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(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS

(OSCE/ODIHR)

HUNGARY

DRAFT JOINT OPINION

ON THE PROVISIONS OF THE SO-CALLED "STOP SOROS" DRAFT LEGISLATIVE PACKAGE WHICH DIRECTLY AFFECT NGOs

(In particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration)

on the basis of comments by

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I. Introduction

1. In a letter dated 22 March 2018, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Mr Frank Schwabe, informed the Venice Commission that the Committee, at its hearing on "Protecting human rights defenders in Council of Europe members States", held on 14 March 2018 in Paris, had decided to request an opinion from the Venice Commission on the compatibility with international human rights standards of the Hungarian government´s "Stop Soros" legislative package, which included Bill t/1976 on the licencing of organisations supporting migration, Bill t/19775 on the immigration financing duty and Bill t/19774 on the immigration restraint order.

2. Mr Richard Barrett, Mrs Veronika Bílková, Mr Martin Kuijer and Mr Dan Meridor acted as rapporteurs on behalf of the Venice Commission. Mr Serghei Ostaf and Ms Marta Achler were appointed as legal experts for the OSCE/ODIHR.

3. On 24-26 May 2018, a joint delegation of the Venice Commission and OSCE/ODIHR, composed of Mr Richard Barrett, Mr Martin Kuijer and Mr Serghei Ostaf, accompanied by Ms Simona Granata Menghini, Deputy Secretary of the Venice Commission, Mr Ziya Caga Tanyar, legal officer at the Secretariat and Ms Tamara Otiashvili, Senior Legislative Support Officer at the OSCE/ODIHR visited Budapest and met with Mr Balazs Orban, State Secretary from the Prime Minister's Office, representatives of the Foreign Affairs Committee and Committee of Justice of the Hungarian Parliament, including deputies from the ruling and opposition parties, representatives of the Constitutional Court and a number of civil society organisations. The Venice Commission and the OSCE/ODIHR are grateful to the Hungarian authorities for the organisation of the visit.

4. During the visit, the delegation was informed that the three draft laws of the "Stop Soros" draft legislative package had not been maintained on the agenda of the newly elected Parliament (legislative elections took place on 8 April 2018) and that the Hungarian Parliament would no longer pursue its examination. On 25 May, the Hungarian government announced that those draft laws would not be re-submitted to Parliament and that a new package was being prepared. The delegation was told that the legislative package would be adopted before the end of the summer session of Parliament.

5. On 29 May 2018, this new "Stop Soros" draft legislative package was submitted to Parliament by the Minister of the Interior. The new draft package contains amendments to Act XXXIV of 1994 on the Police, Act XII of 1998 on Traveling Abroad, Act I of 2007 on the entry and stay of persons with the right of free movement and residence, Act II of 2007 on the entry and stay of third-country nationals, Act LXXX of 2007 on Asylum, Act LXXXIX of 2007 on the State border, Act XLVII of 2009 on the criminal record system, the registration of judgments adopted against Hungarian nationals by courts of the Member States of the European Union and the registration of criminal and law enforcement biometric data, Act II of 2012 on infractions, infraction procedure and the infraction records system and, finally, Act C of 2012 on the Criminal Code (CDL-REF(2018)025).

6. In a letter dated 31 May 2018, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly confirmed that the initial opinion request of 22 March 2018 also covered the newly proposed legislative amendments *to the extent that they affect NGOs activities in Europe.* Therefore, in the present Opinion, the Commission will concentrate especially on the draft amendment to the Criminal Code of Hungary (draft Article 353A of the Criminal Code), with some reference to the proposed changes to the Police Law. This focus should not be taken to suggest that there might not be legal difficulties arising from other elements of the new package of proposals. In particular, the present joint Opinion does not deal with the conformity of the new draft legislative package with European Union Law and

with the 1951 Convention relating to the Status of Refugee, nor does the Opinion directly deal with Bill No. T/332 concerning the Seventh amendment of the Basic Law of Hungary submitted to Parliament in May 2018 by the Minister of Justice of Hungary.

7. The official translation of the draft bill was received by the Secretariat on 15 June 2018. Inaccuracies may occur in this joint Opinion as a result of the late receipt of the official translation.

8. This joint Opinion was examined by the sub-commission on fundamental rights and subsequently adopted by the Venice Commission at its (…) Plenary Session (Venice, …).

II. General remarks

9. On 29 May 2018, the Hungarian government presented an amendment to the Basic Law of Hungary (Bill No. T/332 – Seventh amendment of the Basic Law of Hungary) and a bill amending certain laws relating to measures to combat illegal immigration (Bill No. T/333).

10. The rationale behind the 7th amendment of the Basic Law is summarised in the general reasoning attached to this Bill: "*The mass immigration hitting Europe and the activities of pro-immigration forces threaten the national sovereignty of Hungary. Brussels plans to introduce a compulsory fixed-quota scheme for the relocation of migrants residing or arriving in Europe, which presents a danger to the security of our country and would change the population and culture of Hungary forever.*" For this reason, Article 1 of the Bill supplements the National Avowal with the following text: "*We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State.*" In addition, the Bill *inter alia* codifies the principle of *non-refoulement* (Article 5 para. 1) while at the same time states that non-Hungarian citizens arriving to the territory of Hungary through a so-called "safe country" shall not be entitled to asylum (Article 5 para. 2).[1]

11. The new draft legislation (Bill No. T/333) is in line with the rationale behind the amendment of the Basic Law. It *inter alia* introduces a criminal offence of 'facilitating illegal immigration' (draft Section 353/A of the Criminal Code[2]). It criminalises, in paragraph 1, anyone 'who

[1] The Commission notes that the amendment of the Basic Law also introduces a new provision dealing with the right to private and family life, home, communications and good reputation (Article 4). This particular provision seems to be unrelated to the general reasoning attached to the Bill. The Commission also notes that the latter provision is highly relevant for a pending request for an Opinion on questions related to the protection of privacy (No. 890/2017), requested by the Hungarian authorities. Work on this request was suspended at the request of the authorities.

[2] **"Facilitating illegal immigration"**
Section 353/A

(1) Anyone who engages in organising activities in order
a) to facilitate that persons who are not persecuted in their native county, in the country of their habitual residence or in the country through which they arrived in Hungary for reasons of race, nationality, the membership of a particular social group, religious or political beliefs, or do not have a well-founded reason to fear direct persecution initiate asylum proceedings in Hungary, or
b) for persons entering or staying illegally in Hungary to acquire title of residence,
shall be punished with confinement unless a more serious criminal offence is committed.

(2) Anyone who provides material resources for the criminal offence specified in paragraph (1) or carries out such organising activities on a regular basis shall be punished with imprisonment for up to one year.

(3) Anyone who commits the criminal offence specified in paragraph (1)

engages in organising activities in order to facilitate the initiation of an asylum request in respect of a person, who in their native country or in the country of their habitual residence or in another country through which they have arrived, is not subject to persecution or those allegations of direct persecution is not well-founded. Equally, the draft provision criminalises organisational activities in order to assist a person entering Hungary illegally or residing in Hungary illegally, in obtaining a title of residence. In the explanatory memorandum it is mentioned that "*practical cases prove that those illegally entering or staying in Hungary are aided in their entry into the country not only by international, but also by Hungarian organisations*".

12. Subsection (2) of Draft Article 353A provides for a year imprisonment for anyone who provides material resources for committing the offence as specified in Subsection (1).

13. The notion of 'organising activities' is described in paragraph 5 of the provision. It refers to (i) border watch at the external borderlines of Hungary, (ii) preparing or distributing of information materials, and (iii) building or operating a network. Categories (ii) and (iii) in particular could target NGOs which provide immigrants with information on, *inter alia*, asylum procedures and legal aid in the border area and who are often assisted by volunteers. This list is not exhaustive and could include other activities.

14. Paragraph 3 of the draft provision introduces aggravating circumstances, such as engaging in these activities for financial gain, assisting more than one person or committing the offence within an 8 kilometre area from the external borders of Hungary. The maximum penalty then increases to a term of imprisonment of up to one year.

