of persons convicted, the Court could order expulsion from Hungary and a bar on return, except for Hungarians, and EU citizens and their family members with the right of free movement.[12]

**Effects of the new criminal provision and related changes**

23. The enactment of the new offence under section 353/A and the related changes would have immediate, coercive and chilling effects on lawyers, human rights defenders, members of civil society organisations, migrants, and those who assist them.

24. The new Bill empowers the police to ban lawyers and others from the border zone without judicial oversight. By commencing criminal proceedings under new section 353/A, the police would automatically impose the ban under amended section 5 of the Law on the State Border.

25. A lawyer who assists a client to claim asylum or apply for a residence permit may immediately be suspected of the section 353/A offence, with the immediate effect of being banned from the border zone where her client is detained. The police may begin these proceedings even without any suspicion of fraud or deception or of assisting illegal entry or stay. The adoption of the law could immediately be used by the police to prevent access of lawyers to current and future clients.

26. The new Bill threatens individuals with arrest and imprisonment, and threatens organisations with fines and bans on activity. These measures risk intimidating people and CSOs from engaging in entirely legitimate activities, such as providing accurate and impartial legal and practical advice to migrants and representing them in proceedings before the immigration police and Hungarian and international courts. The police may seek to use the law - or the threat of it - to interfere in the normal operation of legitimate asylum and residence permit applications, including confidentiality of lawyer-client relations, the work of interpreters and the assistance of family members. The law may be used to justify raids on CSOs and interference with their publications. Individuals and organisations who provide funding, advice or assistance to CSOs in Hungary may, for example, be threatened with arrest, fined, or, if they live abroad, subjected to an international arrest warrant.

27. The expansive and vague language of the law will cause fear and uncertainty for migrants, their families, lawyers, and other advisers and organisations. The chilling effects of the law may lead to migrants being denied access to information and advice, as well as to lawyers and other advisers refusing to provide advice to individual migrants who lack papers. For example, lawyers who currently assist migrants to apply for permits may avoid the threat of criminal prosecution under the law by refusing to accept cases from migrants who do not hold a current permit or are seeking asylum. CSOs that currently publish information for

[9] By amending Law XLVII of 2009 on the criminal record system,
[10] By amending Law II of 2012 on petty offences,
[11] See section 57 of the Criminal Code,
[12] Under section 57 of the Criminal Code,

migrants on the internet or on paper may try to avoid that threat by removing from their websites or materials any advice to asylum seekers or migrants who seek to apply for residence permits. . Staff and volunteers of organisations may resign for fear of being prosecuted as participants in a section 353/A offence.

## III. VIOLATIONS OF EUROPEAN UNION LAW

28. European Union ("EU") law requires Hungary to guarantee legal rights of migrants to information and assistance with asylum claims and applications for residence permits. Section 353/A and the related measures fall within the scope of EU law and violate those EU law rights and the EU Charter of Fundamental Rights (see this section and next section on "violations to European Human Rights Law"). If the Bill is adopted, EU law would require the Hungarian courts to disapply the new law, and the Court of Justice of the European Union should declare that Hungary has failed to comply with EU law.

**Violation of EU law on asylum**

29. Article 67 of the Treaty on Functioning of the European Union requires the EU to "*frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals*," which includes stateless people.

30. EU Directives made under article 67 require Hungary to guarantee specific rights to third country nationals who are in Hungary or at its border:

- The right to claim asylum, under the International Protection Procedures Directive 2013/32. Asylum-seekers should enjoy the right to advice and counselling, including at border crossing points and transit zones, at external borders, see article 8.
- The right to material assistance until the asylum claim is decided, under the Reception Directive 2013/33. Asylum-seekers should enjoy the right to information on asylum procedures and to contact groups providing legal assistance, see recital 21 and article 5(1).
- The right to a residence permit if the conditions for asylum or subsidiary protection are met, under the International Protection Qualification Directive 2011/95, article 24.

31. Under these Directives and the Dublin Regulation (Regulation 604/2013), asylum-seekers should also enjoy the right to free legal assistance and representation in asylum appeals (Directive 2013/32, art 20(1), 22(1)); appeals under the Dublin Regulation (art 27(5)); appeals about detention (Directive 2013/33, art 9(6), 10(2), 18(2)(b), (c)) and appeals about material conditions (Directive 2013/33, art 26(2)).

32. The Treaty and the Directives must be interpreted and applied to give effect to the EU Charter of Fundamental Rights (CFR), and Member States must comply with CFR when implementing them: CFR art 50(1). The CFR:

- Articles 11 and 12: that guarantee the rights to free expression and association.
- Article 18: guarantees the right to asylum in accordance with due respect for the Geneva Convention of 28 July 1951.

- Article 19: prohibits expulsion of migrants to a state where there is a risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.
- Article 47: guarantees the right to an effective remedy.

33. Any restriction imposed by Hungary on the freedom of persons and non-governmental organisations to provide information, advice, assistance, and representation to persons who wish to claim asylum or are asylum-seekers is a derogation from European Union law. Section 353/A does not meet the conditions for a derogation, because it imposes the risk of criminal sanctions on legitimate legal aid or other assistance to a third country national who is in Hungary or at the border and wishes to make a claim for asylum or for subsidiary protection.

34. The legitimacy of the role of non-governmental organisations to provide information, advice, assistance, and representation is recognised across the Directives: for example, Directive 2013/32, recital 25; Directive 2013/33, article 5.1. The freedom of migrants to receive such information and assistance from organisations and persons *other than the Government* is inherent in the guarantees. This is explicitly recognised by the Directives, for example, article 8 of Directive 2013/32 states:

> "Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible."

Article 10.4 of Directive 2013/33:

> "Member States shall ensure that family members, legal advisers or counsellors and persons representing relevant non- governmental organisations recognised by the Member State concerned have the possibility to communicate with and visit applicants in conditions that respect privacy. Limits to access to the detention facility may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the detention facility, provided that access is not thereby severely restricted or rendered impossible."