15. Currently the Hungarian Criminal Code contains standard provisions to criminalise the smuggling of illegal immigrants (Section 353) and facilitation of unauthorised residence (Section 354). These provisions contain the criminalisation of the act of smuggling (aid to another person for *crossing state borders* in violation of statutory provisions) and of aiding for financial gain to a foreign national to reside unlawfully in Hungary. According to the Hungarian authorities, the new Article 353/A differs from the existing Articles 353 and 354 by criminalizing organizational activities listed in a non-exhaustive manner in its paragraph 5, which are conducted in order to initiate an asylum procedure by an irregular migrant and to assist him/her to enter and reside in Hungary illegally and to obtain a title of residence.

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a) for financial gain,
b) by assisting more than one person, or
c) within the 8 kilometre zone counted from the borderline or boundary marker corresponding to the external border under Article 2, point 2 of the Schengen Borders Code,
shall be punished in accordance with paragraph (2).

(4) The punishment of the perpetrator of the criminal offence specified in paragraph (1) may be reduced without limitation or, in cases deserving special consideration, may be waived if the perpetrator reveals the circumstances of committing the criminal offence not later than at the time the indictment is filed.

(5) For the purposes of section 353/A, organising activities shall include in particular
a) organising a border watch for a purpose specified in paragraph (1) at the borderline or boundary marker corresponding to the external border of Hungary according to Article 2, point 2 of Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders,
b) preparing or distributing information materials or entrusting another with such acts,
c) building or operating a network."

16. There are three other provisions which are relevant to persons who are under criminal prosecution for or who have been convicted for having committed the criminal offence introduced by draft Article 353/A and who do not have Hungarian nationality / EU citizenship:

- Section 46/F of the Police Law according to which a person under criminal prosecution for the offence introduced by Article 353/A shall be prevented from entering, and ordered to leave, the 8 kilometre area of the border line;
- Section 5 of Act LXXXIX of 2007 on the State border according to which a person under criminal prosecution for the offence introduced by Article 353/A may not stay in the territory referred to in paragraph 1a of the provision.
- Draft Section 364 of the Criminal Code according to which perpetrators of the criminal offence *inter alia* introduced in Article 353/A may be banned from certain areas.

17. Finally, attention should be drawn to Act CIV of 2001 on measures applicable to legal entities under criminal law. Act CIV is in itself *not* a part of the 'Stop Soros' legislative package, but is referred to in the explanatory notes and is relevant to understand the full array of sanctions following a criminal conviction under the new criminal offence under draft Article 353A discussed in the present opinion. Under Sections 2 and 3 of the Act CIV, if certain staff members of a legal entity[3] are found guilty of having committed a criminal act defined in Act IV of the Criminal Code intentionally aimed at or resulting in the legal entity gaining benefit, the court could – and in some cases shall – take certain measures against the legal entity, including the winding up of that legal entity; limiting the activity of that legal entity; or imposing a fine.

III. Comparative overview of legislation concerning the offence of assisting irregular migrants

18. In its 2009 Guidelines on the protection of human rights in the context of accelerated asylum procedures, the Committee of Ministers of the Council of Europe considered that "*asylum seekers must receive the necessary social and medical assistance, including emergency care*."[4]

19. The Parliamentary Assembly, in its 2015 Resolution on "Criminalisation of irregular migrants: a crime without a victim", underlined "*the need to end the threat of prosecution on charges of aiding and abetting irregular migration*" and called on the member States to "*give access to the essential rights for human dignity (medical care, education) to irregular migrants.*"[5]

[3] Including a) the legal entity's executive officer, its member, employee, officer, managing clerk entitled to represent it, its supervisory board member and/or their representatives, within the legal entity's scope of activity, b) its member or employee within the legal entity's scope of activity, and it could have been prevented by the executive officer, the managing clerk or the supervisory board by fulfilling his/her/its supervisory or control obligations.

[4] Guidelines on the protection of human rights in the context of accelerated asylum procedures, adopted by the Committee of Ministers on 1 July 2009, a t its 1062nd meeting of the Ministers' Deputies. See also paragraph 34 of the UN General Comment 14: The Right to the Highest Attainable Standard of Health (Article 12), which states that "States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants."

[5] Doc. 13788, 7 May 2015, Criminalisation of irregular migrants: a crime without a victim. Previously, in its 2014 "The left-to-die boat: actions and reactions" Report, the Parliamentary Assembly of the Council of Europe, with regard to criminalisation of irregular migration, recommended that member states abolish factors which dissuade private vessels from carrying out rescues (…) "*by ending the threat of prosecution*

20. As Hungary is a Member State of the European Union, the law of the European Union is an important part of the legal context for its legislation on migration. The framework concerning the facilitation of unauthorised entry, transit and residence lies in Council Directive 2002/90/EC of 28 November 2002 "defining the facilitation of unauthorised entry, transit and residence" and in the Council Framework Decision of 28 November 2002 "on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence."[6] Council Directive 2002/90/EC, after having considered that measures should be taken to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings, impose on each member State, in its Article 1 (General infringement), to adopt appropriate sanctions on assisting illegal migration. Article 1 (1) provides that "each member State shall adopt appropriate sanctions on: *a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens."*

21. The second paragraph of Article 1 of the Council Directive provides however that states may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying their national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

22. Article 3 of the Council Directive provides, moreover, that each Member State shall take the measures necessary to ensure that infringements referred to in Articles 1 and 2 are subject to effective, proportionate and dissuasive sanctions.

23. In the Council Conclusions on migrant smuggling adopted by the Council of the European Union on 10 March 2016[7], the importance of a coherent, credible and effective policy with regard to preventing and countering migrant smuggling, which fully respects human rights and the dignity of the smuggled migrants as well as of those providing humanitarian assistance, among others, has been stressed. The Conclusions also recalled that the Council Directive 2002/90/EC provides the possibility for Members States to exempt persons facilitating irregular entry or transit in order to offer humanitarian assistance to migrants from sanctions. In March 2017, the European Commission's evaluation report on the application of EU rules on countering migrant smuggling addressed concerns about the criminalisation of actions carried out by civil society organisations or individuals providing humanitarian assistance to irregular migrants.[8]

24. According to a survey conducted by the Venice Commission and on the basis of a research carried out in 2013 by the European Union Agency for Fundamental Rights (FRA) concerning the legislation of EU Members States on facilitating of irregular entry and stay of irregular

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of charges of aiding and abetting irregular immigration which give rise to moral and financial damages." Doc. 13532, 09 June 2014, The « left-to-die boat » : actions and reactions.

[6] 2002/946/JHA.

[7] Council of the European Union, Press release 120/16, available at http://www.consilium.europa.eu/en/press/press-releases/2016/03/10/council-conclusions-on-migrant-smuggling/

[8] European Commission, SWD(2017) 120 final, Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)

migrants[9], facilitating irregular entry and irregular stay is punishable in almost all EU Member States and the majority of Council of Europe Member States. Such provisions to discourage migration are thus a common trend in countries seeking to reduce the "pull effect" which is seen to attract migrants to some jurisdictions. According to the FRA Report on Criminalisation of migrants in an irregular situation and of persons engaging with them, 24 EU Member States do not require financial gain or profit to facilitate irregular *entry* to be a punishable offence and financial gain is considered an aggravating circumstance, but not an element of the criminal offence. 13 EU Member States do not require a profit motive to facilitate an irregular *stay* to be punished under criminal legislation and in 14 Member States, facilitation of stay is punishable only if done for profit.

25. In France, under Article L621-1 of the Code of Entry and Stay of Aliens and Right of Asylum (hereinafter, "CESEDA"), any person who directly or indirectly assists or attempts to assist the entry, movement or residence of an irregular third country national, is punished by a fine of 30 000 euros and 5 years' imprisonment. Article L622-4 of the CESEDA introduces a number of exceptions to the general rule under Article L621-1 concerning the offence of assisting an irregular third-country national to *stay* illegally in France. Consequently, assisting an irregular third-country national to stay illegally in France will not give rise to criminal prosecution in case the assistance is provided by relatives of the third-country national, indicated in an exhaustive manner in the provision[10]. Moreover, under Article L622-4 (3), providing legal advice or the provision of food, accommodation or medical care to ensure dignified and decent living conditions for the third-country national, or any other assistance to preserve the dignity, health and well-being of the third-country national, provided that assistance does not give rise to any direct or indirect compensation, is explicitly foreseen as an exception the criminal offence of assistance to irregular stay under Article L621-1.