Article 18 of Directive 2013/33:

> "2. Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to housing referred to in paragraph 1(a), (b) and (c) of this Article Member States shall ensure that:
>
> (b) applicants have the possibility of communicating with relatives, legal advisers or counsellors, persons representing UNHCR and other relevant national, international and non- governmental organisations and bodies;
>
> (c) family members, legal advisers or counsellors, persons representing UNHCR and relevant non-governmental organisations recognised by the Member State concerned

are granted access in order to assist the applicants. Limits on such access may be imposed only on grounds relating to the security of the premises and of the applicants."

35. These provisions relate to persons detained or housed by the authorities. But they recognise a wider principle relevant to asylum-seekers who are *not* detained or housed by the authorities — the right to receive communications and to meet with and be assisted by representatives of non-governmental organisations.

36. It follows that it is a derogation from European Union law for Hungary to impose any restriction on the freedom of persons and non-governmental organisations to provide information, advice, assistance, and representation to persons who wish to claim asylum or are asylum-seekers.

37. Where a residence permit is not granted, Qualification Directive article 46, and article 47 CFR require the third-country national concerned to have a right of effective remedy. Section 353/A(1)(b) violates that right by threatening criminal sanctions against a person providing advice or assistance, including legal aid, for the use of that remedy.

38. National law may legitimately impose requirements of qualifications of legal or other adviser with the aim of protecting the migrant from incompetent advice. National law may also legitimately provide for sanctions against individuals who are found to have knowingly assisted in fraudulent claims.

39. Section 353/A is not addressed to, let alone confined to, these situations, or to those set out as derogations in the Directives. It is a broad, vague provision which threatens professionally qualified and other bona fide advisers and supporters. Section 353/A violates, therefore, the provisions of the Directives set out above.

40. Section 353/A also violates article 4, TEU, read in the light of article 18 CFR, since it jeopardises the achievement of the objectives of the Treaty and the Directives to maintain a policy of asylum, with due respect for the Geneva Convention.

41. Section 353/A also contravenes article 18 CFR, by violating the principle of non-penalisation in Refugee Convention, article 31.1. This prohibits the imposition of a penalty on a refugee by reason of illegal entry or presence, where that person presents themselves without delay and shows good cause for their entry and presence.[13] UNHCR's Executive Committee has stated that 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."[14]

42. While section 353/A does not impose a *criminal* penalty on the asylum-seeker, it does impose upon them a penalty on account of illegal entry or presence, by threatening criminal sanctions on those who would assist them to make their asylum claim. Section 353/A

[13] 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 authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." the UNHCR's Executive Committee has stated that "'[t]here is no obligation under international law for a person to seek international protection at the first effective opportunity."

[14] EXCOM Conclusion No 15 (XXX) 'Refugees without an Asylum Country' (1979).

imposes, therefore, a disadvantage on the asylum-seeker that impedes effective access to the protection required by the Refugee Convention for a good faith asylum claim.[15]

43. The ban on presence in the border zones of a person seeking to assist migrants in the border zone violates the provisions set out above, most specifically article 8 of Directive 2013/32. An automatic ban based merely on pending proceedings is incapable of justification under this provision.

44. Since such a ban falls within the scope of those provisions of EU law, the lack of any effective remedy against the ban is a violation of article 47 of the Charter.

**Violation on EU law on victims of trafficking**

45. Directive 2004/81 requires Hungary to maintain a system of granting residence permits to third-country nationals who are irregularly present and are found to be victims of trafficking. Section 353/A threatens to jeopardise the achievement of the objects of that Directive, contrary to article 4 TEU, by threatening criminal sanctions for assisting a person to obtain a permit.

46. Article 3.1 of the Directive states that "Member States shall apply this Directive to the third-country nationals who are, or have been victims of offences related to the trafficking in human beings, *even if they have illegally entered the territory of the Member States*." Article 8 requires the Member State to consider the issue of a permit, if certain conditions are met.

47. Recital 11 states "The third country nationals concerned should be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position. This should help put them in a position to reach a well-informed decision as to whether or not to cooperate with the competent authorities, which may be the police, prosecution and judicial authorities (in view of the risks this may entail), so that they cooperate freely and hence more effectively."

48. Article 5 lays down a mechanism for Member States to inform third country nationals *of whom they are already aware* of their rights under the Directive.

49. It would jeopardise achievement of the Directive's objectives, contrary to article 4 TEU, for Hungary to interfere with the freedom of third-country nationals to receive, from non-governmental sources, information about rights under the Directive and the means of applying for a permit under it. This is particularly so since victims of trafficking who have not been identified by the authorities are likely to be fearful of approaching them.

50. Where a residence permit is not granted, article 47 CFR requires the third country national concerned to have a right of effective remedy. Section 353/A(1)(b) violates that right by

[15] This proposition is well established in jurisprudence: *R v Uxbridge Magistrates'* Court and Another, ex parte Adimi 1999 4 ER 520, para 16 (Simon Brown LJ); *R v Asfaw* [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008; *R v Ali Reza Sadighpour* [2012] EWCA Crim 2669; *R and Koshi Pitshou Mateta and others* [2013] EWCA Crim 1372, 30 July 2013; *R v Chikho* [2016] EWCA Crim, 13 October 2016; *R v Abdul Haroun* [2016] EWCC, 1 April 2016; *R v Mirahessari and Vahdani* [2016] EWCA Crim 1733. Decision 179/2011, 3 February 2012 (Supreme Court of Denmark); *BO2913* [2011] 09/02696 (Supreme Court of the Netherlands), *BO2914,* [2011] 09/02785 (Supreme Court of the Netherlands). *BO2915,* [2011] 09/02786 (Supreme Court of the Netherlands), *BU2863* [2012] 10/02976 (Supreme Court of the Netherlands); *Arse v Minister of Home Affairs* [2010] 252010 2010 ZASCA 9 (Supreme Court of Appeal of South Africa), *Bula and Others v Minister of Home Affairs and Others* [2011] 58911 2011 ZASCA 209 2012 2 SA 1 SCA 2012 4 SA 560 SCA.

threatening criminal sanctions against a person providing advice or assistance, including legal aid, for the use of that remedy.

**Violation of the Returns Directive 2008/114**

51. Section 353/A would deny third-country nationals their rights under Directive 2008/114 to information, advice, and representation. Article 13(1) requires the Member State to ensure that a person subject to a return decision has "the possibility to obtain legal advice, representation and, where necessary, linguistic assistance." Article 3(3) provides that persons with the right of free movement do not fall under the Directive.

52. A third-country national subject to removal proceedings may in fact be entitled to or eligible for a residence permit. This includes residence permits provided for in implementation of EU law, for example, as a victim of trafficking or under EU law on free movement. This possibility may have been overlooked or ignored by officials. The freedom to receive advice therefore necessarily includes information and assistance with applying for a residence permit. The criminalisation of assisting persons under the returns procedure with obtaining a permit would jeopardise the achievements of the objectives of the Directive.

**Violation of EU law on freedom of movement**

53. Citizens Directive 2004/38 requires issue of residence permits to third-country national family members of Union citizens, even those in an irregular situation. Section 353/A threatens to jeopardise the achievement of the objectives of that Directive, contrary to article 4 TEU, by threatening criminal sanctions for assisting a person to obtain a permit.

54. Articles 9, 10 and 20 provide for the issue, on application, of a residence permit to family members of EU citizens who are third-country nationals. Persons with this right include those who entered unlawfully, or remained after their visa expired: C-459/99 *MRAX* operative paras 2, 3. Article 3(2) requires states to consider applications by third country national durable partners and extended family members, and does not state any *a priori* exclusion for persons irregularly present.

55. Article 34 states "Member States shall disseminate information concerning the rights and obligations of Union citizens and their family members on the subjects covered by this Directive, particularly by means of awareness-raising campaigns conducted through national and local media and other means of communication." The Directive does not state any ban on non-governmental organisations disseminating such information,

56. Section 353/A(1)(b) jeopardises the achievement of the Directive's objectives, contrary to article 4 TEU, by interfering with the freedom of third country nationals to receive, from non-governmental sources, information about rights under the Directive and the means of applying for a permit under it.

57. Articles 15 and 31 require the third-country national concerned to have a right of effective remedy against any decision restricting free movement: this includes denial of a residence permit. Section 353/A(1)(b) violates that right by threatening criminal sanctions against a person providing advice or assistance, including legal aid, for the use of that remedy.

<u>Other EU law rights of third country nationals to be granted a residence permit</u>

58. Section 353/A violates other aspects of EU law on similar grounds. Under these provisions, an applicant may be eligible for a residence permit despite being (or appearing to be) irregularly present, for example, having stayed beyond the time limited by national law

under circumstances which do not end entitlement, or having lost or mislaid their documents. These provisions include:

- **Treaty on the Functioning of the EU**, article 20. This may require a Member State to recognise a right of residence (which necessarily leads to issue of a residence permit) to a third-country nationals, whose stay is necessary for the enjoyment of a Hungarian citizen's exercise of the right to reside in the EU territory (*Ruiz Zambrano)*. Under article 20, irregular presence does not permit a Member State to bar consideration of such an application: C/82-16, *K.A.* 8 May 2018, operational part para 2.
- **Long-term Residents Directive 2003/109**
- **Family Reunion Directive 2003/86**
- **Directive 2004/114/EC** on studies, pupil exchange, unremunerated training or voluntary service.
- **Directive 2005/71** on scientific research.
- **Directive 2009/50** on highly qualified employment.
- **EU-Turkey Association Agreement** and measures adopted under it by the EU can require Member States to issue Turkish citizens and their third-country nationals family members with residence permits, including where the person is or appears to be irregularly present.
- Similarly, **nationals of Algeria, Morocco, Tunisia** may be eligible for residence permits under the 'Euro-Mediterranean Agreements' with the EU which provide that nationals working legally in a Member State have a right to reside during that period of work.[16]

## IV. VIOLATIONS OF EUROPEAN HUMAN RIGHTS LAW AND INTERNATIONAL HUMAN RIGHTS LAW

### Interference with rights to freedom of expression and freedom of association

59. Section 353/A interferes with the right to freedom of expression by making it a crime to "prepare or distribute information materials […] in order to allow the initiating of an asylum procedure in Hungary" by a person who under Hungarian law is not entitled to apply for asylum, or in order for a person who has entered Hungary or is residing in Hungary in violation of Hungarian law to obtain a residence permit (subsections (1) and (5)(b)). The crime is punishable by up to one years' imprisonment if the materials "provide support for more than one person" (subsection (3)(b)).

60. Under article 10 of the European Convention on Human Rights (ECHR), "everyone" is entitled to the right to freedom of expression, which includes the "freedom […] to seek and impart information and ideas without interference by public authority and regardless of frontiers."[17] Information which is necessary to enjoy or protect an internationally

[16] Moroccan Agreement, article 64, see C-416/96 *El-Yassini*, given under former agreement and C-276/06 *El Youssfi* applying old case-law to new agreement

[17] See, e.g., ECtHr, *Case of Yurtsever and Others v. Turkey* (2015), Applications nos. 14946/08, 21030/08, 24309/08, 24505/08, 26964/08, 26966/08, 27088/08, 27090//08, 27092/08, 38752/08, 38778/08 and 38807/08, para. 101 and 102, regarding the right of prisoners to receive information through newspapers.

recognised right, such as the right to apply for asylum, is entitled to heightened protection.[18]