26. In April 2018, the French National Assembly adopted an amendment to Article L622-4 and extended the exceptions of the criminal offence provided under Article L621-1. According to the draft amendments, which are currently pending before the *Sénat,* the exceptions do not only concern the assistance to irregular stay of irregular non-nationals, but also cover transport of irregular non-nationals, if the act is linked to one of the exceptions foreseen under Article L622-4. In addition, according to the draft amendments, the linguistic or social assistance to irregular migrants is not considered a criminal offence. Article L-622, in its current form, was brought before the French Constitutional Council for review of constitutionality; the case is currently pending.[11]

[9] FRA, 2013 Annex "EU Member States" legislation on irregular entry and stay, as well as facilitation of irregular entry and stay (https://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants-annex_en.pdf).

[10] Ascendants or descendants of the non-national or his/her spouse, brothers or sisters of the non-national or his/her spouse ; the spouse of the non-national, or a person who cohabits with the non-national, or the parents, children, brothers or sisters of the spouse of the non-national or of the person who cohabits with the non-national.

[11] Several people have been convicted in France in recent years for assisting irregular migrants because their "militant action" went beyond mere humanitarian concerns. The farmer Cédric Herrou was sentenced on appeal in Aix-en-Provence on 8 August 2017 to four months of suspended prison term. Opposing the reasoning of the court of first instance[11], the Advocate General had considered that he could not benefit from the exemptions provided for by Article L622-4 of the CESEDA, because "*when the aid is part of a general challenge to the law, it does not enter into the exemptions, but serves a militant cause that does not respond to a situation of distress. This challenge is a counterpart of the aid*". The judgment of the Court of Appeal specifies that militant action in order to remove irregular non-nationals from the control exercised by the authorities, does not fall within the scope of exceptions provided by the law.

27. In a number of countries, "humanitarian assistance", at least in some forms, is explicitly exempted from punishment for the offence of facilitating irregular entry and/or stay.

28. In Austria, under Article 120(9) of the Aliens' Police Act, husbands and wives, registered partners, children and/or parents are exempted from punishment for the offence of facilitating of entry and stay (under Article 120(3) of the Aliens' Police Act) if the perpetrator does not have a purpose to enrich him/herself or a third person unlawfully. Moreover, in a decision of 22 June 2006, the Austrian Constitutional Court considered that provision of humanitarian aid without the intention to prevent official measures over a long period of time does not meet the elements of the offence.[12]

29. In Belgium, according to Article 77 (2) of the Immigration Act, paragraph 1 of Article 77 concerning the offence of knowingly helping an irregular foreigner to enter, stay or transit, does not apply if the assistance was provided for humanitarian reasons. It seems that the case-law of Belgian courts is still developing in this area.[13]

30. In Germany, according to the General Administrative Regulation of the Federal Ministry of Interior, as amended in 2009, persons who act within the scope of their specific professional or honorary duties shall not be punished under Section 96 of the Residence Act concerning the offences of facilitating of entry and stay of irregular migrants.

31. In the United Kingdom, Section 25A of the 1971 Immigration Act provides that the criminal offence of facilitating the commission of a breach of immigration law by an individual who is not a citizen of the European Union (including the offences of facilitating of entry and stay of an irregular migrant) does not apply to anything done by a person acting on behalf of an organisation which aims to assist asylum-seekers and does not charge for its services. The law therefore explicitly excludes from its scope humanitarian activities conducted by not-for-profit civil society organisations.

32. In Greece, the imprisonment term and fine provided under Article 73 of the Immigration Act for the offence of facilitating entry and/or stay on the Hellenic territory of irregular third-country nationals is not imposed in case of rescue of people at sea and in case of carriage of people in need of international protection, as dictated by the international law of the sea (Article 88(6) of the Immigration Act).

33. In Finland, according to Section 8 (2) of the Criminal Code concerning the "arrangement of illegal migration", an act which, when taking into account in particular the humanitarian motives of the person committing it or his or her motives relating to close family relations, and the circumstances pertaining to the safety of the foreigner in his or her home country or country of permanent residence, and when assessed as a whole, is to be deemed committed under vindicating circumstances, does not constitute arrangement of illegal immigration. Although "humanitarian assistance" is not explicitly provided as an exception to the criminal offences of facilitating the unlawful entry and transit of an alien (Chapter 20, Section 7 of the Alien Act) or of assisting an alien to unlawfully remain in Sweden for financial gain (Chapter 20, Section 8), the

[12] Constitutional Court, G11/06, 22 June 2006.

[13] According to a recent press release, 12 persons including two journalists have been put on trial for providing shelter to irregular migrants and the case reveals a hardening towards those who intend to help irregular migrants.
https://www.lemonde.fr/europe/article/2018/06/04/en-belgique-deux-journalistes-accusees-d-activites-criminelles-pour-avoir-aide-des-sans-papiers_5309397_3214.html

Swedish Supreme Court has argued that assisting someone for humanitarian reasons to apply for asylum, may, in principle, be excluded from punishment.[14]

34. In Italy, according to Article 12 of the Immigration Law, aid and humanitarian assistance carried out in Italy, toward aliens in state of need, do not constitute a crime.

35. In Norway, under Section 108 of the 2008 Immigration Act, a person who provides humanitarian assistance to a foreign national who is unlawfully residing in the realm shall not be liable to a penalty for aiding and abetting unlawful residence, unless the person in question has intended to help the foreign national to evade the obligation to leave the realm and the assistance has made it more difficult for the authorities to implement removal of the foreign national.

36. In Hungary, the criminal provisions related to the offence of facilitation of entry and stay of irregular migrants (Articles 353 and 354 of the Criminal Code) do not mention "humanitarian assistance" as a specific reason for exemption from punishment. The general clause of Article 23 of the Criminal Code, entitled "Means of Last Resort" which provides that *"[a]ny person who engages in conduct to save his own person or property or the person or property of others from an imminent danger that cannot otherwise be prevented, or acts so in the defence of the public interest shall not be prosecuted, provided that the harm caused by the acts does not exceed the peril with which he was threatened*" may be applied in relation to offences of facilitation of entry and stay.

37. In the Netherlands, although "humanitarian assistance" is not specifically mentioned in Article 197A(1) and (2) concerning respectively the offences of facilitation of entry and stay, it appears that the legislator never intended for the criminal offence to be applicable to persons acting out of humanitarian considerations[15], which is also reflected in the case-law of the Dutch Supreme Court.[16]

38. The question of whether or not humanitarian aid/assistance is considered exempted from punishment is particularly important in countries where financial gain is not an element of the offence. If the prosecuting authorities have to prove the financial gain or profit for the application of the appropriate criminal sanction to the act of facilitating, then humanitarian assistance, which is by definition not-for-profit[17], does not fall, at least theoretically, under the scope of criminal provisions.

39. In Luxembourg, for instance, under Article 382-4 of the Criminal Code, the criminal offence of facilitating entry or stay may only be committed with a "lucrative goal". Although humanitarian assistance is not explicitly mentioned in the law, the financial gain element of the offence theoretically puts the humanitarian assistance activities outside the scope of application of the criminal provision.

40. In Portugal (Article 183 of the Foreigners Law), in Croatia (Article 326 of the Criminal Code), in Serbia (Article 350 of the Criminal Code), in Turkey (Article 79 of the Criminal Code –

[14] Sweden, Supreme Court, Case No. NJA 2009 s. 424, 15 June 2009, cited in the FRA Report on Criminalisation of migrants in an irregular situation and of persons engaging with them, p. 10-11.
[15] Kamerstukken II 2003-2004, 29 291, nr. 3, p. 6.
[16] Hoge Raad, 16 May 2017, ECLI:NL:HR:2017:888.
[17] For the non-profit character, see the principles of humanitarian aid (humanity, impartiality, neutrality and independence) which are derived from the Geneva Conventions, especially Article 27 Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. At the EU level, the humanitarian principles are enshrined in the European Consensus on Humanitarian Aid, signed in December 2007 and Article 214.2 Treaty on the Functioning of the European Union (TFEU).

material profit-), in the Slovak Republic (Articles 355 and 356 of the Criminal Code – financial profit-), in Bosnia and Herzegovina (Article 189(1) of the Criminal Code) and in Germany (Section 96 of the Residence Act), both offences of facilitating entry and stay require financial gain. As the intention to make a financial gain is an element of the crime, according to a research report published by the German Federal Office for Migrants and Refugees, an exemption from punishment may be derived from this section even in case of humanitarian assistance by private persons.[18] In Ireland, the offence of facilitating stay does not exist. Concerning the offence of facilitating entry, the punishment shall not apply to anything done by a person otherwise than for gain (Section 2 of Illegal Immigrants (Trafficking) Act of 2000). Moreover, according to the same provision, the punishment shall not apply to anything done to assist an illegal immigrant by a person in the course of his or her employment by a *bona fide* organisation if the purpose of that organisation includes giving assistance to persons seeking asylum.

41. In Austria, financial gain (the purpose to enrich oneself or a third person) is an element of the offence of facilitating entry (Article 114 of the Aliens' Police Act). Article 115 of the Aliens' Police Act concerning the offence of facilitating the stay uses a different standard and considers as a criminal offence facilitating the unlawful stay of an alien with the purpose to enrich oneself or a third person unlawfully *with a not only significant fee*.

42. The element of financial gain may differ according to the nature of the offence in question and in many countries, whereas the financial gain is an element of the offence of facilitating the stay, this is not the case concerning the offence of facilitating the entry. This is the case for instance in Bulgaria (Article 280 –facilitation of entry- and 281 – facilitation of stay- of the Criminal Code), in Cyprus (Article 19A of the Aliens and Immigration Act), in the Czech Republic (Article 340 – Facilitation of entry- and 341 –Facilitation of stay- of the Criminal Code), in Hungary (Article 353 –facilitation of entry- and Article 354 –facilitation of stay- of the Criminal Code, in Italy (Article 12 of the Immigration Law, Legislative Decree 92/2008 – Facilitation of entry- and Article 12 of the immigration Law, Legislative decree 94/2009 – Facilitation of stay-), in the Netherlands (Article 197A(1) –Facilitation of entry- and Article 197A(2) –Facilitation of stay- of the Criminal Code), in Poland (Article 264–Facilitation of entry- and Article 264a of the Criminal Code –Facilitation of stay-), in Spain (Article 318bis –Facilitation of entry- and Article 54 of the Organic Aliens Law –Facilitation of stay-), etc.

43. In a number of countries, financial gain is not at all an element of the offence of assisting irregular migration (facilitation of both entry and stay of irregular migrants), as in Belgium (Article 77 of the Immigration Act), Croatia (Article 43 of the Alien Act), Denmark (Article 59(7) of the Aliens Act), Monaco (Article 24 of the Criminal Code), Switzerland (Article 116 of the Foreign Nationals Act –where the financial gain is considered an aggravating circumstance-) Estonia (Article 259 of the Penal Code), France (Article L622-1 of the CESEDA), Greece (Article 87 of the Immigration Act), Slovenia (Article 146 of the Aliens Act), Ukraine (Article 332 of the Criminal Code), Albania (Article 297 of the Criminal Code under which profit is only an aggravating circumstance), Peru (Articles 303A and B of the Criminal Code) etc. As stated previously, in case financial gain is not an element of the offence of facilitating entry and/or stay, the exemption made to humanitarian aid/assistance in the application of criminal provisions becomes even more important.

44. From comparative perspective, the offence of assistance to irregular migration, which covers both facilitation of entry and stay, is punished with fines or/and imprisonment. In countries where financial gain is an element of the criminal offence, the amount of the fine may be higher or the prison term provided in the criminal legislation may be longer. In Portugal, for

[18] Research Report, Illegal aufhältige Drittstaatsangehörige in Deutschland: Staatliche Ansätze, Profil und soziale Situation, German Federal Office for Migrants and Refugees 31st March 2006, page 35 f.

instance, where the offence of assisting irregular migration may only be committed for profit, the prison term foreseen by the legislation is from 1 to 5 years. In the Netherlands, although the financial gain is only an element of the offence of facilitation of stay and not of the offence of facilitating entry, both offences are punished with a fine up to 78 000 euros or with imprisonment of up to 4 years. In Slovakia, the prison term for the offence of facilitating entry (which does not require financial gain for the commission of a crime) is 1 to 5 years and for the offence of facilitating of (which requires financial gain) is from 2 to 8 years.

IV. International standards

45. Hungary is a state party to all the major international human rights instruments, including the 1966 *International Covenant on Civil and Political Rights,* and the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms.* By virtue of Article Q of the Constitution *"(i)n order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law"* (para. 2). Since the Hungarian legal order is predominantly dualist in nature, international treaties are not directly applicable but *"shall become part of the Hungarian legal system by promulgation in legal regulations"* (Article Q(3) of the Constitution).

46. The right to *freedom of association* is enshrined in Article 22 of the ICCPR[19] and Article 11 of the ECHR[20]. Soft law instruments dealing with freedom of association encompass: the Guidelines *The Legal Status of Non-Governmental Organisations and their Role in a Pluralistic Democracy,* adopted on a Multilateral meeting organised by the Council of Europe on 23 - 25 March 1998; *UN Declaration on Human Rights Defenders* of 8 March 1999;[21] the *Fundamental Principles on the Status of Non-governmental Organisations in Europe,* adopted by multilateral meetings organised by the Council of Europe in 2001-2002 and the *Recommendation of the Committee of Ministers of the Council of Europe CM/REC(2017)14 on the Legal Status of Non-Governmental Organizations in Europe* of 10 October 2007.[22] The OSCE participating States have committed to "ensure that individuals are permitted to exercise the right to association, including the right to form, join and participate effectively in non-governmental organizations" (Copenhagen Document, 1990) and to "enhance the ability of NGOs to make their full contribution to the further development of civil society and respect for human rights and fundamental freedoms" (Istanbul Document, 1999).

47. The Venice Commission, together with the OSCE/ODIHR, produced in 2014 *Joint Guidelines on Freedom of Association*[23] which give an overview of international standards applicable in this area. Concerning the right to freedom of association which grants individuals the right to establish associations and to determine their goals, Principle 4 of the Guidelines on Freedom of Association expressly stipulates that *"(f)ounders and members of associations shall*

[19] Article 22(2) of the ICCPR stipulates that *"(n)o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others".*

[20] Article 11(2) of the ECHR stipulates that *"(n)o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".*

[21] UN Doc. A/RES/53/144, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 8 March 1999.

[22] *Recommendation CM/REC(2007)14 on the Legal Status of Non-Governmental Organizations in Europe, 10 October 2007.*

[23] CDL-AD(2014)046, *Joint Guidelines on Freedom of Association,* Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, 17 December 2014.

be free in the determination of the objectives and activities of their associations, within the limits provided for by laws that comply with international standards". The Venice Commission has also dealt with freedom of association in a number of opinions.[24]

48. All of the above-mentioned instruments recognises the important role that civil society organisations (CSO) play in modern democratic societies. CSO allow citizens to associate in order to promote certain goals and/or pursue certain agenda. As a form of public engagement parallel to that of the participation in the formal political process, CSO have to cooperate with public authorities while, at the same time, keep their independence. Both members of CSO and CSO themselves are the holders of human rights. Moreover, the state has the obligation to respect, protect and facilitate the exercise of the right to freedom of association.[25]

49. The right to freedom of association is *"an essential prerequisite for other fundamental freedoms"*.[26] It is closely intertwined with the right to freedom of expression, the right to freedom of religion, the right to privacy or the prohibition of discrimination. It is *"an individual human right which entitles people to come together and collectively pursue, promote and defend their common interests".*[27]

50. The right to freedom of association is at the core of a modern democratic and pluralistic society. It serves *"as a barometer of the general standard of the protection of human rights and the level of democracy in the country".*[28]

51. Although freedom of association is not an absolute right, it can be limited, or derogated from, only under the strict conditions stipulated in human rights instruments:

- Legality: any limitation must be prescribed by law in clear and precise terms. A limitation therefore needs to have a basis in domestic law, i.e. the disputed measure is based on a legal rule, originating from a competent (by virtue of attribution or delegation) legislative authority. In

[24] See CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan,* Opinion No. 636/2011, 19 October 2011; CDL-AD(2013)023, *Interim Opinion on the Draft Law on Civic Work Organisations of Egypt*, Opinion No. 732/2013, 18 June 2013; CDL-AD(2013)030, *Joint Interim Opinion on the Draft Law amending the Law on Non-commercial Organisations and other Legislative Acts of the Kyrgyz Republic,* Opinion No. 738 /2013, 16 October 2013; CDL-AD(2014)025, *Opinion on Federal Law N. 121-FZ on non-commercial organisations ("law on foreign agents"), on Federal Laws N. 18-FZ and N. 147-FZ and on Federal Law N. 190-FZ on making amendments to the criminal code ("law on treason") of the Russian Federation,* Opinions No. 716-717/2013, 27 June 2014; CDL-AD(2014)043, *Opinion on the Law on Non-Governmental Organisations (Public Associations and Funds) as Amended of the Republic of Azerbaijan*, Opinion No. 787/2014, 15 December 2014; CDL-AD(2016)020, *Opinion on Federal Law No. 129-FZ on Amending Certain Legislative Acts (Federal Law on Undesirable Activities of Foreign And International Non-Governmental Organisations),* Opinion No. 814/2015, 13 June 2016.