61. It is noteworthy that section 353/A (5)(b) criminalises not only the distribution of information but even its preparation. Thus, under this section, an organisation's premises could be searched on suspicion that "materials" were being prepared there, the materials could be seized, and persons suspected of having prepared the materials could be arrested. This section thus constitutes a prior restraint on publication, which is deeply disfavoured under international law and requires "the most careful scrutiny."[19]

62. The criminalisation of the preparation and provision of information about asylum procedures is particularly of concern in light of statements by high ranking Government and party officials condemning lawful civil society advocacy, such as the campaign by Amnesty International to welcome asylum seekers to Hungary.[20] Such public campaigns could be subject to criminal penalties under section 353/A (5) (b) on distribution of information or under the criminalisation of "organisational activities" set forth in section 353/A (1). Section 353/A (5) makes clear that the list in that section of "organisational activities" is illustrative only, meaning that the vague phrase "organisational activities" could well cover many activities protected by the right to freedom of expression. Vague and overbroad criminal provisions when applied to freedom of expression are particularly problematic and are recognised as having "substantial undesirable effects",[21] because they risk chilling the exercise of legitimate expression.

63. Section 353/A interferes with the right to freedom of association by criminalising the core functions of organisations, such as accessing funding, providing legal assistance, building a network or working in coalitions, and monitoring the border.[22] The Human Rights Committee has observed that "the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association *freely to carry out its statutory activities*. The protection afforded by article 22 of the International Covenant on Civil and Political Rights extends to all activities of an association."[23] The former UN Special Rapporteur on the rights to freedom of peaceful assembly and of

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[18] See, for instance, ECtHR, *Open Door and Well Woman v. Ireland* (1992), Application no. 14234/88; 14235/88, para. 80, regarding the right to receive information disseminated by non-profit organisations on reproductive rights.

[19] ECtHR, *RTBF v. Belgium* (2011), Application no. 50084/06, para. 105. See also: ECtHR, *Ekin Association v. France* (2001), Application no. 39288/98, para. 56; and Open Door, supra.

[20] See, e.g., statement on 7 June 7 2018, by "Speaker of the Christian Democratic parliamentary group Nacsa Lőrinc that "the Soros network has switched to a higher level," alluding to the recently published nine points of the "I Welcome" campaign, launched by Amnesty International. "It is clearly the Soros Plan evolving before our very eyes," Mr. Nacsa added and concluded that it makes the approval of the "Stop Soros" bill all the more important."

[21] Declaration of the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression, adopted on 4 July 2012 at the 1147th meeting of the Ministers' Deputies. In: Dominika Bychawska-Siniarska Protecting the right to freedom of expression under the European Convention on Human Rights, Council of Europe, 2017, page 81.

[22] FRA, criminalisation of migrants in an irregular situation and of persons engaging with them, March 2014, file:///C:/Users/dikawa/Downloads/fra-2014-criminalisation-of-migrants-1_en.pdf. See also, the annex: file:///C:/Users/dikawa/Downloads/fra-2014-criminalisation-of-migrants-annex_en%20(1).pdf

[23] Human Rights Committee. *Viktor Korneenko et al. v. Belarus*, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (2006), par. 7.2.

association has considered, for instance, that fundraising activities are protected under article 22, and funding restrictions that impede the ability of associations *to pursue their statutory activities* constitute an interference with the right to freedom of association. The European Court of Human Rights (ECtHR) has also recognised a right to "carry out activities", such as holding public meetings, disseminating information, [24] distributing propaganda, lobbying authorities, involving volunteers, publishing,[25] soliciting, receiving and using (foreign) funds,[26] as part of the right to freedom of association.

**Three-prong test for violations of the rights to freedom of expression and freedom of association**

64. The ECHR requires the application of a three-prong test to assess whether restrictions to such rights are compatible with European human rights law. Any restrictions should be prescribed by law, pursue legitimate aims, and be necessary in a democratic society.

Not prescribed by law

65. The ECtHR has determined that "article 11 of the European Convention (on the right to freedom of association) does not only require that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question." [27] The ECtHR add that the "law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." [28] The "law must [also] indicate with sufficient clarity the scope of any such discretion and the manner of its exercise." [29] Article 10 of the European Convention (on the right to freedom of expression) also requires that the "relevant law must provide a clear indication of the circumstances when such restraints are permissible."[30]

66. Section 353/A, however, establishes a broad criminal offense. As noted above, this covers an open-ended list of "organisational activities", criminalising the imparting and reception of information (freedom of expression), such as the publication and dissemination of

[24] ECtHR, *Case of Koretskyy and Others V. Ukraine* (2008), Application no. 40269/02, para. 40.
[25] ECtHR, *Case of Koretskyy and Others V. Ukraine* (2008), Application no. 40269/02, para. 52.
[26] ECtHR, *Case of Ramazanova v. Azerbaijan* (2007), *Application no. 44363/02*, par. 59.
[27] ECtH, *Case of Koretskyy and others v. Ukraine* (2008), Application no. 40269/02, para. 46 and 47. See also: ECtHR, *Case of Maestri v. Italy* (2004), Application n. *39748/98*, para. 30-34 and 41; *Larissis and Others v. Greece* (1998), Reports of Judgments and Decisions 1998-I, p. 378, para. 40; *Hashman and Harrup v. the United Kingdom* (1999), Application no. 25594/94, para. 31; and *Metropolitan Church of Bessarabia and Others v. Moldova* (2001), Application no. 45701/99, para. 109.
[28] ECtH, *Case of Koretskyy and others v. Ukraine* (2008), Application no. 40269/02, para. 46 and 47. See also: ECtHR, *Case of Maestri v. Italy* (2004), Application n. *39748/98*, para. 30-34 and 41; *Larissis and Others v. Greece* (1998), Reports of Judgments and Decisions 1998-I, p. 378, para. 40; *Hashman and Harrup v. the United Kingdom* (1999), Application no. 25594/94, para. 31; and *Metropolitan Church of Bessarabia and Others v. Moldova* (2001), Application no. 45701/99, para. 109.
[29] ECtH, *Case of Koretskyy and others v. Ukraine* (2008), Application no. 40269/02, para. 46 and 47. See also:
ECtHR, *Case of Maestri v. Italy* (2004), Application n. *39748/98*, para. 30-34 and 41; *Larissis and Others v. Greece* (1998), Reports of Judgments and Decisions 1998-I, p. 378, para. 40; *Hashman and Harrup v. the United Kingdom* (1999), Application no. 25594/94, para. 31; and *Metropolitan Church of Bessarabia and Others v. Moldova* (2001), Application no. 45701/99, para. 109.
[30] ECtHR, *Gaweda v. Poland* (2002), Application no. 26229/95, para. 40.