[25] See Principle 2 of the Guidelines on Freedom of Association. According to the ECtHR, "genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere (ECtHR, *Ouranio Toxo and Others v. Greece (*Application no. 74989/01, judgment of 20 October 2005), para. 37 and "t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective" (*Airey v. Ireland* (Application no. 6289/73, judgment of 9 October 1979).

[26] See CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan,* para. 45; and CDL-AD(2012)016, *Opinion on the Federal law on combating extremist activity of the Russian Federation,* para. 64

[27] CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan,* §40.

[28] CDL-AD(2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan,* §41.

addition, the legal basis needs to be accessible.[29] Lastly, the rule needs to be foreseeable. A rule is "foreseeable" if it is formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to regulate his/her conduct. The law must be sufficiently clear and detailed in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to an interference with the right concerned.[30]

• Legitimate aim: the interference or restriction must have a legitimate purpose, as set out in the exhaustive list of grounds of limitation in the international standards.

• Necessity in a democratic society: the restriction must be necessary and proportional. Public authorities need to be able to demonstrate that the measure can truly be effective to reach the legitimate aim, it responds to a pressing social need and why the disputed measure is necessary in addition to already existing possibilities to pursue the legitimate aim, what the cumulative effect is of all legal rules combined on the freedom concerned, and that there is a proportionate relationship between the effects of the measure concerned and the rights affected.

52. In its 2007 *Recommendation on the Legal Status of Non-Governmental Organizations in Europe*, the Committee of Ministers stressed *"the essential contribution made by non-governmental organizations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies"* (par. 2 of the Preamble).

53. The 1999 *UN Declaration on Human Rights Defenders* confirms that *"everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels"* (Article 1). States must adopt measures to ensure this right.

54. The right to *freedom of movement* is enshrined in Article 12 of the ICCPR and Article 2 of Protocol 4 to the ECHR. In its General Comment No. 27, the UN Human Rights Committee notes that *"(l)iberty of movement is an indispensable condition for the free development of a person".*[31] The Committee also stresses that *"/t/he permissible limitations which may be imposed on the rights (…) must not nullify the principle of liberty of movement, and are governed by the requirement of necessity (…) and by the need for consistency with the other rights recognized in the Covenant".*[32]

V. Preliminary Remarks

A. *Ad hominem* legislation

55. The general reasoning of Bill No. T/333 amending certain laws relating to measures to combat illegal migration, as in the previous version of the package, refers to the package as the "Stop Soros Act package". Although it is questionable whether the legislative package can be

[29] ECtHR, 12 May 2000, *Khan v. UK*, no. 35394/97.
[30] Human Rights Committee, 14 July 1995, *De Groot v. The Netherlands*, no. 578/1994 and ECtHR 26 April 1979, *The Sunday Times v. UK*, no. 6538/74, para. 49.
[31] UN Doc. CCPR/C/21/Rev.1/Add.9, *General Comment No. 27. Article 12 (Freedom of Movement),* 2 November 1999, par. 1.
[32] UN Doc. CCPR/C/21/Rev.1/Add.9, *General Comment No. 27. Article 12 (Freedom of Movement),* 2 November 1999, par. 1.

described *stricto sensu* as *ad hominem* legislation, a legislative technique previously criticised by the Venice Commission,[33] the Explanatory Note refers to a particular individual. It may therefore reasonably be considered as directing this legislation towards an individual, which is problematic from a rule of law perspective. It is inappropriate for a State to direct laws against individuals since, as a general principle laws should apply to all persons equally. This is especially so in the current context when there was a virulent campaign including discriminatory anti-Semitic statements by politicians.[34] The Venice Commission and the OSCE/ODIHR recall that the principle of "Equality before the law" is one of the benchmarks of the Rule of Law principle, which requires the universal subjection of all to the laws and implies that laws should be equally applied, and consistently implemented.[35] It is therefore recommended that the authorities refrain from referring to the legislative package in this way and remove this expression from the explanatory note. They could simply use the official title of Bill No. T/333, which covers the substance of the bill more accurately.

B. Public consultation

56. It was explained in the Explanatory memorandum to the initial "Stop Soros" draft legislative package submitted to Parliament on 13 February 2018 that**,** in the spring of 2017, the Hungarian government organised a national consultation, entitled "Let´s Stop Brussels". The consultation presented citizens with six questions relating to the alleged interference in the Hungarian domestic affairs by the European Union or by other foreign actors. Three of the questions are of particular relevance to the initial Stop Soros package. They read as follows:

57. *"Question 2: In recent times, terror attack after terror attack has taken place in Europe. Despite this fact, Brussels wants to force Hungary to allow illegal immigrants into the country. What do you think Hungary should do? (a) For the sake of the safety of Hungarians these people should be placed under supervision (felügyelet) while the authorities decide their fate. (b) Allow the illegal immigrants to move freely in Hungary.*

58. *Question 3: By now it has become clear that, in addition to the smugglers, certain international organizations encourage the illegal immigrants to commit illegal acts. What do you think Hungary should do? (a) Activities assisting illegal immigration such as human trafficking and the popularization of illegal immigration must be punished. (b) Let us accept that there are international organizations which, without any consequences, urge the circumvention of Hungarian laws.*

59. *Question 4: More and more foreign-supported organizations operate in Hungary with the aim of interfering in the internal affairs of our country in an opaque manner. These organizations could jeopardize our independence. What do you think Hungary should do? (a) Require them to register, revealing the objectives of their activities and the sources of their finances. (b) Allow them to continue their risky activities without any supervision."*

[33] See, for instance, CDL-AD(2016)037 Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016, adopted by the Venice Commission at its 109th Plenary Session, 9-10 December 2016, paras. 86, 91 and 227, point 3. CDL-AD(2017)022 Hungary - Opinion on Article XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education, endorsed by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017), para. 22.

[34] See, Agency for Fundamental Rights, Fundamental Rights Report, 2018, p. 79.

[35] See, CDL-AD(2016)007 Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 12-12 March 2016), para. 73.

60. According to the Hungarian government, 2.356.811 questionnaires were returned with more than 95% voting for the A answers. In view of the way in which the questions were formulated, this is hardly surprising.

61. The Government has not opted for a consultation period before the new draft legislative package was submitted to Parliament on 29 May 2018. During the visit, the delegation was informed that everyone would be able to send their comments on the Bill under consideration via email to the Parliament.

62. However, this possibility does not exempt national authorities from acting in accordance with Recommendation CM/Rec(2007)14 on the Legal Status of Non-Governmental Organisations in Europe.[36] This Recommendation stipulates that *"NGOs should be consulted during the drafting of primary and secondary legislation which affects their status, financing or spheres of operation"* (para. 77). Moreover, the Explanatory Memorandum to the Recommendation clarifies that *"it is essential that NGOs not only be consulted about matters connected with their objectives but also on proposed changes to the law which have the potential to affect their ability to pursue those objectives. Such consultation is needed not only because such changes could directly affect their interests and the effectiveness of the important contribution that they are able to make to democratic societies but also because their operational experience is likely to give them useful insight into the feasibility of what is being proposed"* (par. 139).[37]

63. The Commission has repeatedly stressed this –procedural- element of the quality of the legislative process: conducting a public consultation with civil society organisations prior to the adoption of legislation directly concerning such organisations therefore constitutes part of the good practices that the European countries should strive to adhere to in their domestic legislative processes.[38] The CM Recommendation refers to a consultation phase during the drafting process of a specific piece of legislation. The Commission and the OSCE/ODIHR note that the 'public consultation' to which the Government refers does not satisfy the above-mentioned requirements.

VI. Analysis

64. Criminalising certain activities by persons working for NGOs in the framework of their functions represents an interference with their freedoms of association and, in some cases, expression. In order to be justified, such interference needs to be in accordance with the law, must pursue a legitimate aim and must be necessary in a democratic society.

[36] According to paragraph 106 of the Guidelines of Freedom of Association: "*Associations should be consulted in the process of introducing and implementing any regulations or practices that concern their operations.*"

[37] In addition, paragraph 18.1 of the 1991 Moscow Document requires that participating States formulate and adopt legislation "as the result of an open process reflecting the will of the people, either directly or through their elected representatives." Paragraph 5.8 of the 1990 Copenhagen Document further provides that "[l]egislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability" and that [t]hose texts will be accessible to everyone."

[38] CDL-AD(2017)015, Opinion on the Draft Law on the Transparency of Organisations receiving Support from Abroad, para. *27.* See also, CDL-AD(2016)007 Rule of Law Checklist, p. 13.

A. Draft Article 353/A of the Criminal Code

a. The legality of the interference

65. The restrictions imposed on the right to freedom of association should have a legal basis in the law. At the same time, the relevant law has to be clear enough for natural and legal persons to be able to adjust their behaviour accordingly (the so-called 'foreseeability criterion'). In the case at hand, a number of problems arise.

66. First, draft Article 353A of the Criminal Code is entitled "facilitating illegal migration" and criminalises engaging in organising activities in order to facilitate the initiating of an asylum procedure by a person who in their native country (or in the country of their habitual residence or another country through which they had arrived) was not subjected to persecution or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a title of residence. Seeking asylum or requesting a title of residence is not a crime, and thus, it should not be a crime to support a person in this position. Whether or not in the end asylum is granted is a matter of decision of the State and not a decision taken by an NGO. Transferring this burden in the form of criminal sanctions for "getting it wrong," about whether or not an asylum seeker has reason to fear persecution or not onto organisations effectively prevents any attempt by NGOs to assist the migrant concerned. It is not clear how an NGO employee is expected to know at the border which asylum seeker falls within the category of persons falling under draft Article 353A. In addition, it is important to stress that the mere fact that a person has arrived from or through a safe (third) country cannot be considered as proof that this person does not have reasons to fear persecution. It is clear from Section 7 of the Amended Act LXXX on Asylum that the lack of persecution in a safe (third) country is a rebuttable presumption.

67. Second, Article 353A(5) has been drafted in a very broad manner. The reasoning to the Draft Act does not provide further clarification. It reads: "It is not possible to specify the exhaustive content of such organising activities in full, hence point (5) of the new statutory definition sets out, by means of appropriate abstraction, the most typical organising part-activities as interpretative provisions. The statutory definition lays down, besides penalising the most typical conducts of this criminal offence, the possibility of sanctioning any other kind of conduct which corresponds in practice to an organising activity." During the visit, the authorities indicated that they wished to leave the domestic courts responsible for the interpretation of the provision. However, the Commission draws attention to the limits of such a legislative approach. The current broad formulation of the provision which could include virtually any activity is not in line with the principle of legal certainty. It thereby gives the prosecution an over-broad discretion to prosecute.

68. The draft provision should also clearly and explicitly either exclude "preparing or distributing of informational materials or entrusting another with such acts" from its scope or stipulate that at most the preparation/distribution of information materials specifically and explicitly encouraging *to circumvent the law* could give rise to criminal prosecution.

69. Similar considerations are applicable with regard to "building or operating a network" (draft Article 353A(5)c)). In view of their limited financial funds, NGOs are dependant –at least to a certain extent- on the availability of a network of volunteers. The proposed wording of the new provision lacks sufficient clarity, especially because Article 353 of the Criminal Code already criminalises a person who provides aid to another person for crossing state borders (Illegal Immigrant Smuggling) in violation of statutory provisions. The commission of the offence "in criminal association with accomplices" is an aggravating circumstance under Article 353(3) e).

70. Thirdly, the commission of the offence under Article 353A(1) for financial gain is an aggravating circumstance (Article 353A(3a)). The current draft does not precisely define the notion of 'financial gain' and does not exclude the possibility that any income generated

whatsoever in the ordinary operations of the NGO, which are not necessarily the strict counterpart of the illegal activity, could be deemed as "financial gain." The Guidelines recognise in paragraph 202 that "*associations should be free to engage in any lawful economic business in order to support their non-for profit activities, without any special authorisation being required. (…)This is under the condition that they do not distribute any profits, as such, that might arise from their activities to their members or founders, but that they use them for the purposes of their objectives*".

71. Lastly, under Article 353A(2), providing material resources for the commission of the offence under the first paragraph, or regularly carrying out such organisational activities specified under the same paragraph is punished by a term of imprisonment. The general reasoning of the drafts explains that the severe punishment is imposed when a person provides material resources in any form for his or her criminal organisational activity (in other words, he or she provides material resources or engages in such activities on a regular basis). It further explains that "on regular basis" means that the criminal offence is committed at least twice in a short interval, in accordance with established practice. It is however not explicit what a "short interval" might amount to, compounding further the lack of legal certainty that should be prominent in any criminal code. Finally, it is very concerning that the court may apply "*the punishment of a ban from certain areas against the perpetrator, either together with another punishment or alone, which serves individual prevention more effectively by banning the person."* (reasoning of the draft provision). This may lead to varied and inconsistent sanctions. It is true that it is not uncommon to leave certain discretion to a judge regarding sentencing nor is it uncommon to include "open norms" in a legislative text, even of a criminal nature. However, here the criteria should be more specific. This is not the case in the draft provision under examination.

72. It follows that Draft Article 353A lacks the required clarity and precision and does not meet the criteria of "legality" under Article 11 ECHR.

b. The aim of the interference

73. The interference into the right to freedom of association must have a legitimate purpose, as set out in the exhaustive list of grounds of limitation in the international standards. In the case of *Mallah v. France*[39], the applicant had been convicted in criminal proceedings for having facilitated the entry and stay of an irregular foreigner (the son in law of the applicant) in France by virtue of Article L622-1 of the CESEDA. In this case, the Court accepted that the French legislation criminalising the facilitation of the unauthorised residence of an alien served the legitimate aim of prevention of disorder or crime. It noted that the legislature had intended to tackle illegal immigration and organised networks such as smugglers who help, in return for large sums, foreigners to enter or remain illegally in the territory.

74. While the Venice Commission and the OSCE/ODIHR are ready to acknowledge that in principle the draft provision under examination in light of the case-law of the European Court of Human Rights intends to pursue the legitimate aim of prevention of disorder or crime under the second paragraph of Article 11, they stress that these legitimate aims must not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work nor as a means to hinder persons from *applying* for asylum.

c. The necessity in a democratic society

75. The restriction of the right must be necessary in a democratic society and proportionate to the legitimate aim pursued by the restriction. The Commission and the OSCE/ODIHR welcome

[39] ECtHR, judgment of 10 November 2011, appl. no. 29681/08

the fact that the heading of Section 353/A Criminal Code reads 'Facilitating *illegal* immigration'.[40] The initial "Stop Soros" draft legislative package submitted to Parliament on 13 February 2018 did not always make a clear distinction between various forms of migration, which could potentially have contributed to a hostile public perception towards *all* immigrants/foreigners. However, as a result of the lack of clarity of the wording of draft Article 353/A, as described above, although the heading speaks about "illegal migration", the provision may apply in reality to virtually a large number of migrants, irrespective of whether they are "illegal" or not. It cannot be excluded that the criminal provision could be held applicable with regard to persons assisting migrants who may not be considered illegal migrants, for example, because the transit country may not be considered a safe country for that particular migrant.

76. While the introduction of a so-called *délit de solidarité* has been criticised by various international actors,[41] several European countries have criminal legislation aimed at penalising acts by persons who are facilitating unauthorised entry, transit and residence of illegal migrants.[42] This practice is in line with Article 1 of EU Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence.[43] However, such criminal provisions are ordinarily accompanied by a so-called humanitarian exception clause.[44] In the before-mentioned judgment in the case of *Mallah v. France*, the Court concluded that the Convention was not violated in part because the French law had a "*legal impunity mechanism* […] *provided for the nearest relatives of illegally resident aliens*". If domestic law does *not* provide for an exception concerning humanitarian assistance, it is usually criticised from an international law perspective,[45] in particular when "financial gain" is not an element of the offence of facilitation as in the draft Article 353A under examination. Moreover, under Paragraph (4) when the perpetrator reveals the circumstances of the offence before the indictment has been brought, the punishment may be reduced without limits - and may be lifted in cases of "special consideration". However, as it is formulated currently, the exemption is conditional but not definite. The cases where this exemption may be applicable are also not clear nor is it clear what the terms "special consideration" means.