leaflets or books on the rights of asylum seekers and refugees, which include information on applications for residence permits, and trainings in this area. It also includes the conduct of activities under an association's statute (freedom of association), such as holding meetings and organising networks of volunteers to disseminate practical and legal information, the provision of legal services to refugees and all those seeking a residence permit, and funding of human rights organisations that defend the rights of asylum seekers and refugees through any activity (including the publication of materials) – an essential mandate, for instance, of Open Society Foundations (OSF). In light of its excessive breadth, the new legislation can hardly be said to enable affected individuals or organisations to "foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

Illegitimate aims

67. The ECtHR has made clear that, in order to comply with Articles 10 and 11 of the Convention, a law must pursue predominantly legitimate aims. Analysis of the legitimacy of aims should be conducted, therefore, together with an analysis of article 18 of the ECHR, on limitations on use of restrictions on rights. The ECtHR has established at least since *Merabishvili v. Georgia* (2017) that even when

> "a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, [it can] still infringe Article 18 because it was chiefly meant for another purpose that is not prescribed by the Convention; in other words, if that other purpose was predominant. […] Which purpose is predominant in a given case depends on all the circumstances. In assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law."[31]

68. The Anti-NGO Bill (Bill T333), in its entirety, pursues predominantly illegitimate aims, being, therefore, incompatible with the ECHR. The title, text, and the Government's formal reasoning of the Bill set out three principal aims: (i) to combat illegal migration; (ii) to prevent Hungary from becoming an immigrant country; and (iii) to protect national security and public order.

69. The Government states in the Bill's title that its aim is to combat illegal migration. However, recent statements by Government officials, the legal amendments introduced by the Bill, and the other aims stated by the Government in the Bill's reasoning indicate that the Government's predominant aims actually go beyond legitimate steps to prevent law-breaking and "combat illegal immigration". Indeed, Hungarian law already imposes significant sanctions for any activities, and assistance to such activities, which could be considered to constitute, or contribute to, illegal migration. Two unlawful aims can be identified:

- First, to prevent individuals and organisations from exercising their rights to freedom of expression and freedom of association, including by giving "support to" lawful applications for asylum.

[31] ECtHR, *Merabishvili v. Georgia* (2017), Application n. 72508/13, para. 305 and 307.

- Second, to "stop"[32] George Soros and the organisations partially supported by his foundations from opposing Government policies and practices such as corruption and discrimination, in their work in defence of human rights and democracy. This second aim makes this an ad hominem Bill.[33]

70. The Government has issued statements that target organisations partially funded by Soros and their staff, and refer to them as part of a "Soros network."[34] The Bill is still named by the Government as "Stop-Soros package." These are a few examples:

- On 7 June 2018, Nacsa Lőrinc, Speaker of the Christian Democratic parliamentary group, stressed that "the *Soros network* has switched to a higher level," referring to Amnesty's "I Welcome" campaign, and raising concerns among activists about the overly broad character of the Bill.[35]
- On 8 June 2018, Pál Völner, Parliamentary State Secretary of the Ministry of Justice, said on State news television M1 that the *"Stop Soros" package* targets the leaders of the organisations.[36]
- On 1 June 2018, István Hollik. Spokesperson of Fidesz-KDNP parliamentary groups, had stated at a press conference that "the *Soros-network* has targeted Hungary with its anti-migration account." He enumerated Hungarian Helsinki Committee, Amnesty International, Hungarian Civil liberties Union (TASZ), Human Rights Watch, and Eötvös Károly Institute as attackers, creating apprehension about retaliation against such organisations.[37]
- On 13 June 2018, main media outlets reported that István Hollik placed stickers on the door of the office of Amnesty International, which read "pro-migration organisation." Stickers also had a quote attributed to AI: "the issues of migration and terrorism shouldn't be linked." Hollik contested the latter message at a press conference, stressing that "pro-migration organisations threaten the security of Hungary and oppose the opinion expressed by the Hungarian people on the 8th of April". He added that "they are working on implementing the Soros-plan, they want to flood Europe with migrants and

[32] The Bill's reasoning still refers to the "Stop Soros" package. The expression is repeated by public officials every day on Hungarian news.
[33] See, for instance, ECtHR, *Case of Erményi v. Hungary* (2016), Application no. 22254/14, para. 35 and 36, where the Court ruled that the dismissal of the vice-present of Hungary's Supreme Court, which the Government sought to justify as an inevitable part of the restructuring of the judiciary "did not pursue a legitimate aim." See also the dissenting opinion in this case, which fully recognises the *ad hominem* character of the legislation adopted during the judicial reform. Finally, see ECtHR, *Baka v. Hungary* (2016), Application no. 20261/12, where the applicant was removed from the position of president of the Supreme Court by individualised legal and constitutional provisions.
[34] Building a network is a conduct criminalised by Section 353/A, added to the Criminal Code by the new "Stop-Soros" Bill.
[35] Magyar Midok,FIDESZ-KDNP: A „Soros-Hálózat" Nagyobb Fokozatba Kapcsolt, 6 June 2018, available at: https://magyaridok.hu/belfold/fidesz-kdnp-a-soros-halozat-nagyobb-fokozatba-kapcsolt-3171175/.
[36] Hirado.Hu, Völner Pál: Egyre többen követik a magyar példát, 7 June 2018, available at: https://www.hirado.hu/belfold/kozelet/cikk/2018/06/07/volner-pal-egyre-tobben-kovetik-a-magyar-peldat/
[37] Magyarhirlap.hu, „A Soros-hálózat összehangolt támadást indított a bevándorlás-ellenes Magyarország ellen", 31 May 2018, available at: http://magyarhirlap.hu/cikk/119577/A_Soroshalozat_osszehangolt_tamadast_inditott_a_bevandorlasellenes_Magyarorszag_ellen

they would have Hungary become a migrant country."[38] Hollik added on M1 state news channel that they will visit all other "mostly Soros-supported organisations"[39] that support migration.[40]