77. As mentioned above, under draft Article 353A(5), an activity shall be regarded as organisational activity for the purposes of the offence under Article 353A(1) *in particular* if a) the

[40] *Italics* added.

[41] See for example the recent letter of the Human Rights Commissioner to the French National Assembly of 8 March 2018.

[42] See the Section on Comparative Law concerning the Offence of Assisting Irregular Migrants of the present Opinion.

[43] Article 1

General infringement

1. Each Member State shall adopt appropriate sanctions on:

(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

[44] See Article 1(2) of EU Directive 2002/90/EC. See the Section on Comparative Law of the present Opinion.

[45] See for example the letter of the Human Rights Commissioner to the Croatian authorities of 15 October 2016.

person organises border watch at the external borderlines of Hungary b) prepares or distributes information materials or entrusts another with such acts, c) builds or operates a network. Freedom to act with regard to the rights and freedoms of third country nationals by democratic means, for example, by using advocacy and public campaigning, production of information materials, are the types of activities aimed at advancing democratically the issues of human rights and public interests. These activities, including specifically providing information on existing procedures for applying for asylum and on human rights-based arguments to lodge appeals and make full use of the appeal procedures (including before international bodies) are protected under Article 10 of the ECHR and Article 11 ECHR as *lex specialis.* The draft provision as such is in contradiction with the right to freedom of expression, the principle of "presumption in favour of the lawful formation, objectives and activities of associations" and the principle of "freedom to determine objectives and activities, including the scope of operations".[46]

78. Indeed, paragraph 110 of the Guidelines notes that in practical terms, *"the exercise of freedom of expression and opinion also means that associations should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accordance with government policy or advocates a change to the law."* The Draft Act proposes a new category of content-related speech limitations which are not directly related to the materialization of the illegal migration and therefore giving the prosecution too much discretion and running counter to the role of assistance to victims by NGOs recognised in international law. The Venice Commission and the OSCE/ODIHR reiterate that the draft provision should exclude "preparing or distributing informational materials or entrusting another with such acts" from its scope. At most the preparation/distribution of information materials *specifically and explicitly encouraging to circumvent the law* could give rise to criminal prosecution.

79. Paragraph 2 of the draft provision provides for a prison term for anyone who provides "material resources" for committing the criminal offence specified in paragraph 1. Apart from the problems raised by this draft provision concerning its foreseeability (see paragraph 71 of the present opinion), the provision limits the sources from which NGOs may seek funding, as understandably donors may be deterred from providing funds where they are under threat of criminal sanctions, including imprisonment. This conflicts with the Principle 7 of the Guidelines which speaks of the freedom to seek, receive and use resources. Furthermore, paragraph 218 of the Guidelines states that associations should be free to seek funding from a variety of public but also private sources nationally or internationally, which can only serve to further their independence.

80. The severity of the penalty imposed is also an important element when assessing the proportionality of the interference into the right. In the case of *Mallah,* the domestic court had found the applicant guilty of facilitation of stay of an irregular foreigner. However, taking into account the special circumstances of the case (especially the fact that the irregular foreigner was the applicant's son-in-law) and the applicant's conduct, which had been guided solely by generosity, the French courts had granted him an absolute discharge when convicting him. The Court therefore considered that the authorities had struck a fair balance between the various interests involved, namely the need to preserve public order and to prevent criminal offenses on the one hand, and to protect the applicant's right to respect for his family life, on the other hand. These factors should also be primarily relevant for the Hungarian courts when applying the law in question.

[46] Principles 1 and 4 of the Venice Commission/OSCE/ODIHR Guidelines on Freedom of Association, paras. 26 and 29.

81. The prison terms provided by draft Article 353A may go up to one year in particular in case financial gain is involved in the commission of the offence. This provision does not differ significantly from other European provisions.

82. However, it is particularly problematic that one consequence of a criminal conviction under Article 353/A Criminal Code could be that the NGO as such could be discontinued on the basis of Act CIV of 2001 on measures applicable to legal entities under criminal law. As mentioned above (see paragraph 17 of the present opinion), under Sections 2 and 3 of the Act CIV, if certain staff members of a legal entity are found guilty of having committed a criminal act defined in Act IV of the Criminal Code intentionally aimed at or resulting in the legal entity gaining benefit, the court could – and in some cases shall – take certain measures against the legal entity, including the winding up of that legal entity; limiting the activity of that legal entity; or imposing a fine. This is especially problematic since the scope of application of Article 353/A Criminal Code is at the moment not limited to situations in which persons intentionally facilitate the circumvention of migration laws.

83. It should be recalled in the first place, as indicated in the Guidelines on Freedom of Association, the individual wrongdoing of founders or members of an association should lead only to their personal liability for such acts, and not to the prohibition or dissolution of the whole association[47], unless the criminal act is committed by the main representatives of an organisation, whose acts are attributable to the organisation itself.[48]

84. Furthermore, the Venice Commission and the OSCE/ODIHR recall that according to paragraph 255 of the Guidelines "*any penalty or sanction amounting to the effective dissolution or prohibition of an association must be proportionate to the misconduct of the association and may never be used as a tool to reproach or stifle its establishment and operations.*"[49] Paragraph 72 of *Recommendation Rec(2007)14* provides that in most instances, the appropriate sanction against civil society organizations for breach of the legal requirements applicable to them *"should merely be the requirement to rectify their affairs and/or the imposition of an administrative, civil or criminal penalty on them and/or any individuals directly responsible. Penalties should be based on the law in force and observe the principle of proportionality."* This usually translates to a graduated approach to penalties where criminal sanctions, prohibition or dissolution should always be a measure of last resort.[50]

[47] Para. 254.

[48] See, *mutatis mutandis, Refah and others v. Turkey,* Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

[49] See also the case law of the European Court of Human Rights (ECtHR), among others, the rulings on *Barankevich v. Russia (*Application No. 10519/03, 26 July 2007), *Ouranio Toxo v. Greece* (Application No. 74989/01, 20 October 2005), *Adalı v. Turkey*, (Application No. 38187/97, 31 March 2005) and *Sindicatul "Păstorul cel Bun" v. Romania* (Application no. 2330/09, 31 January 2012). ECtHR 8 October 2009, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan* (Application no. 37083/03), para. 82: "The Court considers that a mere failure to respect certain legal requirements on internal management of NGOs cannot be considered such serious misconduct as to warrant outright dissolution." ECtHR 22 November 2010, *Jehovah's Witnesses of Moscow and others v. Russia*, no. 302/02, § 159: "Therefore, even if the Court were to accept that there were compelling reasons for the interference, it finds that the permanent dissolution of the applicant community, coupled with a ban on its activities, constituted a drastic measure disproportionate to the legitimate aim pursued. Greater flexibility in choosing a more proportionate sanction could be achieved by introducing into the domestic law less radical alternative sanctions, such as a warning, a fine or withdrawal of tax benefits."

[50] See also, CDL-AD(2017)015, Hungary - Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad, para. 62. CDL-AD(2011)036, Opinion on the compatibility with universal human rights standards on the article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus, para. 107.

85. The Human Rights Commissioner has previously warned the Hungarian authorities that the use of criminal law provisions related to facilitation of border crossings could be applied to volunteers who provide humanitarian assistance to migrants. He warned that this could have a "chilling effect on action for solidarity".[51] Especially in the absence of a humanitarian exception clause in the current draft of the criminal provision, the authorities willingly accept the risk of stigmatisation. This is especially true as a result of the fact that the authorities still proclaim a causal connection between 'mass immigration' and national security risks (see the general reasoning of Bill No. T/333).[52]

86. The risk of stigmatisation is a relevant factor in the jurisprudence of the European Court of Human Rights (see for example ECtHR4 December 2008, *Marper v. UK*, nos. 30562/04 and 30566/04, par. 122). There is no doubt that the ECtHR will be vigilant with regard to the risk of stigmatisation as regards asylum seekers. It previously held that an asylum seeker is "a member of a particularly underprivileged and vulnerable population group in need of special protection. It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive".[53] At the same time, the ECtHR stated that the legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions (ECtHR 21 January 2011, M.S.S v. Belgium and Greece, no. 30696/09, § 261). Thus, the Court differentiates between illegal immigration and refugees and also implicitly states that combating illegal immigration can go and should go hand in hand with the protection offered by the State to legal asylum seekers. Therefore, authorities need to make reasonable efforts to distinguish between lawful asylum seekers and illegal immigrants.