71. The targeting of specific CSOs has been a main purpose of the Hungarian government's previous Bills, introduced to Parliament in February 2018. Referring to the latter, Gergely Gulyás, Minister of the Hugarian Prime Minister's Office, stressed that Helsinki Committee and George Soros would be reached by the Bills.[41]

72. Moreover, the government affirms, in the Bill's reasoning, that it seeks "to prevent Hungary from becoming an immigrant country". The statement should be read in connection with article 5(1) of Bill T332: "No alien population shall be settled in Hungary. Any foreign citizen, excluding persons having the right of free movement and residence, shall be allowed to live in the territory of Hungary on the basis of his or her application individually evaluated by the Hungarian authorities." By doing so, the government goes against European values, recognized by EU Law and the European System of Human Rights, such as democracy and pluralism (art. 2, the Lisbon Treaty). It also violates the ECHR. In the last decades, the ECtHR has decided a number of cases on the protection of the right to freedom of association, where restraints to plural political parties and associations were considered "not necessary in a democratic society", as they unduly limited pluralism. A plural approach to democracy should, therefore, be protected, not restrained by government measures. In the *Case of Freedom and Democracy Party (Özdep) v. Turkey* (1999), for instance, the ECtHR stated that: "as the Court has said many times, there can be no democracy without pluralism." And pluralism is "built on the genuine recognition of, and respect for, *diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs*, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion" (emphasis added).[42] The key relevance of pluralism for democracy is also recognised in UN Human Rights Committee views on *Mr. Jeong-Eun Lee v. Republic of Korea* (2005).[43]

73. Finally, the government also alleges in the Bill's reasoning that they "firmly *believe* that immigration poses serious risks and is therefore a question of national security" (emphasis added). No further explanation is given by the government as to specific risks. Although one may concede that, in certain contexts, one or more out of hundreds of thousands

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[38] Hirado.hu, Kormánypártok: Az Amnesty International egy bevándorlást támogató szervezet, 12 June 2018, Available at: https://www.hirado.hu/belfold/belpolitika/cikk/2018/06/12/kormanypartok-az-amnesty-international-egy-bevandorlast-tamogato-szervezet/

[39] Kálmán Attila**,** A Fidesz-szóvivő könyörtelenül folytatja a matricázást, 12 June 2018, available at: https://24.hu/belfold/2018/06/12/a-fidesz-szovivo-konyortelenul-folytatja-a-matricazast/

[40] News summarised and translated by XKK, a Hungarian organisation founded in 2012 "to use the power of communication to advance social causes." For more information, go to: 1.

[41] Gergely Gulyás, Minister of Prime Minister's Office, Parliament may decide on STOP Soros legislative package in February, 18 January 2018. Available at: http://www.kormany.hu/en/prime-minister-s-office/news/parliament-may-decide-on-stop-soros-legislative-package-in-february

[42] ECtHR, *Case of Freedom and Democracy Party (Özdep) v. Turkey* (1999), Application n. 23885/94, para. 37. See also: ECtHR, *Case of Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, Application no. 37083/03, para. 53. See also: ECtHR, *Case of Gorzelik and others v. Poland* (2004), Application no. 44158/98, para 92; *Case of Moscow Branch of the Salvation Army v. Russia* (2007), Application no. 72881/01, para. 61; *Zhechev v. Bulgaria* (2007), Application no. 57045/00, para 35.

[43] UN HRC, *Mr. Jeong-Eun Lee v. Republic of Korea* (2005), Communication No. 1119/2002, para. 7.2.

crossing a border can pose a national security risk, that ratio could also be found in regard to violence perpetrated by nationals. As stressed by the ECtHR, in *Case of A. and Others v. United Kingdom*, the "distinction between nationals and non-nationals" would not be legitimate as a means to assure national security. The latter is even more valid when Hungary has not offered a single example of such a risk. Indeed, the ECtHR has held that general allegations of threats to national security are not sufficient: risks should be specified, leaving the State with a narrow margin of appreciation (*United Communist Party of Turkey v. Turkey* and *Sidiropoulos v. Greece*). In *The Case of United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria* (2005), the ECtHR stated that "the Constitutional Court's holding that the applicant party's activity truly "imperil[ed] [Bulgaria's] national security" was not based an acceptable assessment of the relevant facts."[44] In the *Case of Stomakhin v. Russia* (2018), "the Court reiterates that the concepts of 'national security' and 'public safety' in relation to freedom of expression (Article 10 § 2)[…] must be interpreted restrictively and should be brought into play only where it has been shown to be necessary to suppress the release of information for the purposes of protecting national security and public safety"[45].

74. The UN HRC has addressed the issue of unspecified risks in *Nikolai Alekseev v. Russian Federation* (2013)[46] and *Mr. Jeong-Eun Lee v. Republic of Korea* (2005)[47] stating in the latter that "the State Party must further demonstrate that the prohibition of the association and the criminal prosecution of individuals for membership in such organisations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose."

Not necessary or proportionate to alleged aims and not necessary in a democratic society

75. Aside from the fact that the explicit and implicit aims established for the Bill are not legitimate, the means to achieve such aims are disproportionate and not necessary in a democratic society.

76. Section 353/A imposes both coercive and chilling effects, which disproportionately restrict the right to freedom of expression, including to disseminate and access information. They also disproportionately restrict the right to freedom of association.

77. The assessment of proportionality is addressed by the UN HRC and the ECtHR. In *Mr. Jeong-Eun Lee v. Republic of Korea* (2005), the Human Rights Committee stated in the context of the right to freedom of association that: "The reference to a 'democratic society' indicates, in the Committee's view, that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favorably received by the government or the majority of the population, is one of the foundations of a democratic society. *Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State Party must further demonstrate that* […] *less intrusive measures would be insufficient to achieve this purpose*" (emphasis

[44] ECtHR, *The Case of United Macedonian Organisation Ilinden – Pirin and Others v. Bulgaria* (2005), Application n. 59489/00, par 61.
[45] ECtHR, *Case of Stomakhin v. Russia* (2018), Application n. 52273/07, para. 85. See also: ECtHR, *Case of Stoll v. Switzerland* (2007), Application no. 69698/01, para. 54; and *Görmüş and Others v. Turkey* (2016), Application no. 49085/07, para. 37.
[46] UN HRC, *Nikolai Alekseev v. Russian Federation* (2013), Communication No. 1873/2009, para. 9.6.
[47] UN HRC, *Mr. Jeong-Eun Lee v. Republic of Korea* (2005), Communication No. 1119/2002, para. 7.2

added).[48] In *Tebieti*, the ECtHR reiterated that "the exceptions to freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a "*pressing social need*"; thus, the notion "necessary" does not have the flexibility of such expressions as "useful" or "desirable."In determining whether a necessity within the meaning of article 11 § 2 exists, the *States have only a limited margin of appreciation*, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. […]. *[I]t must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued"* and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient." In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."[49]

78. Article 10 of the ECHR on the right to freedom of expression should be read here in conjunction with article 14 of the ECHR, on the prohibition of discrimination. While article 14 has been held to permit differences in treatment on grounds of nationality and immigration status, Bill T333 (new Anti-NGO Bill) would deny asylum seekers and other migrants information about, and assistance with, exercising their legal rights under national and international law.

79. Section 353/A is a disproportionate means in at least the following ways:

- It disproportionately restricts the right to freedom of expression of any organisation or individuals, including civil society organisations, media outlets, lawyers, bloggers, and scholars taking steps to ensure that asylum-seekers and other migrants are informed of and can exercise their legal rights. It criminalises the distribution and reception of information and campaigning[50] aimed at "allowing the initiation of an asylum complaint" or obtaining residence permits by persons entitled to apply. The ECtHR has recently ruled in the context of the right to freedom of expression that "the nature and severity of the sanctions imposed are […] factors to be taken into account when assessing the proportionality of the interference. As the Court has previously pointed out, interference with freedom of expression may have a chilling effect on the exercise of that freedom."[51]

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[48] Human Rights Committee. *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1119/2002, U.N. Doc. CCPR/C/84/D/1119/2002 (2005), para. 7.2. Available at: http://hrlibrary.umn.edu/undocs/1119-2002.html

[49] ECtHR, *Case of Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, Application no. 37083/03, para. 67 and 68. See also: ECtHR, *Gorzelik and Others v. Poland* (2004), Application no. 44158/98, para. 92 and 95, *Case of Sidiropoulos and Others* (1998), 57/1997/841/1047, para. 40, ECHR 2004-I; *Case of Moscow Branch of the Salvation Army v. Russia* (2007), Application no. 72881/01, para. 61; *Zhechev v. Bulgaria* (2007), Application no. 57045/00, para 35; *United Communist Party of Turkey and Others v. Turkey* (1998), para. 47, *Reports* 1998-I, and *The United Macedonian Organisation Ilinden and Others v. Bulgaria* (2006), Application no. 59491/00, para. 62.

[50] ECtHR, *Open Door and Well Woman v. Ireland* (1992), Application no. 14234/88; 14235/88, para. 73 and 80, which highlights, for instance, the "perpetual" character of the restraint, determined by the Irish Supreme Court, to impart (and receive information). The case addresses both forms of conduct.

[51] ECtHR, *Case of Baka v. Hungary*, Application no. 20261/12 (2016), para. 160. See also: ECtHR, *Guja v. Moldova*, Application no. 14277/04, para. 95, and *Morice v. France*, Application no. 29369/10, para. 127,

The "lack of clarity as to what material could and could not be published" or the "lack of certainty" of the interference also has a chilling effect on the right to freedom of expression.[52]

It disproportionately restricts the rights to freedom of association of non-governmental organisations, foundations, or any other legal entity, when it criminalises legal activities conducted by associations, as mandated by their Statute, including restrictions to funding, building of networks, monitoring, campaigning, and legal representation. The State has not demonstrated the necessity of restricting provisions,[53] beyond vague allegations of national security.

- It is also disproportionate when it targets migrants as a threat to national security. The ECtHR ruled in *Case of A. and Others v. United Kingdom* that the "distinction between nationals and non-nationals" would not be legitimate as a means to assure national security.[54]
- Finally, it makes it disproportionately difficult for asylum seekers and other individuals to get legal representation (please see previous section).

80. In sum, section 353/A of the Bill violates the right to freedom of expression and association, as recognised by the ECtHR.

## V. DENIAL OF ASYLUM TO REFUGEES ARRIVING FROM UNSAFE COUNTRIES

81. The new Anti-NGO Law (Bill T333) would change the Asylum Law to allow for denial of asylum to refugees on the ground that they arrived from an *unsafe* country. This is an explicit violation of European Union law. This change, and a change made by the Constitutional Amendment Bill (Bill T332), also threatens breaches of Hungary's obligations under the Refugee Convention.