87. In conclusion, although draft Article 353A of the Criminal Code may in principle be considered to pursue the legitimate aim of prevention of disorder or crime, the draft provision lacks the required clarity and does not meet the criterion of foreseeability. First, the meaning of "organising activities" which may fall under the scope of the draft provision is not exhaustively defined and legitimate activities, such as initiating an asylum request on behalf of a migrant, are criminalised under the draft provision. Second, Paragraph 3 of the provision does not distinguish between financial gain "as the strict financial counterpart of the illegal activity" and income generated by associations in their ordinary operations. Lastly, the draft provision does not provide an exemption clause for "humanitarian activities", which may have a chilling effect on action for solidarity, and the legal consequences of the criminal conviction of NGO staff member on the legal entity itself by virtue of Act CIV of 2001 appear to be disproportionate.

[51] Press release of 27 November 2015 "Hungary's response to refugee challenge falls short on human rights" (http://www.coe.int/en/web/commissioner/-/hungary-s-response-to-refugee-challenge-falls-short-on-human-rights). In a report on Croatia the Commissioner argued that the criminalisation of social and humanitarian assistance to irregularly present migrants encourages "intolerance and racism" as it punishes people for helping others on the basis of their immigration status (https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?coeReference=CommDH(2016)31; see para. 125). Concerning the current draft package, see the press release of 1 June 2018 by the Human Rights Commissioner https://www.coe.int/en/web/commissioner/-/hungary-commissioner-concerned-at-further-planned-barriers-to-the-work-of-ngos-assisting-migrants and of 29 May 2018 by the UNHCR (http://www.unhcr.org/news/press/2018/5/5b0d71684/unhcr-urges-hungary-withdraw-draft-law-impacting-refugees.html).

[52] See also Question 2 of the consultative national consultation 'Let's Stop Brussels': "In recent times, terror attack after terror attack has taken place in Europe. Despite this fact, Brussels wants to force Hungary to allow illegal immigrants into the country".

[53] ECtHR, 21 January 2011, *M.S.S v. Belgium and Greece*, appl. no. 30696/09, para. 251.

B. Draft Article 46/F of Chapter V of the Police Law "Border and Security restraining measure"

88. The original request for Opinion of the Parliamentary Assembly covers the new draft legislative package "to the extent that it affects NGOs activities." Therefore, the Venice Commission and the OSCE/ODIHR, apart from draft Article 353A, also take into account the amendment introduced to the Police Law concerning the restraining measures.

89. According to draft Article 46/F for the purpose of ensuring the order of the state border and undisturbed border surveillance, police officers shall prevent a person from entering the 8 kilometre zone counted from the borderline or boundary marker corresponding to the external border or shall require a person staying in that area to leave if that person is subject to criminal proceedings for the criminal offence under, *inter alia*, Section 353A of the Criminal Code (facilitating illegal migration). As such, this measure will constitute a restriction of free movement in the sense of Article 2 of Protocol No. 4 to the ECHR[54] as it grants a push-back power in relation to persons who are under criminal proceedings for the draft Article 353A offences.

90. It is positive that like the previous legislative package (which introduced an immigration restraint order) the geographical scope of the measure seems to be limited, since draft Section 46/F of the Police Law mentions an area within 8 kilometres of the border line. However, the following observation should be made.

91. Contrary to the previous immigration restraint order, there are no temporal restrictions of the measure. The previous legislative package made clear that the measure could only be applied for a maximum period of 6 months. It is recommended that a similar temporal restriction, as for instance "a period of 6 months during a prescribed migration crisis", be introduced in the draft.

92. Draft Article 46/F is silent about the judicial protection available to the person against whom the measure is taken by the police officer. This is perhaps regulated in general administrative law, but it is recommended that the judicial remedy against restraining orders be directly regulated in the Police Act (at least by including a cross reference).

93. The fact that prosecution is pending for having committed the offence introduced *inter alia* by Article 353/A Criminal Code is sufficient for the police officer to order a person to leave the area. While it is not uncommon to grant a police officer the power to order a person to leave when he or she is disrupting public order, such a power will ordinarily only be deemed proportionate if it is limited to a small geographic area and for a limited, short period of time (i.e. not several months).

VII. Conclusion

94. The introduction of a criminal offence establishing criminal liability for intentionally assisting irregular migrants to circumvent immigration rules is not in and by itself contrary to international human rights standards and may be considered as pursuing the legitimate aim of prevention of disorder or crime under the second paragraph of Article 11 ECHR.

95. Draft Article 353A, however, goes far beyond that. It criminalises organisational activities which are not directly related to the materialization of the illegal migration, such as "preparing or distributing informational materials". This on the one hand runs counter to the role of assistance

[54] See, *Garib v. The Netherlands,* Grand Chamber 6 November 2017, appl. no. 43494/09, para. 152.

to victims by NGOs, restricting disproportionally the rights guaranteed under Article 11 ECHR, and on the other hand, criminalises advocacy and campaigning activities, which constitute an illegitimate interference with the freedom of expression guaranteed under Article 10 ECHR.

96. Draft Article 353A lacks the required clarity to qualify as a "legal basis" within the meaning of Article 11 ECHR.

97. In addition, there may be circumstances in which providing "assistance" is a moral imperative or at least a moral right. As such, the draft provision may result in further arbitrary restrictions to and prohibition through heavy sanctions of the indispensable work of human rights NGOs and leave migrants without essential services provided by such NGOs. Under the draft provision, as it currently stands, persons and/or organisations that carry out informational activities, support individual cases, provide aid on the border of Hungary may be under risk of prosecution even if they acted in good faith in line with the international law for supporting the asylum seekers or other forms of legal migrants, for instance victims of trafficking.[55] The proposed amendment therefore criminalises activities that are fully legitimate including activities which support the State in the fulfilment of its obligations under international law.[56] Moreover, as "financial gain" is not considered as an element of the offence (but only as an aggravating circumstance), the draft provision is not accompanied by a humanitarian exception clause.

98. The Venice Commission and the OSCE/ODIHR make the following recommendations to the Hungarian authorities:

- Current draft Article 353A lacks the requisite precision, and does not appear to meet the foreseeability criterion as understood in the ECtHR case-law and thus is not in line with European standards. In its current drafting, it should not be adopted since it entails a risk of criminal prosecution for individuals and organisations providing lawful assistance to migrants and asylum seekers;

- Should the Hungarian authorities consider that it is necessary to supplement the current criminal provisions:

  - they should ensure that the right to freedom of association is respected and that a humanitarian exception clause is explicitly included. The authorities may consider following the wording of Article 1 of EU Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence;

  - the criminalisation of initiation of an asylum procedure in respect of a person that was not subject to prosecution or direct persecution in the country of origin should be excluded;

[55] See the United Nations 1951 Refugee Convention, the Council of Europe Convention on Action against Trafficking in Human Beings, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

[56] See, the United Nations 1951 Refugee Convention, the Council of Europe Convention on Action against Trafficking in Human Beings, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, with the latter two conventions directly addressing co-operation with civil society in providing assistance to victims.

- Any future provision should be exhaustive rather than listing open options as to the targeted organisational activities. Advocacy and campaigning activities should be explicitly excluded from its scope and only explicitly encouraging migrants *to circumvent the law* should give rise to criminal prosecution;

- Only the strict financial counterpart of an organisational activity should be deemed as "financial gain". The provision should not jeopardise the funding of NGOs;

- The individual criminal liability of an NGO member and the liability of the legal entity should be differentiated. A gradual and proportional approach to penalties should be adopted and prohibition or dissolution of the association should always be a measure of last resort;

- Any draft legislative amendments should be submitted to broad public consultations before their adoption.

99. The Venice Commission and the OSCE/ODIHR remain at the disposal of the Hungarian authorities and the Parliamentary Assembly for further assistance in this matter.