### Context

82. EU law permits states to send asylum seekers to safe third countries after individual consideration. Hungarian law provides for this in the Asylum Act.[55] In July 2015, the Hungarian Government formally declared that Serbia is presumed to be a safe third country, requiring the claimant to disprove this.[56] Hungarian officials routinely refused claims by persons arriving from Serbia on the ground that Serbia is a safe third country. However, Hungary's courts frequently disagreed with officials, ruling that Serbia's asylum

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where the Court considered that: "The relatively moderate nature of the fines [for defamation] does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression, this being all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his clients."

[52] ECtHR, *Cumhuriyet Vakfi and Others v. Turkey*, Application no. 28255/07, (2013), para. 62 and 63.

[53] ECtHR, *Case of Koretskyy and Others V. Ukraine* (2008), Application no. 40269/02, para. 52.

[54] ECtHR, *Case of A. and Others v. United Kingdom* (2009), Application n. *3455/05*, para. 185-186.

[55] By amendment in December 2010 to Law LXXX of 2007 on Asylum. Now in section 51(2)(e), as inserted by Section 34 of Act CXXVII of 2015, effective as of 1 August 2015.

[56] Hungary Adopts List Of Safe Countries Of Origin And Safe Third Countries, *AIDA Asylum Information Database*, available at http://www.asylumineurope.org/news/30-03-2017/hungary-adopts-list-safe-countries-origin-and-safe-third-countries.

system was ineffective to secure asylum for genuine claimants.[57] In 70% of such cases represented by Hungarian Helsinki Committee, the judges overruled the officials. In 2017, officials stopped routinely refusing asylum decisions on grounds that Serbia was safe.[58] During 2017, Hungary granted a residence permit to more than 50% of all asylum cases decided, more than 1300 people.[59]

**Amendment to Asylum Act and to Constitution and their effects**

83. Section 7 of Bill T333 would insert a new section 52(2)(f) in the Asylum Act:

*"the applicant arrived via a country where they had not been subjected to persecution as defined in Subsection (1) of Section 6 or to the serious harm as defined in Subsection (1) of Section 12 or if the adequate level of protection is provided in the country through which they had arrived in Hungary.*

84. Section 5 of the Constitution Amendment Bill would amend article XIV(4) of the Basic Law to read:

*"Hungary shall, upon request, grant asylum to non-Hungarian citizens being persecuted or having a well-founded fear of persecution in their native country or in the country of their usual residence for reasons of race, nationality, membership of a particular social group, religious or political belief, if they do not receive protection from their country of origin or from any other country. Any non-Hungarian citizen arriving to the territory of Hungary through a country where he or she was not exposed to persecution or a direct risk of persecution shall not be entitled to asylum."*

85. The effect of these provisions in practice is unclear. The laws may be read as preventing asylum being granted to asylum seekers solely on the ground that their journey passed through a country where they would not be persecuted, regardless of whether that country would have expelled them or they can be returned there. However, the explanation to section 5 of the Constitution Amendment Bill states that Parliament may decide if asylum is to be granted to persons who arrive via a country in which they did not have a well-founded fear of persecution.

86. New section 52(2)(f) appears aimed at justifying Hungarian officials to resume refusals of asylum claims by people who arrived from Serbia - which is almost all of current claimants. Because Hungarian judges keep deciding that Serbia's asylum system does not offer sufficient protection for it to meet the standards of a safe third country, officials are no longer able to use current Hungarian law.

**Violation of EU law on asylum**

87. The EU International Protection Procedure Directive, 2013/32, permits Member States to refuse an asylum claim as inadmissible on safe third country grounds. But this is subject to conditions to ensure the safety of the asylum-seeker concerned. Under article 38, an asylum seeker may not be sent to a non-EU country unless that country guarantees effective access

[57] In 2012, UNHCR had advised that Serbia was unsafe and Hungary's Supreme Court had agreed: http://www.asylumineurope.org/news/30-03-2017/hungary-adopts-list-safe-countries-origin-and-safe-third-countries.
[58]AIDA 2017 Update: Hungary & Serbia, 22 February 2018, available at http://www.asylumineurope.org/news/22-02-2018/aida-2017-update-hungary-serbia
[59] AIDA 2017 Update: Hungary & Serbia, 22 February 2018, available at http://www.asylumineurope.org/news/22-02-2018/aida-2017-update-hungary-serbia

to asylum in accordance with the Geneva Convention, there is a case-by-case assessment of the safety of that country for the individual and it is reasonable to expect them to go there on the basis of their connections with that country.

88. Hungary has already provided for this possibility in its safe third country rule (Asylum Act, section 51(2)(e)). The new rule in section 5(2)(f) is therefore only necessary for countries that would be found *not safe* under Hungary's safe third country rule.

89. The Directive does not permit Hungary to adopt a rule for *unsafe* third countries. New Section 51(2)(f) is therefore contrary to the Directive and prohibited by EU law.

90. New article XIV(4) of the Basic Law may put into question the right to asylum of persons entitled to it under the EU International Protection Qualification Directive 2011/95. If so, it is contrary to that Directive.

**Violation of the Refugee Convention and European Convention of Human Rights**

91. By authorising rejection of asylum claims as inadmissible solely on the grounds of the route taken to Hungary, Bill T333 (the new Anti-NGO Bill) would permit violations of the prohibition on refoulement in article 33.1 of the Refugee Convention, and European Convention on Human Rights (ECHR), articles 2, 3, and 4, which prohibit expulsion where there are substantial grounds for believing that expulsion would result in a real risk of treatment contrary to those articles, including suffering killing, torture, inhuman or degrading treatment, slavery, servitude or forced labour.

## VI. CONCLUSION

92. The new Anti-NGO Bill (Bill T333), introduced by the Hungarian Government to Parliament in May 2018, should be withdrawn, as it violates International Human Rights Law, European Human Rights Law, and EU law. It violates the rights to freedom of expression and freedom of association recognised by the ECHR. It violates EU law on asylum, victims of trafficking, freedom of movement and other rights of third country nationals to be granted a residence permit. It also violates the UN Convention on Refugees.